

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Richland County

Honorable L. Casey Manning, Circuit Court Judge  
\_\_\_\_\_

ORIGINAL  
RECEIVED

AUG 28 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

v.

TEKYSHA COHEN,

APPELLANT

APPELLATE CASE NO. 2016-002044  
\_\_\_\_\_

FINAL BRIEF OF APPELLANT  
\_\_\_\_\_

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**STATEMENT OF ISSUE ON APPEAL**

Whether the court erred by denying appellant's motion to reconsider without a hearing where the court at the probation revocation hearing did not allow appellant or her attorney an opportunity to offer a defense, and explain why her failure to completely pay court-ordered restitution was not willful, and where the court never made a finding that appellant's failure to pay was willful?

## STATEMENT OF THE CASE

Appellant was indicted at the July 18, 2012 term of the Richland County Grand Jury for the offense of criminal conspiracy. The indictment alleged that appellant engaged in “criminal conspiracy and/or breach of trust with fraudulent intent over \$10,000 in violation of Section 16-17-410, South Carolina Code of Laws . . .” R. 23. Appellant pled guilty to this offense on October 2, 2012, before the Honorable Alison Lee. Judge Lee sentenced appellant to three years’ imprisonment, suspended upon five years’ probation, and the payment of \$7,901.07 in restitution. R. 21.

On September 16, 2016, appellant came before the Honorable L. Casey Manning for a probation violation hearing. Emily Kuchar represented appellant. Probation Agent Morales represented the state. At the conclusion of the very truncated hearing, the judge revoked sixty days of appellant’s probation, and continued her on probation following service of that sentence. R. 3, 1. 25 – 4, 1. 1.

Counsel Kuchar filed a motion to reconsider on September 16, 2016. This motion described how appellant’s financial violations of probation were not willful. R. 6. On September 21, 2016, the trial judge denied the motion to reconsider. R. 7.

This appeal follows.

## ARGUMENT

The court erred by denying appellant's motion to reconsider without a hearing where the court at the probation revocation hearing did not allow appellant or her attorney an opportunity to offer a defense, and explain why her failure to completely pay court-ordered restitution was not willful, and where the court never made a finding that appellant's failure to pay was willful.

### **Relevant Facts**

Defense counsel Kuchar told the judge that appellant was not working. The probation agent confirmed to the judge that "the recommendation is in [an] effort *to try to help her in some way, I assume, to get some restitution.*" The agent also told the judge that appellant received a sentence of three years' imprisonment suspended to five years' probation. The judge then asked appellant if she had any children, and when counsel interjected that appellant had no children, the judge responded that he wanted to hear directly from appellant. Appellant then told the judge that she did not have any children. R. 3, ll. 7-24.

Given that answer, the judge immediately ruled, "Revoke sixty days and continue." R. 3, l. 25 – 4, l. 1. When defense counsel tried to argue in favor of appellant, the judge told counsel he had ruled, and "you can't argue beyond that. Call the next case." R. 4, ll. 3-8.

Defense counsel filed a motion to reconsider, which stated:

"It appears that on September 16, 2016, Ms. Cohen was before this Court on a probation citation, which alleges only financial violations by Ms. Cohen. Judge Manning ordered that Ms. Cohen's probation be revoked for 60 days and then continued.

Ms. Cohen worked most recently on the assembly line at Jarden Applied Materials; she was laid off from that job in June. She made \$7.25 an hour at that job and worked part time. Ms. Cohen lives with her twin sister, Lakeysha, and assists with the care and transportation of Lakeysha's 13-year-old autistic daughter. Lakeysha's 20 year-old son also lives in the home, and Ms. Cohen takes him to and from his classes at Midlands Tech. Also, in July,

Ms. Cohen took out a loan for \$2,100 from a family friend and paid the full amount toward her court-ordered restitution. Her balance is now \$2,296.28, down from \$4,847.28 at the time of her citation. The original restitution amount ordered was \$9,481.28.

“Ms. Cohen alleges that her financial violations of probation *were not willful, and respectfully asks the Court to reconsider her sentence.*”

R. 6. (emphasis added).

The judge issued an order denying appellant’s motion to reconsider without having oral argument. While the order cites appellant’s argument that financial violations were not willful, the judge did not make a finding that he found appellant’s inability to pay her restitution was a willful violation. R. 7.

