THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of General Sessions

Kristi Lea Harrington / Trial Judge, Sentencing Judge

Appellate Case No. 2017-001704

State of South Carolina

Respondent,

v.

DEVAR TREMAINE RAVENELL,

Appellant.

FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. The Sentencing Judge's interrogation of the Defendant as to whether or not he would pass a drug test after his entry of a plea (to a non-drug related offense) and prior to his sentencing violated his constitutional right not to testify against himself in contravention of the 5th Amendment of the United States Constitution and S.C. Const. art. I, § 12 where there was no res gestae between drug use and the crimes the Defendant was being sentenced for.

2. The Sentencing Judge's interrogation of the Defendant occurred without the Defendant being mirandized, in violation of his rights under the 5th Amendment of the United States Constitution.

3. The Sentencing Judge's ordering a drug test of the Defendant during the Defendant's sentencing hearing for a non-drug related offense violated the Defendant's constitutional right to privacy as it was an unlawful and warrantless search in contravention of the 4th Amendment to the United States Constitution.

4. The Sentencing Judge improperly revoked the Defendant's probation on the basis of drug use where the Department of Probation and Parole's probation violation notice to the Defendant did not identify drug use as a basis for revocation; in violation of the Defendant's right to procedural due process guaranteed by the 5th and 14th Amendments to the United States Constitution.

5. The Sentencing Judge improperly violated the doctrine of separation of powers when the Judge engaged in investigatory action which is the purview of the executive branch by interrogating the Defendant about drug use and ordering that he submit to a drug test.

STATEMENT OF THE CASE

On March 18, 2016 the Defendant plead guilty to a violation of the habitual traffic offender statute, and was sentenced to four years suspended upon the service of three years of probation. On September 3, 2016 the Defendant was charged with the offenses of habitual traffic offender and leaving the scene of an accident. On March 10, 2017, the Defendant entered a plea of guilty to the charges arising out of the events of September 3, 2016 but postponed sentencing until the hearing on the probation violation arising out of the guilty plea. On May 4, 2017 the Defendant appeared for a probation revocation hearing and for sentencing on the guilty plea.

When the case was called, the judge immediately began interrogation of the Defendant concerning drug use and ordered a drug test from the bench. The following excerpt from the transcript is demonstrative: (Transcript of Record, May 4, 2017, beginning Page 2, Line 1)

> MR. CANNON: The State calls Devar Ravenel. This is a deferred sentencing from a plea off the trial docket from March 10, 2017, where the defendant pled guilty to habitual traffic offender and leaving the scene of an accident.
>
> THE COURT: He's also on probation.
>
> THE PROBATION OFFICER: Yes, ma'am.
>
> THE COURT: Would you like to give a drug test today?
>
> THE PROBATION OFFICER: I can't recall right now --
>
> THE COURT: A special condition was random drug and alcohol testing. Mr. Ravenel, I'm going to drug test you today. What's the result going to be?
>
> THE DEFENDANT: Excuse me, ma'am?

THE COURT: What's the result going to be?

THE DEFENDANT: I can't do it today, ma'am,.

THE COURT: You can't do it?

THE DEFENDANT: No.

THE COURT: What does that mean? You are unable to produce a sample today?

THE DEFENDANT: Yes. I was around marijuana.

THE COURT: You were around marijuana?

THE DEFENDANT: Yes.

THE COURT: Let's go ahead and test him. We will have a drug test and come back.

When the test was completed, the judge was verbally told that the Defendant failed the drug test. Defense Counsel was never provided any information regarding the test, its results, or how it was administered. The sentencing judge interrogated the Defendant further concerning drugs, and was uninterested in anything else. When the Defendant's counsel called other witnesses to speak on the Defense's behalf the sentencing judge questioned them about the Defendant's alleged drug use and alleged drug test results.

At sentencing hearing, the solicitor stated that the State had no opinion or recommendation on sentencing. The representative of the Department of Probation and Parole stated that they did have an opinion on sentencing and that the Department's recommendation was that the Defendant serve 10 days, on 5 consecutive weekends, and that he be placed on intensive reporting which involves visits with his probation officer every two weeks.

