STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

Honorable Thomas L. Hughston, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHARLES LESLIE DAVIS, JR.,

APPELLANT

APPELLATE CASE NO. 2017-001268

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

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Columbia, SC 29211-1589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The court abused its discretion in revoking one year of appellant's community supervision, since appellant's "indirect contact with the victim" through Facebook was not a violation of the "no contact" provision in its plain and ordinary meaning. Further, any minimal dealings appellant had with the children of his new wife or fiancé also did not violate the letter or spirit of the "no contact with children" restrictive clause as it was written.

STATEMENT OF THE CASE

Appellant was indicted at the June 20, 2006, term of the Oconee County Grand Jury for the offense of criminal sexual conduct with a minor between eleven and fourteen years old in the second degree. R. 44 – 45. Appellant was sentenced on May 7, 2007, to fifteen years' imprisonment, suspended upon the service of ten years and five years' probation by the Honorable James Williams. A sentencing provision provided appellant was to have "no contact with the victim." R. 46.

Appellant was on community supervision when a revocation hearing was held on May 18, 2017, before the Honorable Thomas H. Houston, Jr. Suzanne Earle represented appellant and Jim Manley was the probation officer. R. 1. The community supervision arrest warrant alleged that appellant violated his probation and a restraining order by attempting to communicate with the victim through Facebook. R. 47.

At the conclusion of the revocation hearing, Judge Houston ruled that appellant had "indirect contact with the victim through the Facebook page . . ." Judge Houston then revoked one year of appellant's community supervision, and ruled appellant would be returned to probation after his release from the Department of Corrections. R. 40, l. 21 – 42, l. 6.

This appeal follows.

ARGUMENT

The court abused its discretion in revoking one year of appellant's community supervision, since appellant's "indirect contact with the victim" through Facebook was not a violation of the "no contact" provision in its plain and ordinary meaning. Further, any minimal dealings appellant had with the children of his new wife or fiancé also did not violate the letter or spirit of the "no contact with children" restrictive clause.

Relevant Facts

The judge told the attorneys and witnesses they would have to explain social media and Facebook to him because he did not know how they worked. R. 6, l. 5 – 8, l. 13. The judge said that the applicable provision in this case provided that appellant would not have contact with any person under the age of eighteen except for immediate family members, and then only with advanced approval. The judge acknowledged in the case of "*incidental contact with any child*" that the provision called for appellant to "be civil and courteous, remove himself from the situation, and immediately report it." R. 8, l. 14 – 9, l. 3.

Appellant told the judge he did not violate any provision, and he had not had any contact with children impermissibly. R. 9, l. 2 – 10, l. 7.

The now adult victim of appellant's underlying conviction was present in the courtroom, and she told the judge that her sense of security and safety was removed when appellant was released from prison. The victim said that the judge should have the Facebook profile she alleged was a violation of appellant's probation in front of him. However, the judge said he did not think he had the applicable document, and he had not seen it. R. 10, l. 24 – 13, l. 22. Similarly, defense counsel Earle also said she had not been provided with a copy of the alleged Facebook document. R. 17, ll. 2 – 15.

The probation officer admitted to the judge that the Facebook alleged violation was still under investigation, but he alleged that appellant nonetheless had violated the restraining order. The judge responded that he needed proof of the state's allegations. R. 13, l. 11 – 16, l. 14.

Later in the hearing, the judge stated that the document at issue had appellant's name on it as well as the name of the victim. Appellant denied that he was responsible for putting the document on the internet. Defense counsel Earle argued appellant had not violated the provision of the restraining order or his probation or his community supervision which prohibited him from having contact with children. R. 20, l. 23 – 29, l. 5.

