

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Union County

Honorable John C. Hayes, Circuit Court Judge

RECEIVED
JUL 26 2017
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

KEVIN LEE BOYTER,

APPELLANT.

APPELLATE CASE NO. 2016-002375

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the PCR court erred by revoking appellant's probation for not refraining from changing his address without the consent of his probation agent, since appellant presented a witness showing the information relied on by his probation agent was incorrect, and therefore appellant's probation was revoked for a factually inaccurate reason?

STATEMENT OF THE CASE

Appellant was indicted at the May 9, 2011 term of the Union County Grand Jury for the offenses of burglary in the third degree, and grand larceny. R. 34-37. He sentenced on May 12, 2011 to ten years' imprisonment suspended upon the service of one year and five years' probation for these property offenses. R. 27-28.

A probation arrest warrant was issued on October 27, 2016. R.21-22. Appellant appeared on November 14, 2016, for a probation revocation hearing before the Honorable John C. Hayes. Jennifer Nichols Williams represented appellant. Beth Belue and Andy Fowler were the probation agents. R. 1.

At the conclusion of the probation revocation hearing on November 15, 2016, Judge Hayes found substantial violations of appellant's probation and revoked his probation in full – nine years. R. 16, ll. 4-12. The judge that same day modified his revocation to four and a half years rather than the full nine-year revocation. R. 18, ll. 16-24; r. 26.

This appeal follows.

ARGUMENT

The PCR court erred by revoking appellant's probation for not refraining from changing his address without the consent of his probation agent, since appellant presented a witness showing the information relied on by his probation agent was incorrect, and therefore appellant's probation was revoked for a factually inaccurate reason.

Relevant Facts

Appellant confirmed to Judge Hayes that he had been sentenced to ten years' imprisonment, suspended to one year's imprisonment and five years' probation by Judge Alford for these property crimes. R. 4, l. 23 – 5, l. 4. One of the allegations was that appellant changed his residence without the consent of his probation agent. "Per home visit conducted on 10/27/2016, it was determined that the offender was no longer living at the residence." R. 21.

Appellant immediately disputed that allegation, saying another woman told the authorities that appellant did not live there, even though he was in the house at the time when they came to visit. R. 6, ll. 6-23. Appellant said he did not come outside and talk with the authorities at the time because he was trying to get pending charges settled, and he did not wish to be arrested. R. 6, l. 17 – 7, l. 24.

Probation agent Belue said that Agent Fowler went to visit appellant on October 27, 2016, and "a female at that residence told him that he had not been at that particular residence in like three or four months." R. 7, l. 10 – 8, l. 16.

Appellant's mother told the judge that she knew the person who erroneously told the authorities appellant no longer lived at the same residence. The judge said he was going to recess the revocation hearing until the next day to hear from the woman who allegedly gave the erroneous information to the probation agents. R. 10, l. 23 – 12, l. 15.

The following day, Kimberly Ennis testified that some of her cats stayed with appellant and his mother at their mobile home. Ms. Ennis acknowledged that probation agent Fowler had come to the mobile home, and startled her. Ms. Ennis said she told Agent Fowler that she had not seen appellant in a few months . . . He lived there but I don't see him, I mean, going. You know what I am saying? I hadn't seen him in a while. She said she told probation agent Fowler that she did not know whether appellant was home or not. R. 13, l. 9 – 15, l. 19. The judge revoked appellant's probation in full, and then he modified the revocation by cutting the revocation in half to four years and six months. R. 16, ll. 5-13; r. 18, ll. 23-24; r. 26.

Discussion

The probation arrest warrant alleged that appellant failed “to refrain from changing residence without the consent of the agent. Per home visit conducted on 10/27/2016, it was determined that the offender was no longer living at the residence.” R. 21.

The conditions of probation are contained in South Carolina Code § 24-21-430(2). Condition (4) provides the probationer must “permit the probation agent to visit at his home or elsewhere. Appellant understands that trial courts can impose additional reasonable conditions of probation which are not illegal or void as against public policy. See State v. Brown, 284 S.C. 407, 410, 326 S.E.2d 410, 411 (1985).

However, it was not clear from this record where the condition of probation that appellant could not move without the consent of his probation agent came from in this case. While an objection to this condition was not raised to the probation revocation judge, Appellant submits a condition allowing a probation agent the veto power over a probationer moving anywhere else was not a reasonable condition given that the living choices of many people on probation (having

a prior criminal record, especially for sex offenders) are limited. See State v. Brown, 284 S.C. 407, 410, 326 S.E.2d 410, 411 (1985)

Appellant asserts that allowing his probation agent a veto power over where he moves or not allowing him to move unless and until the probation agent consents is both an overbroad condition and one that denied him his right to free association. See Beckner v. State 296 S.C. 365, 373 S.E.2d 469 (1988); People v. Lopez, 66 Cal.App.4th 615, 78 Cal.Rptr.2d 66, 74-75 (5th Dist. 1998).

Further, “it is an essential component of due process that individuals be given fair warning of those acts which may lead to a loss of liberty. This is no less true whether the loss of liberty arises from a criminal conviction or the revocation of probation.” A probationer cannot be subjected to the loss of his liberty for those acts unless he is given prior fair warning. U.S. v. Dane, 470 F.2d 840, 843-44 (9th Cir. 1977).

At the revocation hearing, Kimberly Ennis testified that Agent Fowler startled her when he appeared to be knocking on the side of the mobile home. Ennis told Agent Fowler that she had not seen appellant in “a few months,” but she failed to tell him that she did not even live at the residence and had no way of knowing whether appellant was inside the mobile home at the time of Fowler’s visit or not. R. 13, l. 9 – 15, l. 21. Based on this appellant ultimately had his probation revoked, and he is incarcerated.

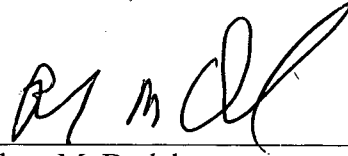
In short, the probation arrest warrant erroneously alleged “it was determined that the offender was no longer living at the residence,” an erroneous interpretation of what Ennis actually told Fowler. While the revocation of probation is not a stage of a criminal prosecution, a probationer has a constitutionally protected liberty interest and cannot be denied due process

simply because probation has been described as an act of grace. See Morrissey v. Brewer, 408 U.S. 471 (1972).

Because the state failed to prove appellant violated his probation in the manner described in the probation arrest warrant as to failing to refrain from changing residence without the consent of his agent, and because this apparent term of appellant's probation was overbroad and because it denied him his right to free association, the revocation of appellant's probation should be vacated. R. 21; State v. Allen, 370 S.C. 88, 634 S.E.2d 653 (2006).

CONCLUSION

By reason of the foregoing arguments, the revocation of appellant's probation should be vacated.

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of July, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kevin Lee Boyter states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's probation revocation hearing before Judge John C. Hayes, which was held on November 14 - 15, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Kevin Lee Boyter.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 26th day of July, 2017.

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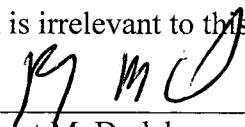
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments;
- (2) Entire probation revocation hearing transcript;
- (3) Probation arrest warrant;
- (4) PPP violation report;
- (5) Sentencing sheet;
- (6) Probation revocation sentencing sheet;

I certify that this designation contains no matter which is irrelevant to this appeal.

July 26, 2017



Robert M. Dudek
Chief Appellate Defender

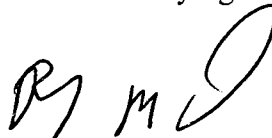
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 26, 2017.



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