The Defendant was not being sentenced on a drug related offense. The Department of Probation reported that he had passed all of the random drug tests administered as part of his probation program.

The judge sentenced the Defendant to three years on the guilty plea and revoked the Defendant's probation in full, to run concurrently. The revocation amounts to a four year sentence.

The Defendant timely filed a motion to alter or amend the sentence pursuant to SCRCrimP 29. The Court denied the Defendant's motion by Order of June 16, 2017. The Court nor the State served the Defendant or his counsel with a notice of entry of judgment. Defense Counsel discovered the existence of the Order by contacting the Court seeking an update on August 4, 2017. The Defendant timely filed and served the Notice of Intent to Appeal on August 14, 2017.

The Defendant / Appellant's appeal challenges actions taken by the sentencing judge at the hearing on May 4, 2017, the Order of the sentencing judge on May 4, 2017, and the subsequent denial of the motion to alter or amend the sentence by Order filed on June 16, 2017.

ARGUMENT

1. The Sentencing Judge's interrogation of the Defendant as to whether or not he used drugs after his entry of a plea (to a non-drug related offense) and prior to his sentencing violated his constitutional right not to testify against himself in contravention of the 5th Amendment of the United States Constitution and S.C. Const. art. I, § 12 where there was no res gestae between drug use and the crimes the Defendant was being sentenced for.

The Fifth Amendment privilege against compelled self-incrimination applies in both the guilt and penalty phase of a capital trial... State v. Arther, 290 S.C. 291, 350 S.E.2d 187 (1986). The Appellant is not familiar with any precedent which limits the scope of the Fifth Amendment privilege in a non-capital case.

The scope of the Fifth Amendment privilege was discussed by the United States Supreme Court in Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).

> 1011 The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard," *468 Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S. Ct. 195, 198, 35 L. Ed. 1110 (1892), and the privilege is fulfilled only when a criminal defendant is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence."11 Malloy v. Hogan, 378 U.S. 1, 8, 84 S. Ct. 1489, 1493–1494, 12 L. Ed. 2d 653 (1964).

The Fifth Amendment privilege against compelled self-incrimination applies in both the guilt and penalty phase of a capital trial... State v. Arther, 290 S.C. 291, 350 S.E.2d 187 (1986). The Appellant is not familiar with any precedent which limits the scope of the Fifth Amendment privilege in a non-capital case.

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> 1011 The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard," *468 Counselman, 142 U.S. at 562, and the privilege is fulfilled only when a criminal defendant is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence."11 Malloy, 378 U.S. at 8.
>
> ....."Volunteered statements ... are not barred by the Fifth Amendment," but under Miranda v Arizona, supra, we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not "given freely and voluntarily without any compelling influences" and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. Id., at 478, 86 S.Ct., at 1630.

The introduction of drug use under a theory of res gestae in the South Carolina courts is discussed in State v. Broaddus, 361 S.C. 534, 605 S.E.2d 579 (Ct. App. 2004).

> Our appellate courts have found evidence of prior drug use to be inadmissible as part of the *res gestae* where the record does not support any relationship between the charged crime and the drug use. *See, e.g.*, State v. Hough, 325 S.C. 88, 92–94, 480 S.E.2d 77, 79–80 (1997) (finding co-defendant's testimony regarding prior crack cocaine use did not form a part of the *res gestae* of burglary and grand larceny where there was no evidence defendant and co-defendant had smoked crack cocaine immediately prior to the burglary or that the prior acts were "so linked together in point of time and circumstances" as to be required for a full presentation of the State's case); State v. Smith, 309 S.C. 442, 446–47, 424 S.E.2d 496, 498–99 (1992) (holding evidence of defendant's prior drug use should have

been excluded where it was unrelated to the crimes of murder and armed robbery and was not contemporaneous with the victim's murder); State v. Bolden, 303 S.C. 41, 43, 398 S.E.2d 494, 494–95 (1990) (concluding evidence that defendant was a social user of crack cocaine should have been excluded where evidence was "not essential to a full presentation of the State's case, nor was it so intimately connected with the crimes charged that its **583 introduction was appropriate to complete the story of the crime"). Broaddus, 361 S.C. at 540

