

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Chester County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMAL B. PERKINS,

APPELLANT

APPELLATE CASE NO. 2018-000086

RECEIVED

ANDERS BRIEF OF APPELLANT

JUN 11 2018

SC Court of Appeals

ROBERT M. PACHAK
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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 without a finding that his failure to pay fines and fees was willful?

STATEMENT OF THE CASE

On July 27, 2016, appellant appeared before the Honorable Brian Gibbons in Chester County and pled guilty to habitual traffic offender. R. 1. He was sentenced to five (5) years suspended to eighteen (18) months probation. R. 8, ll. 10-11. Devon Nielson, Esq. was plea counsel. R. 1. Luke Knight, Esq. was the solicitor. R. 1.

On January 8, 2018, appellant again appeared before the Honorable Brian Gibbons. R. 12. This time it was for a probation revocation hearing. Judge Gibbons revoked fourteen (14) months of appellant's probation. R. 15, ll. 22-24. Appellant was represented by Kay Boulware, Esq. R. 8.

This appeal follows.

STANDARD OF REVIEW

Probation Revocation – Failure to Pay

“Our appellate courts have continued to maintain that ‘probation may not be revoked *solely* for failure to make required payments of fines or restitution without the circuit judge first determining on the record that the probationer has failed to make a bona fide effort to pay.’” State v. Spare, 374 S.C. 264, 268-269, 647 S.E.2d 706, 708 (Ct. App. 2007) (quoting State v. Hamilton, 333 S.C. at 649, 511 S.E.2d at 97; See Bearden v. Georgia, 461 U.S. 660 (1983); Nichols v. State, 308 S.C. 334, 337, 417 S.E.2d 860, 861 (1992); Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986)). “Therefore, in those cases involving the failure to pay fines or restitution, the circuit judge must, in addition to finding sufficient factual evidence of the violation, make an additional finding of willfulness.” Spare, 374 S.C. at 269, 647 S.E.2d at 708 (quoting Hamilton, 333 S.C. at 649, 511 S.E.2d at 97) (internal quotation marks omitted).

“Willful failure to pay means a voluntary, conscious and intentional failure.” Spare, 374 S.C. at 269, 647 S.E.2d at 708-709 (quoting People v. Davis, 576 N.E.2d 510, 513 (Ill.App.1991); See State v. Sowell, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006) (“A willful act is defined as one ‘done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.’” (quoting Spartanburg County Dep’t of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988))). “The trial court may infer that the failure to pay is intentional where a probationer has the ability to pay a fee, but does not do so.” Spare, 374 S.C. at 269, 647 S.E.2d at 709 (quoting Joseph v. State, 3 S.W.3d 627, 641 (Tex.App.1999)) (internal quotation marks and citations omitted).

ARGUMENT

The court erred in revoking appellant's probation without a finding that his failure to pay fines and fees was willful.

In 1972, the United States Supreme Court handed down the opinion of Morrissey v. Brewer, 408 U.S. 471 (1972), setting forth minimal due process requirements for the revocation of parole. The Court noted that "revocation deprives an individual . . . of the conditional liberty properly dependent on observance of special parole restrictions." Id. at 480. The Court went on to write that there must be an orderly process before a liberty protection is terminated. Id. at 482. 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 arrested 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.Ed2d 287.

Id. at 484.

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.

Id. at 486-487.

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.

Id. at 488-489.

In Gagnon v. Scarpelli, 411 U.S. 778 (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 (1973). Then in Bearden v. Georgia, 466 U.S. 660 (1983), the Court held that the State cannot revoke a defendant's probation because he is too poor to pay a fine. A probation violation has to be willful. A short time later, the South Carolina Supreme Court also held that probation could not be revoked "solely" on the ground that one on probation failed to pay fines or to make restitution. Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986) (emphasis in original). The judge has to make a finding "on the record that the probationer failed to make a bona fide effort to pay." Id. (citing Bearden, 466 U.S. 660).

In this case, appellant was cited for failing to pay supervision fees by being in arrears \$330. He failed to pay court fines by being \$252 in arrears. He also failed to pay a drug testing

fee of \$20. R. 14, ll. 5-15. The judge made absolutely no find as to whether the failure to pay was willful. See R. 15, ll. 22-24.

CONCLUSION

Appellant's probation revocation should be reversed.

Respectfully Submitted,

Jana M. Caudy for:

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of June, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jamal B. Perkins states:

1. He is an 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 the Honorable Brian M. Gibbons, which was held on January 8, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new hearing.
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 hearing.

WHEREFORE, he asks the Court to relieve him as counsel for Jamal B. Perkins.

Respectfully Submitted,

Robert M. Pachak for:
Robert M. Pachak
Appellate Defender

This 11th day of June, 2018.

ATTORNEY FOR APPELLANT

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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) True-billed indictments;
- (2) Complete guilty plea transcript dated July 27, 2016;
- (3) Probation revocation arrest warrant;
- (4) Complete probation revocation hearing transcript dated January 8, 2018;
- (5) Order revoking probation.

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

June 11, 2018

Robert M. Pachak For:
Robert M. Pachak
Appellate Defender

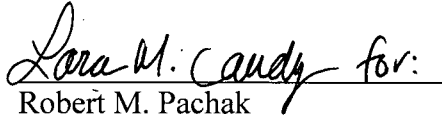
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ATTORNEY FOR APPELLANT

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."

June 11, 2018.


Robert M. Pachak
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 Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter has been served upon Jamal B. Perkins, 375082, at Manning Correctional Institution, 502 Beckman Drive, Columbia, SC 29203, this 11th day of June, 2018.

Lara M. Candy for:

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 11th day of June, 2018.

Maryann (L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027.