She further explained that appellant's contact with an adult woman whom he planned to marry did not violate the "no contact with children" provision. "He tells me that they have made arrangements to live separate and apart *while her children are young because he knows that's a violation.* And everything that has been brought forth today seems to me to indicate that he has done his best to abide by the conditions by removing himself from the situation if the children were present, by being civil and courteous to them. And, yes, sir, he did marry someone he was told not to. But, again, I just don't believe that the state [probation agent] has the ability to tell him he's not allowed to get married. I think that's beyond the purview of a probation agent." R. 29, l. 6 – 30, l. 8. (emphasis added).

As stated, the judge found appellant had "at least indirect contact with the victim through the Facebook page, Facebook posting that was made, and he also had unauthorized conduct with children under the age of eighteen. Although under very unusual circumstances, I still find that what he did is in violation of the provision of his release, and so I order that he be returned to the Department of Corrections for a period of one year." R. 40, l. 21 – 41, l. 16.

Discussion

Appellant's sentencing sheet reveals he was to have "no contact with the victim." The state maintained that same provision was contained in a restraining order, and that appellant was prohibited from being around children except under very restrictive conditions.

The record in this case -- offered at the May 18, 2017 revocation hearing -- does not support the judge's ruling that appellant attempted to contact the victim indirectly. Further, defense counsel correctly argued that any incidental contact with the children of his wife or fiancé was not covered by the letter or the spirit of the "no contact with the victim or children" restrictive clauses. Further, fundamental fairness, and more importantly, the rule of lenity, provide that penal provisions by their very nature should be construed strictly against the state and in favor of the defendant. See Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991); State v. Cutler, 374 S.C. 376, 264 S.E.2d 420 (1980).

In State v. Allen, 370 S.C. 88, 634 S.E.2d 653 (2006), the Supreme Court found that a condition of probation that the defendant not associate with people who had a criminal record did not violate due process. However, the Court in Allen wrote that the state did not address whether this condition was overly broad as a general rule, but only asserted that the evidence in that particular case showed the trial judge did not abuse his discretion in revoking Allen's probation. Importantly, the Court in Allen also wrote that less restrictive provisions could serve the same rehabilitative function desired by the probation department as it related to the not associating *with anyone with a criminal record.*

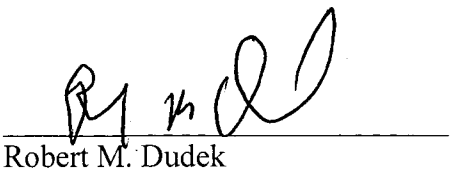
Conversely in reversing a revocation, the Supreme Court noted that in Beckner v. State, 296 S.C. 365, 373 S.E.2d 469 (1988), that a provision of probation that the defendant not be

anywhere where alcohol was available was unreasonable. The provision had the practical effect of prohibiting the defendant from entering or working in virtually every grocery store and convenience store in South Carolina, and it excluded him from entering a large number of restaurants. The Supreme Court in Beckner therefore vacated the revocation and the provision that appellant could not be in any place of business that sold alcohol.

Here, the judge struggled with the state's very weak case to find appellant had "indirect contact" with the victim, and the children of his wife or fiancé. Appellant therefore had violated his community service that judge ruled. The evidence in this case did not support that finding. Consequently, the revocation of appellant's community supervision should be revoked so that that "violation" does not appear on appellant's record, and it is not used against him in the future.

CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of March, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Charles Leslie Davis 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 revocation hearing before Judge Thomas L. Hughston, which was held on May 17 - 18, 2017, 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 Charles Leslie Davis.

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 8th day of March, 2018.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) Entire Revocation Hearing Transcript;
(2) Indictment;
(3) Sentencing Sheet dated May 7, 2007;
(4) Probation arrest warrant;
(5) Revocation Order dated May 18, 2017

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

March 8, 2018

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(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."

March 8, 2018.

Robert M. Dudek
Chief Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Matthew Buchanan, Esquire, at the SCPPPS, Post Office Box 50666, Columbia, SC 29250; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Charles Leslie Davis, 321669, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 8th day of March, 2018.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of March, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.