In the case of Mr. Ravenell, he had already plead guilty to the offenses of violation of the habitual offender act and leaving the scene of an accident. He was out on bond and self-surrendered to the Court on May 4, 2017 to face sentencing. Drug use was not in any way related to the crimes for which he was to be sentenced and Mr. Ravenell did not volunteer information concerning his drug use. There was no allegation that he had used illegal drugs in the indictments or in the facts of the case. There was no allegation by the Department of Probation and Parole that he had failed a drug test. Because drug use had no res gestae to the crimes for which he was being sentenced the Defendant's drug use was an improper consideration for the Court, and interrogating the Defendant concerning drug use was improper for the Court.

2. The Sentencing Judge's interrogation of the Defendant occurred without the Defendant being mirandized, in violation of his rights under the 5th Amendment of the United States Constitution.

The Defendant was, at the time the judge interrogated him regarding drug use, in the custody of the State. He was not free to leave, nor was he free to discontinue the inquiry by the judge. He did not voluntarily take the stand to testify. Although this was a custodial interrogation regarding a crime unrelated in any way to the guilty pleas that had been entered by the Defendant; the Defendant was not informed by the judge nor the State that he was free to refuse to answer the questions by the judge on the basis of the Fifth Amendment as is required by Miranda v Arizona.

Again, the principles expressed by the United States Supreme Court in Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981) are applicable.

> 1011 The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard," *468 Counselman, 142 U.S. at 562, and the privilege is fulfilled only when a criminal defendant is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence."11 Malloy, 378 U.S. at 8.
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> ....."Volunteered statements ... are not barred by the Fifth Amendment," but under Miranda v Arizona, supra, we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not "given freely and voluntarily without any compelling influences" and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. Id., at 478, 86 S.Ct., at 1630.

At a minimum, the sentencing judge should have advised Mr. Ravenell consistent with Miranda v Arizona, that he was not required to answer her questions concerning his drug use during the sentencing proceeding. The failure to do so was a violation of Mr. Ravenell's constitutionally protected rights.

3. The Sentencing Judge's ordering a drug test of the Defendant during the Defendant's sentencing hearing for a non-drug related offense violated the Defendant's constitutional right to privacy as it was an unlawful and warrantless search in contravention of the 4th Amendment to the United States Constitution.

South Carolina recognizes that "a court order that allows the government to procure evidence from a person's body constitutes a search and seizure under

the Fourth Amendment." State v. Sanders, 388 S.C. 292, 297, 696 S.E.2d 592, 595 (Ct. App. 2009); *quoting* Schmerber v. California, 384 U.S. 757, 767–70, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

In the case of Mr. Ravenell, the urine test constitutes a search; it was taken at the direction of the sentencing judge, and ordered from the bench during a sentencing hearing. This is referred to as a pre-sentencing urine test. The purpose of a presentencing urine test is to influence the sentencing judge's subjective decision on sentencing.

The Appellant is not aware of any South Carolina precedent directly addressing this practice. However, in the case of Portillo v. U.S. Dist. Court for Dist. of Arizona, 15 F.3d 819 (9th Cir. 1994), the Ninth Circuit Court of Appeals held that mandatory presentence urine testing of a convicted defendant violates the Fourth Amendment to the United States Constitution. *See* Portillo, 15 F.3d 819. The Ninth Circuit determined that even though a special needs exception to the Fourth Amendment existed, the Government's need failed the balancing test against a defendant's subjective expectation of privacy. Id.

Mr. Ravenell's expectation of privacy trumps any government interest in knowing whether or not he uses drugs for purpose of his sentencing. The Judge's order that he be drug tested against his will and the subsequent use of that information in sentencing violates his rights guaranteed by the Fourth Amendment to the United States Constitution.

4. The Sentencing Judge improperly revoked the Defendant's probation on the basis of drug use where the Department of Probation and Parole's probation violation notice to the Defendant did not identify drug use as a basis for revocation; in violation of the Defendant's right to procedural due process guaranteed by the 5th and 14th Amendments to the United States Constitution.

