

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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ORIGINAL

Appeal from Chester County

Honorable R. Keith Kelly, Circuit Court Judge

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RECEIVED

AUG 24 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

KENDRA NICOLE TUCKER,

APPELLANT

APPELLATE CASE NO 2016-002530

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ANDERS BRIEF OF APPELLANT

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LAURA R. BAER  
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**STATEMENT OF ISSUE ON APPEAL**

Whether the probation revocation judge abused his discretion in revoking Appellant's probation in full where his decision constituted a failure to exercise discretion in light of his policy that "[there are] no second chances with this court on probation?"

## STATEMENT OF THE CASE

On June 24, 2012, the Cherokee County Grand Jury returned an indictment against Appellant Kendra Tucker for petit larceny. R. 25. On July 14, 2014, Tucker pled guilty and was sentenced to ten years, suspended upon the service of five years, followed by five years of probation. R. 27.

On May 20, 2013, the Greenville County Grand Jury returned an indictment against Tucker for shoplifting. R. 28. On October 8, 2013, Tucker pled guilty and was sentenced to eight years suspended upon the service of 9 months, followed by one year of probation. R. 30. Tucker violated her probation and her probation was extended to the maximum five years. R. 9, ll. 11-18.

On August 19, 2014, the Greenville County Grand Jury returned indictments against Tucker for forgery and breaking and entering a motor vehicle. R. 31; R. 34. On November 12, 2014, Tucker pled guilty to both charges. She was sentenced to concurrent terms of five years suspended upon the service of two years, followed by five years of probation. R. 33; R. 36.

On September 21, 2016, arrest warrants for violations of probation were issued against Tucker. The allegations included failure to “maintain a permanent residence,” failure to “refrain from the use of drugs,” failure to “refrain from violation of state law,” failure to “refrain from the possession of a firearm.” R. 1 – 6. On two of the warrants, it was further alleged that Tucker was behind on her restitution and supervision payments. R. 1; R. 3. The warrants were served on November 15, 2016. R. 2; R. 4; R. 6.

A probation revocation hearing was held on December 12, 2016, before the Honorable R. Keith Kelly. Tucker was represented by William Frick, and the State was represented by probation officer Molly Lee. R. 7. The agent requested that Tucker’s probation be revoked in

full and that she be given credit for time-served only back to the date of that the probation arrest warrant was served, November 15, 2016. R. 11, l. 16 – 12, l. 1.

Tucker averred that she had paid her outstanding restitution, that the majority of her criminal charges were pending and the one offense for which she pled to a lesser included was made with the understanding that it would not violate her probation, and that she had never failed a drug screen. Tucker did admit that she talked to her probation agent about participating in an outpatient drug treatment program and, in the context of that discussion, admitted that she relapsed following the termination of her parental rights. Tucker said that the agent told her that she would not violate her probation so long as she continued to pass all future drug screenings, which she did. R. 12, l. 8 – 14, l. 7. When asked by the revocation judge, Tucker again admitted that she used methamphetamine on May 24, 2016. R. 14, ll. 8-15. Regarding the failure to maintain residence, Tucker explained that she was in jail on the pending charges on September 14, 2016, having just been arrested the day prior. If released, she intended to return to the same home where she had been living prior to her arrest. R. 14, l. 16 – 15, l. 8. Judge Kelly said that he understood but was “still hung up on this methamphetamine.” R. 15, ll. 9-10. Tucker explained that her relapse lasted approximately two weeks and wanted help. R. 15, ll. 11-22. Judge Kelly reminded Tucker that when he sentenced her he told her “no second chances.” R. 16, ll. 5-7. Tucker responded that “[r]elapse is a part of recovery.” R. 16, l. 8. She reiterated that she was honest about her relapse and doing the best that she could, including having made substantial payments toward her restitution and fines up until her incarceration prevented her from paying any more. R. 16, ll. 10-15.

Tucker’s boyfriend, Frank Melton, addressed the court, indicating that he was committed to helping Tucker with her recovery and would provide a home and employment for her if her

probation was reinstated. R. 17, ll. 1-24. Counsel asked that the court consider inpatient treatment before sending Tucker back to prison. R. 18, l. 22 – 19, l. 2. Judge Kelly responded:

Yes. Well, I appreciate your concern and I appreciate you asking for that and you have to do that but she's revoked on all three of them, credit for time since November the 15th, ATU is ordered. I told you no second chance with this court on probation.

