

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2017-001704

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SC Court of Appeals

THE STATE,.....RESPONDENT

v.

DEVAR RAVENELL,.....APPELLANT

INITIAL BRIEF OF RESPONDENT

**Matthew Buchanan
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ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- 1. Whether the sentencing judge violated the Appellant's constitutional rights when she ordered him to be drug tested and inquired about his drug use during a probation violation hearing?**
- 2. Whether the sentencing judge violated the doctrine of separation of powers by ordering the Department of Probation, Parole and Pardon Services to drug test the Appellant during his violation hearing?**
- 3. Whether the Court erred in using the information about the Appellant's failed drug test and in-court admissions to revoke the Appellant's suspended sentence in full?**

STATEMENT OF THE CASE

On March 18, 2016, the Appellant plead guilty to habitual traffic offender and received a sentence of four years incarceration suspended on three years of probation. On May 4, 2017, the Appellant appeared before the Honorable Kristi Lea Harrington for a hearing on a violation of that probation. Also at the hearing, the court sentenced the Appellant on two additional offenses to which he had pled earlier, though sentencing was deferred until the probation violation hearing. Those offenses, leaving the scene of an accident and an additional habitual traffic offender, had been committed while the Appellant was on supervision.

At the May 4 hearing, the violation court inquired into the Appellant's ability to pass a drug test. Based on his answer of having been around marijuana, the court instructed the probation agents in the courtroom to test the Appellant. After a brief recess, the agent reported that the Appellant tested positive for both marijuana and cocaine. At the conclusion of the hearing, which included testimony from the Appellant's employer and from the mother of one of his children, the court revoked his suspended sentence in full and ran it concurrent with the sentence on the new offenses.

The Appellant filed a motion for reconsideration on May 15, which the court denied on June 16, 2017. This appeal follows.

ARGUMENT

1. **The Court did not violate the Appellant's constitutional rights against self-incrimination during the probation violation hearing, because violation hearings are not criminal trials and offenders have reduced expectations of privacy while under supervision.**

The crux of this case is whether a circuit court judge, while presiding over a probation violation hearing, can *sua sponte* begin an investigation into an offender's performance on supervision when that offender is before her. In the instant case, although the judge was also conducting a sentencing of a prior guilty plea, the Appellant's main objections lie within the context of the probation violation hearing. In fact, the sentencing was deferred from the plea date so that the new sentence and the probation revocation could be run together. *March 10, 2017 Tr. p.4, ll. 2-8. Thus, the May 4, 2017 hearing consisted of both the sentencing and the probation violation hearing. *May 4, 2017 Tr. p.3, ll. 5-7.¹

The Appellant makes the argument that the judge violated his constitutional rights against self-incrimination, citing both the Fifth Amendment of the U.S. Constitution and Article I, Section 12 of the South Carolina Constitution. However, these rights do not apply to the Appellant in the probation revocation context, because probation violation hearings are not criminal trials.

The Fifth Amendment states that no person "shall be compelled *in any criminal case* to be a witness against himself." U.S. Const. amend. V (emphasis added). Furthermore, the South Carolina Constitution prohibits "any person be compelled *in any criminal case* to be a witness against himself." S.C. Const. art. I, 12 (emphasis added).

¹ The Appellant is appealing the actions of the trial court in the context of the probation violation hearing. Although the court also sentenced the Appellant at the same time as the probation revocation, the Appellant is not appealing the sentence of the new criminal offenses. Therefore, this Reply Brief is only addressing this Appeal from the context of the probation violation hearing.

Probation violation hearings are not criminal trials. State v. Hill, 368 S.C. 649, 659, 630 S.E.2d 274, 280 (2006). As such, the trial court's inquiry into the Appellant's drug use was appropriate and did not violate the Appellant's constitutional rights against self-incrimination.

The Appellant insists that the Fifth Amendment protections apply to both during the guilt and the penalty phase of a capital trial, which can therefore be extrapolated to a non-capital case. Whether this conclusion is correct is immaterial, because the probation violation hearing in question was neither a guilt phase, nor a sentencing phase of the original offense, which had been adjudicated on March 18, 2016. "Probation revocation, by comparison, occurs after a criminal sentence is imposed." Id. at 657, 279.

Similarly, the trial court was not required to issue Miranda² warnings as the Appellant insists. As a preliminary matter, while the questions posed to the Appellant implicated his performance while on supervision, the questions were not intended to elicit a confession to a new criminal offense. Having a failed drug screen is not a criminal offense. The Appellant was not charged with any new crimes for his admissions to being around other individuals while they used illegal drugs. Again, the Appellant's constitutional rights against self-incrimination lie within the context of a criminal case. Miranda is designed to ensure a custodial detainee is aware of his rights to remain silent when being questioned regarding new criminal offenses.

Furthermore, an offender is expected to make truthful accounts to his probation agent. *R. at _____. These reports are required as conditions of probation, but the offender also enjoys a privilege regarding his communications with his probation agent. See S.C. Code § 24-21-290. An offender is therefore required to share details of his behavior while on supervision, including lapses and non-compliance, while being protected from the threat of additional prosecution for

² Miranda v. Arizona, 384 U.S. 436 (1966).

every failed drug test. Thus, Miranda does not apply in the probation context. The trial court's inquiry into the Appellant's drug use pertained to his performance while under supervision, not as an investigation into a new criminal offense.

The Appellant also argues that the trial court violated his Fourth Amendment rights when she ordered him to undergo a drug screening. He claims that doing so was an unlawful and warrantless search.