In State v. Hill, 368 S.C. 649, 659–60, 630 S.E.2d 274, 280 (2006) the Supreme Court of South Carolina re-affirmed that "*Morrissey* and *Gagnon* outline the boundaries beyond which the scope of discovery in these "limited liberty" cases may not be restricted. Specifically, these cases indicate that minimal due process requires that a probationer be given notice of the alleged violations and disclosure of the evidence against him." Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); Morrissey v. Brewer, 408 U.S. 471, 488–89, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

"In South Carolina, §§ 24-21-290 and 24-21-450 set forth rules concerning discovery in probation revocation proceedings. In line with *Morrissey* and *Gagnon's* notice and disclosure requirements, § 24-21-450 requires a probation agent to prepare and submit a pre-hearing report showing how the probationer has allegedly violated his probation. Blindly adding Rule 5 to this framework is unnecessary." Id.

In the case of Mr. Ravenell, the pre-hearing report served upon the Defendant did not identify drug use as a basis for a violation; nor did it state that Mr. Ravenell had failed any drug test. The transcript is clear that the sentencing judge's determination to revoke Mr. Ravenell's probation was in-part based upon the drug test results. In State v Archie, 322 S.C. 135 (Ct. App. 1996) the South Carolina Court of Appeals ruled that where a Court has revoked a Defendants probation, in-part on an impermissible basis, it is reversible error.

The consideration of Mr. Ravenell's use of drugs for purposes of determining a probation violation or for purposes of sentencing upon that violation is in derogation of his constitutional rights to due process.

5. The Sentencing Judge improperly violated the doctrine of separation of powers when the Judge engaged in investigatory action which is the purview of the executive branch by interrogating the Defendant about drug use and ordering that he submit to a drug test.

The South Carolina Constitution provides in part: In the government of this State, the legislature, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other. S.C. Const. art. I, § 8.

S.C. Code Ann. § 24-21-430 provides "the court shall determine and may impose... and may at anytime modify the conditions of probation..." This statute does not authorize the judiciary to administer probation once its terms are set. The Court may order random drug testing as a condition of probation however it is the purview of the probation agent, a member of the executive branch, to administer the probation; including the decision as to when to drug test a probationer. In Archie, 322 S.C. 135 the South Carolina Court of Appeals vacated a probation revocation because the Dept. of Probation violated the separation of powers doctrine by adding probation requirements not originally ordered by the Court. S.C. Code Ann. § 24-21-220 vests the director of the Department of Probation, Parole, and Pardon Services with "the exclusive management and control of the department" and "is responsible for the management of the department and for the proper care, assessment, treatment, supervision, and management of offenders under its control."

In the case of Mr. Ravenell, the Court violated the separation of powers doctrine by ordering a drug test be administered during a probation revocation / sentencing hearing; this constitutes administration of the Defendant's probation; which is properly the authority of the executive branch under S.C. Code Ann. § 24-21-220.

CONCLUSION

The Defendant / Appellant's constitutional rights were violated by the following actions of the sentencing judge at the hearing on May 4, 2017:

1. During the sentencing hearing (after the entry of the guilty plea but prior to the sentence being determined); the sentencing judge interrogated the Defendant concerning drug use, and compelled him to testify under oath concerning his use of illegal drugs, without being mirandized, and under the implied penalty of contempt of court if he failed to comply.

2. The sentencing judge stopped the sentencing hearing and compelled a drug test (urine sample) be performed contemporaneously upon the Defendant against his will, and ordered the sentencing hearing to continue when the test was completed.

3. Improperly considering the illegally obtained information regarding Defendant's drug use in sentencing the Defendant on non-drug related guilty pleas.

4. Improperly considering the illegally obtained information regarding Defendant's drug use in sentencing the Defendant for a probation violation.

5. Improperly considering evidence of drug use as a basis for probation violation where the notice of probation violation did not identify drug use as a violation to be addressed at the hearing.