R. 19, ll. 3-8. He issued corresponding orders revoking Tucker's probation in full in every case.

R. 21 – 24.

## ARGUMENT

**The probation revocation judge abused his discretion in revoking Appellant's probation in full where his decision constituted a failure to exercise discretion in light of his policy that "[there are] no second chances with this court on probation."**

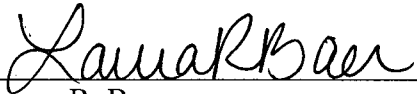
The determination of whether to revoke probation in whole or part rests within the sound discretion of the trial court. State v. Miller, 122 S.C. 468, 474-75, 115 S.E. 742, 745 (1923); State v. Proctor, 345 S.C. 299, 301, 546 S.E.2d 673, 674 (Ct.App.2001); S.C. CODE ANN. § 24-21-460. "That exercise [of discretion] implies conscientious judgment, not arbitrary action." State v. White, 218 S.C. 130, 136, 61 S.E.2d 754, 756 (1950). "While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice." White, 218 S.C. at 136, 61 S.E.2d at 756; State v. Allen, 370 S.C. 88, 96, 634 S.E.2d 653, 657 (2006) ("[A] probationer or parolee has a constitutionally protected liberty interest and cannot be denied due process simply because probation has been described as an act of grace.").

An appellate court will not reverse the trial court's decision unless that court abused its discretion. White, 218 S.C. at 135, 61 S.E.2d at 756; State v. Hamilton, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct. App. 1999). "**An abuse of discretion occurs** when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, **when the trial court is vested with discretion, but the ruling reveals no discretion was exercised**; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." Allen, 370 S.C. at 94, 634 S.E.2d at 656 (emphasis added); Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

In the present case, the probation judge noted twice that he had told Tucker at her original sentencing hearing that there would be no second chances on probation under him. R. 16, ll. 5-7; R. 19, ll. 3-8. Thus, it is evident that no matter what Tucker said, including that her confession to her probation agent that she had relapsed following the termination of her parental rights was made in the context of asking for help to enter a treatment program, was going to make no difference to the probation judge. This “policy” of revoking in full no matter the circumstances of the violation constitutes a failure to exercise discretion, which is an abuse of discretion.

### CONCLUSION

Based on the foregoing, Appellant Kendra Tucker respectfully requests that this Court reverse the revocation of probation and remand for a new revocation hearing.

  
\_\_\_\_\_  
Laura R. Baer  
Appellate Defender

ATTORNEY FOR APPELLANT

This 24<sup>th</sup> day of August, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kendra Nicole Tucker states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's probation revocation hearing before Judge R. Keith Kelly, which was held on December 12, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 hearing.

WHEREFORE, she asks the Court to relieve her as counsel for Kendra Nicole Tucker.

Respectfully Submitted,

  
\_\_\_\_\_  
Laura R. Baer  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 24<sup>th</sup> day of August, 2017.

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

**SC Court of Appeals**

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

- (1) Probation Arrest Warrants (W-12-16-20, W-12-16-21, & W-12-16-22);
- (2) Transcript of probation revocation hearing held Dec. 12, 2016 (entirety);
- (3) Probation Revocation Orders (underlying indictment nos. 2012-GS-11-902, 2013-GS-23-5956, 2014-GS-23-2433, and 2014-GS-23-3320);
- (4) True-billed indictments (2012-GS-11-902, 2013-GS-23-5956, 2014-GS-23-2433, and 2014-GS-23-3320); and
- (5) Original sentencing sheets (2012-GS-11-902, 2013-GS-23-5956, 2014-GS-23-2433, and 2014-GS-23-3320).

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



Laura R. Baer  
Appellate Defender

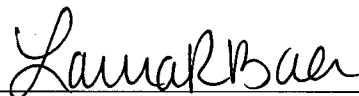
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August 24, 2017

ATTORNEY FOR APPELLANT

**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."



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