

**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Aiken County

**SC Court of Appeals**

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Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DOUGLAS CHEATHAM,

APPELLANT

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

ROBERT M. PACHAK  
Appellate Defender

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred in revoking appellant's probation when his violations were not willful?

## STATEMENT OF THE CASE

On June 29, 2007, appellant appeared before the Aiken County Court of General Sessions and pled guilty to malicious injury to real property and grand larceny. He was sentenced on both charges to five (5) years suspended upon service of forty (40) days with five (5) years probation thereafter.

Appellant was served with a probation violation arrest warrant on October 3, 2011. On October 20, 2011, he appeared before the Honorable Doyet A. Early, III for a probation revocation hearing. Appellant's probation was revoked in full.

This appeal follows.

## ARGUMENT

The court erred in revoking appellant's probation because his violations were not willful.

In 1972 the United States Supreme Court handed down the opinion of Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593 setting forth minimal due process requirements for the revocation of parole. The Court noted that "revocation deprives an individual... of the conditional liberty properly dependant on observance of special parole restrictions." 408 U.S. at 480, 92 S. Ct. at 2600. The Court went on to write that there must be an orderly process before a liberty protection is terminated. 408 U.S. at 482, 92 S. Ct. at 2601. First, the Court dealt with the parolee's arrest and the need for a preliminary hearing. The Court stated:

Due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Cf. Hyser v. Reed, 115 U.S. App. D.C. 254, 318 F.2d 225 (1963). Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrest parolee has committed acts that would constitute a violation of parole conditions. Cf. Goldberg v. Kelly, 397 U.S., at 267-271, 90 S. Ct. at 1020-1022, 25 L. Ed.2d 287.

408 U.S. at 484, 92 S. Ct. at 2602.

With respect to the preliminary hearing before this officer, the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his

own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer.

408 U.S. at 486-487, 92 S. Ct. at 2603.

With respect to the revocation hearing the Court wrote:

We cannot write a code of procedure; that is the responsibility of each State. Most States have done so by legislation, others by judicial decision usually on due process grounds. Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

408 U.S. at 488-489, 92 S.C. at 2604.

In Gagnon v. Scrapelli, 411, U.S. 778, 93 S. Ct. 1756 (1973) the Court made the same procedures set out in Morrissey applicable to probation revocations. A short time later the Court held that due process is violated when the state revokes probation with no evidence that probation was violated. Douglas v. Burden, 412 U.S. 430, 93 S. Ct. 2199 (1973). Then in Bearden v. Georgia, 466 U.S. 660, 103 S. Ct. 2064 (1983) the Court held that the State can not revoke a defendant's probation because he is too poor to pay a fine. A probation violation has to be willful. The South Carolina Supreme Court a short time later

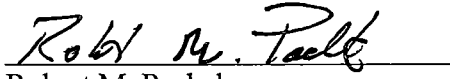
also held the probation could not be revoked “solely” on the ground that one on probation failed to pay fines or to make restitution (emphasis in original). The judge has to make a finding “on the record that the probation failed to make a bona fide effort to pay.” Barlet v. State, 288 S.C. 481, 343 S.E. 2d 620 (1986).

Appellant was brought to the probation revocation hearing for failing to report. Defense counsel explained that appellant had been a union carpenter. After his conviction it hindered his job ability and he became unemployed. He was staying with his aunt. Because of his economic strait he was not able to find transportation to report. (ROA p. 3, line 24 – p. 4, line 19). This shows that appellant’s probation violation was not willful.

CONCLUSION

The decision to revoke appellant's probation should be reversed.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of April, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

DOUGLAS CHEATHAM,

APPELLANT

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Douglas Cheatham states:

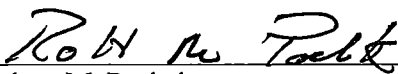
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Doyet A. Early, III, which was held on October 20, 2011, 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 Douglas Cheatham.

Respectfully submitted,

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 12, 2012



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Robert M. Pachak  
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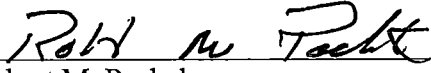
APPELLANT

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CERTIFICATE OF SERVICE


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The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the South Carolina Department of Probation, Parole & Pardon Services, PO Box 50666, Columbia, SC 29250; and a copy of the Final Anders Brief of Appellant and Record on Appeal has been filed on Douglas Cheatham, #348690 at Lower Savannah Pre-Release Center, 361 Wire Road, Aiken, SC 29801; this 12<sup>th</sup> day of April, 2012.

  
\_\_\_\_\_  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 12th day of April, 2012.

 (L.S.)  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: June 21, 2020 .