

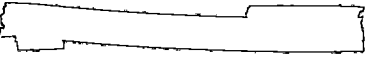
5

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE 

RESPONDENT,

V.

KASEY MARIE GILBERT

RECEIVED
APPELLANT.

JUL 18 2017

SC Court of Appeals

APPELLATE CASE NO. 2016-002139

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT	
The judge erred by revoking appellant’s probation without a finding that her failure to pay restitution was willful, since such a finding was a prerequisite to revoking for a monetary probation violation	3
Relevant Facts	3
Discussion	3
CONCLUSION.....	5
PETITION TO BE RELIEVED AS COUNSEL	6

TABLE OF AUTHORITIES

Cases

Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986)..... 4

Bearden v. Georgia, 461 U.S. 660 (1983)..... 4

Commonwealth v. Edgars, 742 A.2d 174 (Pa. Super. Ct. 1999) 4

Jordan v. State, 327 Ark. 117, 939 S.W.2d 255 (1997)..... 4

State v. Allen, 370 S.C. 88, 634 S.E.2d 653 (2006) 3

State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999)..... 4

State v. Spare, 374 S.C. 265, 647 S.E.2d 706 (Ct. App. 2007) 4

Statutes

SC Code § 24-21-460 (2007)..... 4

STATEMENT OF ISSUE ON APPEAL

Whether the judge erred by revoking appellant's probation without a finding that her failure to pay restitution was willful, since such a finding was a prerequisite to revoking for a monetary probation violation?

STATEMENT OF THE CASE

Appellant was indicted at the March 16, 2005 term of the Spartanburg County grand jury for the offense of grand larceny over \$2,000 but under \$10,000. R. 8-9. She sentenced by the Honorable R. Keith Kelly to three years' imprisonment, suspended upon service of forty-six days, and two years' probation. R. 10.

She appeared on October 7, 2016, before Judge Kelly for a probation revocation hearing. Charles W. Snyder, III, represented appellant. Agent Fahnle appeared on behalf of the state. R. 1.

At the conclusion of the probation revocation hearing, Judge Kelly revoked appellant's probation in full. R 6, l. 4. Judge Kelly also ruled that the remainder of the restitution was to be reduced to a civil judgment. R. 6, ll. 2-8.

This appeal follows.

ARGUMENT

The judge erred by revoking appellant's probation without a finding that her failure to pay restitution was willful, since such a finding was a prerequisite to revoking for a monetary probation violation

Relevant Facts

Appellant wanted her probation transferred to North Carolina, where she had another case. Her attorney, Snyder, told the judge that appellant owed four hundred and twenty dollars in restitution. However, she had four hundred and five dollars of that restitution to pay immediately. Defense counsel Snyder offered that appellant could "come up with" the other fifteen dollars "pretty quickly." Defense counsel asked the judge to allow appellant to pay the restitution in full, terminate her South Carolina case, and let her be supervised in North Carolina. R. 3, l. 7 – 5, l. 6.

Appellant also told the judge that she thought her probation had already been transferred to North Carolina, where she would have paid the restitution owed. R. 5, l. 7 – 6, l. 4. The judge revoked appellant's probation in full even though she had almost all of the money for the owed restitution with the exception of fifteen dollars. The judge also did not make a finding a finding that appellant's failure to pay her restitution was willful.

Discussion

The decision to revoke probation is addressed to the sound discretion of the trial court, and the appellate court's authority to review a decision revoking probation is confined to correcting errors of law. However, if a lack of legal or evidentiary basis exists for the revocation -- which would indicate the circuit court judge's decision was arbitrary and capricious -- the appellate court will vacate the revocation. See State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653,

655 (2006); State v. Hamilton, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct. App. 1999); SC Code § 24-21-460 (2007).

A person on probation cannot be revoked on a whim or caprice. A person owing restitution or other fees should not be revoked unless the record shows the probationer has not made a bona fide effort to pay. Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986); Bearden v. Georgia, 461 U.S. 660 (1983). A judge revoking a probationer's probation for not paying restitution must make a finding that the failure to pay was willful.

In State v. Spare, 374 S.C. 265, 647 S.E.2d 706 (Ct. App. 2007), this Court held that Spare was erroneously revoked where the circuit court judge incorrectly concluded Spare's failure to pay was willful. This Court found that the judge did not make an adequate inquiry into Spare's ability to pay.

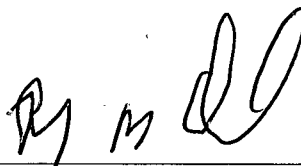
Spare had obtained a full-time job working forty-four hours per week. Spare was also paying the IRS for back taxes, and he had other court-ordered financial obligations. The probation agent also said that Spare simply could not pay \$753 per month in restitution, even though he was working full time. This Court found that a careful review of the record showed Spare's failure to pay his restitution was not willful.

Here, similarly, during a very truncated probation revocation hearing, the judge revoked appellant's probation in full, and he reduced the remainder of the restitution to a civil judgment. Appellant's attorney told the judge appellant had \$405.00 of the \$420.00 owed.

The judge's decision to revoke appellant's probation was, respectfully, arbitrary. This Court should vacate the judge's order, and remand this case for a new probation revocation hearing. See State v. Spare, supra citing Commonwealth v. Edgars, 742 A.2d 174, 176 (Pa. Super. Ct. 1999), Jordan v. State, 327 Ark. 117, 939 S.W.2d 255, 257-58 (1997).

CONCLUSION

By reason of the foregoing arguments, the order revoking appellant's probation should be vacated, and this case remanded to the Spartanburg County Court of General Sessions for a new probation revocation hearing.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of July, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE OF SOUTH CAROLINA

RESPONDENT,

V.

KASEY MARIE GILBERT

APPELLANT.

PETITION TO BE RELIEVED AS COUNSEL

RECEIVED

JUL 18 2017

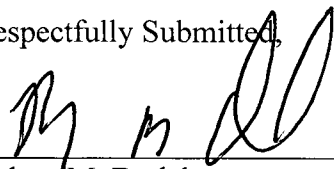
SC Court of Appeals

Counsel for Kasey Marie Gilbert 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 R. Keith Kelly, which was held on October 7, 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 Kasey Marie Gilbert.

Respectfully Submitted,


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 18th day of July, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
/ Honorable R. Keith Kelly, Circuit Court Judge

THE STATE OF SOUTH CAROLINA

RESPONDENT,

V.

KASEY MARIE GILBERT

APPELLANT.

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

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

- (1) True-billed indictment;
- (2) Entire revocation transcript;
- (3) Sentencing order revoking probation.

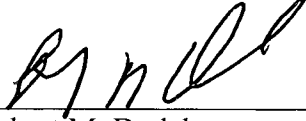
RECEIVED

JUL 18 2017

SC Court of Appeals

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

July 18, 2017


Robert M. Dudek
Chief Appellate Defender


South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

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."

July 18, 2017.



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

RECEIVED
JUL 18 2017
SC Court of Appeals