It is well-settled, however, that a person on probation has fewer rights by virtue of his conviction and ongoing sentence. "We think that while a person convicted of a crime is still restrained within the confines of his probation, he does not enjoy the same unfettered constitutional privileges available to those not so confined. It is elementary that while conviction and imprisonment do not strip the violator of his rights, those privileges are severely diminished." State v. Franks, 276 S.C. 636, 639, 281 S.E.2d 227, 228 (1981), citing State v. Hiott, 276 S.C. 72, 276 S.E.2d 163 (1981).

Specific to the Fourth Amendment protections, the courts have held that probationers have a diminished right to privacy. State v. Edwards, 415 S.C. 401, 782 S.E.2d 124 (Ct. App. 2016).

The Appellant argues that the trial court ordered the drug test to influence sentencing. While there was a sentencing that also took place, this drug test was ordered as a part of the probation violation hearing. As such, by virtue of the Appellant having a reduced expectation of privacy because he was on probation, the trial court's ordering of the drug test was not in violation of his Fourth Amendment rights against unreasonable searches and seizures.

2. The Court has statutory authority to order probation agents to conduct investigations, therefore the Court's request for a drug test was permitted.

The Appellant makes the argument that due process was violated when the court ordered the probation agent to drug test him, and that action violated the separation of powers doctrine by having a member of the judicial branch dictate how a member of the executive branch investigates and supervises offenders.

The South Carolina Code of Laws refutes this argument, however, by specifically granting the court the authority to order and change conditions of probation at any time. "The court may impose by order duly entered and may at any time modify the conditions of probation and may include among them any of the following or any other condition not prohibited in this section." S.C. Code § 24-21-430.

Furthermore, an agent's duties include investigating all cases as required by both the director of the agency and the court. S.C. Code § 24-21-280(A) reads, "A probation agent must investigate all cases referred to him for investigation by the judges or director and report in writing."

Lastly, the court has the authority to issue its own warrant for a violation of probation at any point during the life of the supervision. S.C. Code § 24-21-450 states, "At any time during the period of probation or suspension of sentence the court, or the court within the venue of which the violation occurs, or the probation agent may issue or cause the issuing of a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence."

Read together, the trial court has ongoing authority over the probation conditions, and can direct the probation agents to provide whatever information it deems necessary and appropriate,

or issue warrants on its own volition. This authority can be exercised “at any time,” including during a violation hearing.

The Appellant also states that the court should not have been allowed to require the drug test due to the fact that drug use was not alleged as a violation of probation. This neglects the fact that periodic drug tests are a standard condition of probation, meaning that at any time the probationer could be made to submit to a drug test. *R. at ____.

3. The Court has complete discretion to revoke a suspended sentence in full upon a finding of violations of probation.

“The determination of whether to revoke probation in whole or in part rests within the sound discretion of the trial court.” State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655, (2006), citing State v. Miller, 122 S.C. 468, 474-75, 115 S.E. 742, 745 (1923) and State v. Proctor, 345 S.C. 299, 301, 546 S.E.2d 673, 674 (Ct.App.2001).

“An appellate court will not reverse the trial court's decision unless that court abused its discretion.” Allen at 94, 656, citing State v. White, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950) and State v. Hamilton, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct.App. 1999).

In this case, the Appellant was revoked in full for committing a habitual traffic offender and leaving the scene of an accident while on probation for a previous conviction of habitual traffic offender. The convictions for criminal acts committed while on probation – including the same offense as the original that placed the Appellant on probation – are violations that would be considered reasonable grounds for a revocation.

The Appellant argues that it was because of the failed drug test that gave the court the grounds to revoke his probation in full. He has therefore attacked the appropriateness of the court's questioning and ordering of the drug screen.

However, even if his arguments are well-taken by this Court, the trial court had additional grounds to find the Appellant had violated his probation. Furthermore, the court has discretion in its decision to revoke the suspended sentence. In light of the violations, the trial court did not abuse its discretion to revoke the Appellant's probation in full.

CONCLUSION

A trial court overhearing a probation violation has statutory authority to call for investigations into how the offender has performed while under supervision. By the same token, the offender has diminished rights because he is still serving his sentence so the court does not violate his rights when questioning him during a hearing. And when addressing the violations, the court may exercise its sound discretion in deciding the amount of the revocation.

Respectfully submitted,



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October 31, 2017

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The Honorable Kristi Lea Harrington, Circuit Court Judge

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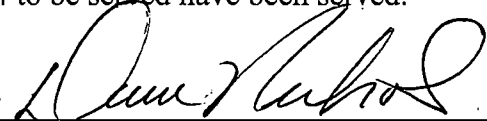
DEVAR RAVENELL,.....APPELLANT

CERTIFICATE OF SERVICE

I, Dawn Nichols, Executive Assistant, hereby certify that I have served the within the *Initial Brief of Respondent and Designation of Matter* dated October 31, 2017, on the Appellant this 1st day of November, 2017, by depositing a copy of same in the United States mail, postage paid, addressed to:

Eric Laquiere, Esquire
Laquiere Law Inc
3674 Old Charleston Highway
Johns Island, S.C. 29455

I further certify that all parties required by Rule 54 to be served have been served.



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November 1, 2017

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street – 5th Floor
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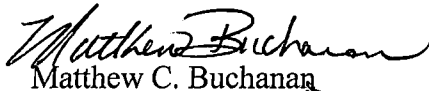
RE: State v. Devar Ravenell

Dear Ms. Kitchings:

Enclosed please find the original *Initial Brief of the Respondent and Designation of Matter*, along with proof of service in the above-referenced case.

Thank you for your assistance in this matter.

Sincerely,


Matthew C. Buchanan
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MCB:dn
Enclosures

cc: Eric Laquiere, Esquire

State of South Carolina

Department of Probation, Parole, and Pardon Services

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