The consideration of the Defendant's illegally compelled admission of drug use and of the illegally obtained drug test by the judge at sentencing was highly prejudicial to the Defendant; and as a result, this Court should vacate the sentence imposed by the lower court with instructions that the case be remanded and that the Defendant be re-sentenced by a different judge, with instructions that the lower court not consider the illegally obtained information regarding drug use.

Respectfully submitted.

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October 13, 2017

REPLY TO RESPONDENT'S ARGUMENTS

In its Brief, the Respondent re-characterized the issues raised by the Appellant in a manner which avoids addressing several issues altogether. In this Reply Brief the Appellant will address the arguments of the Respondent; but first, the Appellant will bring to the Court's attention the issues that were ignored by the Respondent.

ISSUES IGNORED BY THE RESPONDENT

I. The Respondent did not address the unconstitutionality of the sentencing judge:

   a. Interrogating the Defendant regarding his drug use during the sentencing hearing for violations of the habitual offender act SC Code 56-01-1100 and leaving the scene of an accident SC Code 56-05-1220;

   b. Ordering the Defendant be drug tested during his sentencing hearing for violations of the habitual offender act SC Code 56-01-1100 and for leaving the scene of an accident SC Code 56-05-1220.

   c. Utilizing the results of the drug test and responses to interrogation regarding drug use as a basis for determining the appropriate length of a sentence for violations of the habitual offender act SC Code 56-01-1100 and for leaving the scene of an accident SC Code 56-05-1220.

   Rather, the Respondent only addressed whether these actions were constitutional violations in the context of a probation violation hearing. The Appellant challenged the legality of the three (3) year sentence rendered upon the charges of habitual offender, and the one (1) year sentence for leaving the scene of an accident; in addition, the Appellant challenged the legality of the four (4) year sentence rendered upon the probation violation. The Respondent has only elected to address the

Appellant's appeal as to the sentencing judge's actions as they effect the revocation of probation; apparently conceding the sentencing judge's actions were improper with respect to the sentencing on the underlying charges of habitual offender and leaving the scene of the accident.

II. The Respondent did not address the Appellant's argument that his right to due process was violated in the context of the probation revocation proceeding as a result of the probation violation notice's failure to allege drug use as a basis for probation revocation. The Respondent concedes that the Appellant did not have notice that his drug use would be considered as a basis for revoking his probation. In State v. Hill, 368 S.C. 649, 659–60, 630 S.E.2d 274, 280 (2006) the Supreme Court of South Carolina re-affirmed that "Morrissey and Gagnon outline the boundaries beyond which the scope of discovery in these "limited liberty" cases may not be restricted. Specifically, these cases indicate that minimal due process requires that a probationer be given notice of the alleged violations and disclosure of the evidence against him." Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); Morrissey v. Brewer, 408 U.S. 471, 488–89, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). This is a violation of procedural due process requiring the probation revocation be vacated.

REPLY TO ISSUES ADDRESSED BY RESPONDENT

1. **The Respondent argues that the Appellant does not have the benefit of Fifth Amendment protections (or those of Section 12 of the SC Constitution) in the context of a probation violation hearing as a probation violation hearing is not a criminal trial.**

The Respondent ignores the fact that the Appellant was being sentenced for two criminal offenses to which he had plead guilty. Those pleas were not drug related. As discussed at length in the Appellants initial brief; Fifth Amendment protections apply to both the guilt and sentencing phases of a criminal trial. The Respondent falsely states in its Brief that the sentencing occurred on March 18, 2016 and that the Court was not sentencing the Appellate in a criminal case on May 4, 2017. This is incorrect. The Appellate was sentenced to probation on March 18, 2016 in Charleston County, but that is unrelated to this Appeal. The Appellant's plea of guilty to offenses of habitual offender and leaving the scene of an accident were accepted on March 10, 2017 in Berkeley County and sentencing was deferred until May 4, 2017. This appeal arises out of the sentencing judge's conduct during the May 5, 2017 sentencing proceeding.