### **Discussion**

The judge in this case told defense counsel he wanted to talk directly to appellant when counsel told the judge appellant did not have any children. The judge immediately revoked sixty days of appellant’s probation when he learned she did not have any children. When defense counsel sought to challenge the judge’s reasoning or ruling, the judge told counsel she did not have a right to argue after he ruled. The judge invoked Rule 18, SCCrimP, and counsel respectfully should not be required to be held in contempt to have this trial level issue preserved.

Nonetheless, trial counsel filed a motion to reconsider outlining why appellant’s failure to pay was not wilful. The judge denied the motion without a hearing. Thus, appellant has never had an opportunity to present a defense to the financial violations of probation – to show they were not wilful violations.

In Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986), the Supreme Court found that a probationer could not be revoked solely on the ground that he or she failed to make restitution or pay fines. The judge must determine *on the record that the probationer failed to make a bona*

*fide effort to pay.* Barlet v. State, 288 S.C. at 483, 343 S.E.2d at 622, *citing* Bearden v. Georgia, 461 U.S. 620 (1983). (emphasis added).

In State v. Spare, 374 S.C. 264, 647 S.E.2d 706 (2007), the Supreme Court found that the circuit court judge erred in revoking appellant's probation for failure to pay restitution. In Spare, the Court wrote that the trial court must determine whether the state had presented sufficient evidence to establish a probationer has violated the conditions of his probation, and that an evidentiary hearing *must show the facts tending to establish the violation* of probation conditions. State v. Hamilton, 333 S.C 642, 649, 511 S.E.2d 94, 97 (Ct.App. 1999). (emphasis added).

The Court in Spare wrote that "willful failure to pay means *a voluntary, conscious, and intentional failure.*" State v. Spare, 374 S.C 264, 269, 647 S.E.2d 706, 708-709 (2007). (emphasis added).

The Court in Spare cited Commonwealth v. Eggers, 742 A.2d 174, 176 (Pa. Super. Ct. 1999): "A proper analysis should include an inquiry into the reasons surrounding the probationer's failure to pay, followed by a determination of whether the probationer made a willful choice not to pay."

In Spare, the Court found that the circuit court judge abused his discretion by failing to make the requisite inquiry into Spare's ability to pay, his reasons for failing to pay, and whether his failure to pay was willful. The Court noted that Spare was making progress, albeit slow, towards paying his restitution obligation.

The motion to reconsider here similarly showed that appellant was trying to meet her financial obligations. Appellant most respectfully was entitled to an evidentiary hearing where she was offered the opportunity to offer a defense that her failure to pay all of her obligations was not willful.

This Court should reverse the circuit court judge's decision in this case for several reasons. First, the evidentiary hearing did not contain any inquiry or reason for revoking appellant's probation for her entire amount of restitution not having been paid. Further, it appears the probation agent wanted to help appellant with the restitution given his initial answer to the judge. The evidentiary hearing does not show that appellant's failure to pay all of her restitution was "willful." Further, the judge did not make a finding during the evidentiary hearing that appellant's failure to pay all of her restitution was willful. See State v. Spare.

In the motion to reconsider, it was noted that appellant made \$7.25 an hour on her job before she was laid off in June, 2016. Appellant lived with her twin sister, and assisted with the care and transportation of her sister's 13-year-old autistic daughter. R. 6.

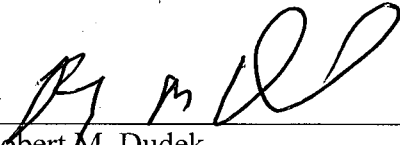
The motion also noted that appellant took out a \$2,100 loan from a family friend and paid the full amount towards her court-ordered restitution. Her balance remained only \$2,296.28 of the original amount ordered paid. R. 6.

The order denying the motion to reconsider did not state that the judge found the failure to pay all of the restitution was "willful." The order in conclusory fashion only cited to the fact *that appellant argued* "that her financial violations of probation were not willful." R. 7. The record of the evidentiary hearing, and even the order denying the motion to reconsider, wholly fail to comply with the Supreme Court's holding in State v. Spare and Barlet v. State about a finding of "willfulness."

The revocation of appellant's probation in this case should be vacated. This revocation could affect appellant in the future, since she was continued on probation. Moreover, since this issue is capable of repetition without being addressed, and that provides another reason why this case is not moot.

**CONCLUSION**

For reason of the foregoing argument, the revocation of appellant's probation should be vacated.



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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of August, 2017.

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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

August 28, 2017



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