Additionally, the Fifth Amendment privilege applies in the context of a probation revocation hearing. In denying this fact, the Respondent misplaces its reliance upon Hill, 368 S.C. 649. The holding in Hill, Id. was limited, it only held that the right to discovery under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) was inapplicable to a probation revocation hearing. There is no South Carolina precedent which holds that a person on probation loses the right against self-incrimination, nor the

right of due process. An admission of actions relating to a crime, made while under oath, in court, can be used against the speaker in a future criminal case; whether or not the present proceeding is a criminal trial. The Appellant attempted to remain silent but the sentencing judge did not allow him to do so. If he had continued to refuse to answer, he risked being held in contempt of court or receiving an increased sentence due to angering the sentencing judge. "The Fifth Amendment privilege is as broad as the mischief against which it seeks to guard and the privilege is fulfilled only when a criminal defendant is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty... for such silence." Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).

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

The Respondent has misconstrued the statutes delegating authority over probationers between the Judicial and Executive branches of government. S.C. Code Ann. § 24-21-430 grants the Courts the authority to "impose by order" conditions of probation. A Court may also "at any time modify the conditions of probation". In the present case, the Court did not issue an order modifying the conditions of probation. The Court, in the middle of a sentencing hearing, instructed law enforcement to administer a drug test to the Appellant. The existing probation conditions provided for random drug testing. The Court may only establish conditions of probation. The Department of Probation and Parole is charged with administering the probation program. In State v. Archie, 322 S.C.

135, 470 S.E.2d 380 (Ct. App. 1996), the Court of Appeals held that the separation of powers doctrine applied to the administration of probation. In Archie, 322 S.C. 135, the Department violated the separation of powers doctrine by adding probationary requirements not expressly ordered by the Court. In the present case, the Court violated the separation of powers doctrine by administering the probation program rather than simply setting requirements as is the limit of its power. S.C. Code Ann. § 24-21-220 vests with the Department the "proper care, assessment, treatment, supervision, and management of offenders under its control." Scheduling random drug tests of probationers constitutes "assessment, treatment, supervision, and management"; and is therefore exclusively the purview of the executive branch.

3. **The Respondent argues that the Court has discretion to revoke a suspended sentence in full upon a finding of violations of probation.**

The Respondent asks the we overlook the clear violation of procedural due process; whereby the Appellant was not given notice that his drug use would be presented as a basis for revocation, or for the purpose of deciding the extent of that revocation. This is in direct contradiction of the law. In Archie, the court opined "This court will not disturb the circuit court's decision to revoke probation unless the decision was influenced by an error of law, was without evidentiary support, or constituted an abuse of discretion. State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950). However, we conclude the revocation, based at least in part on Archie's failure to comply with conditions imposed by the Department, was error." In the present case, it is undisputed that the Appellant received no notice that his drug use would be considered with regard to his probation revocation.

The transcript reflects that the decision to revoke in full was impacted by the drug test results and testimony regarding drug use.

CONCLUSION

The three (3) year sentence for the offense of habitual offender and the one (1) year sentence for leaving the scene of an accident resulted from errors of law and abuses of discretion because the sentence was based in whole or in part on the failed drug test and interrogation of the Appellant regarding drug use in violation of the Fourth and Fifth Amendments of the United States Constitution. The arguments of the Respondent only address the revocation of probation and concede through omission the error of law as to the three (3) year sentence and the one (1) year sentence.

As to the revocation of probation; the existing precedent holds that minimal due process in probation cases requires that a probationer be given notice of the alleged violations and disclosure of the evidence against him. Consistent with Code 24-21-450, this requires, at a minimum, that a probation agent prepare and submit a pre-hearing report showing how the probationer has allegedly violated his probation. No such report included drug use as a basis for probation revocation. The revocation in full, and resulting four (4) year sentence, is in violation of the Appellant's rights of due process. The Respondent concedes the lack of notice but argues the constitutional violation should be overlooked.

The three (3) year sentence and the one (1) year sentences resulting from the criminal plea and the four (4) year sentence resulting from the probation revocation are unlawful; this Court should vacate them and remand all three matters to the Circuit Court for re-sentencing; with the Appellant to receive credit for time served.

Respectfully submitted.

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December 28, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of General Sessions

Kristi Lea Harrington / Trial Judge, Sentencing Judge

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v.

Devar T. Ravenell — Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211 (b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007

January 29, 2018

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