

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Orangeburg County

Honorable Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GREGORY O. DASH,

APPELLANT

APPELLATE CASE NO. 2017-002017

ANDERS BRIEF OF APPELLANT

RECEIVED

JUN 29 2018

SC Court of Appeals

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by revoking appellant's probation without a finding that his failure to pay fees, arrearages, and fines were willful, where the record shows appellant was attempting to remain employed under precarious circumstances, and that his economic situation became untenable for circumstances beyond his control?

STATEMENT OF THE CASE

On March 21, 2016, appellant was sentenced by the Honorable Diane S. Goodstein to six years imprisonment, suspended to ninety days, and two years' probation, for criminal domestic violence, second offense, and unlawful negligence of a child or helpless person. R. 3, ll. 11-22; r. 16. A probation revocation hearing was held on September 18, 2017, before the Honorable Diane S. Goodstein. Martin R. Banks represented appellant. Agent Wright appeared on behalf of the Department of Probation, Parole, and Pardon Services. R. 1.

At the conclusion of the hearing, Judge Goodstein revoked appellant's probation in full, and ordered that appellant's monetary arrearages be reduced to a civil judgement. R. 10, ll. 6-17; r. 16.

This appeal follows.

STANDARD OF REVIEW

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.” Hamilton, 333 S.C. 642, 649, 511 S.E.2d 94, 97 (Ct. App. 1999) (discussing 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.” Hamilton, 333 S.C. at 649, 511 S.E.2d at 97.

“Willful failure to pay means a voluntary, conscious and intentional failure.” People v. Davis, 216 Ill.App.3d 884, 159 Ill.Dec. 841, 576 N.E.2d 510, 513 (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.” Joseph v. State, 3 S.W.3d 627, 641 (Tex.App.1999) (citations omitted).

ARGUMENT

The court erred by revoking appellant's probation without a finding that his failure to pay fees, arrearages, and fines were willful, where the record shows appellant was attempting to remain employed under precarious circumstances, and that his economic situation became untenable for circumstances beyond his control.

Relevant Facts

Probation agent Wright told the judge that a special condition of appellant's probation was that he was to attend criminal domestic violence counselling, and not to live with "the victim until treatment was completed." He was also to attend parenting classes, go to Vocational Rehabilitation substance abuse counseling, and have random drug and alcohol screening." R. 3, l. 19 – 4, l. 2.

In addition, petitioner was also ordered on a prior occasion to satisfy PPP's "fees and arrearage and a civil judgement for fines, and other fees." Additional conditions ordered by the court, according to Wright, were for appellant to pay his supervision arrearage account within ninety days. Petitioner did not comply with the financial conditions of the order, Wright said. R. 4, ll. 3-16.

Defense counsel Banks told the judge that the restrictions on appellant not being able to live with his family made his already marginal economic situation much worse. However, Banks told the judge that appellant found a "very good job with Mars Pet Food, but in Blythewood, and as you know that's at least an hour from here and in that situation he even found a ride." R. 5, ll. 1-5. Banks related that people in this rural area charged appellant "a lot of money for these rides," and that appellant was also getting his paycheck garnished for child support. To make

matters worse, appellant had a “five-thousand dollar medical bill,” and a dentist bill he had to pay for services rendered at the same time. R. 5, ll. 10-18.

Appellant had been in jail for almost a month before the probation revocation hearing, which was held on September 18, 2017. Counsel Banks argued that this was not a case that justified a full revocation. R. 6, ll. 2-11.

Lakendra Spigner said she had been with appellant for ten years, and that she was trying to “push forward with my life.” Spigner said she wanted child support, and she wanted appellant involved with their children after their relationship was over. R. 7, l. 6 – 8, l. 11.

Appellant told the judge that his domestic situation was not part of his probation problems. His problem was a very difficult financial situation made worse given his criminal record. It was difficult to land a job given his record, and then transportation costs in keeping a job was a complicating factor. R. 9, ll. 5-24.

As stated, the judge revoked appellant’s probation in full, and she ordered his monetary probation obligations and arrearages reduced to a civil judgement. R. 10, ll. 6-17.

Discussion

In State v. Spare, 374 S.C. 264, 647 S.E.2d 706 (Ct. App. 2007), this Court found the evidence was insufficient to establish that the probationer’s failure to pay his monetary obligations of probation -- restitution -- was willful so as to justify the revocation of his probation. This Court noted that while probation was a matter of grace, a probationer was still entitled to fair treatment, and his probation could not be revoked on the basis of a whim or caprice. State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999); State v. Allen, 370 S.C. 88, 634 S.E.2d 653 (2006).

The Court noted that where nonpayment of monetary obligations imposed by probation was a reason to revoke the state must prove that there was a willful, voluntary, and conscious failure to pay the monetary probation fees and costs. See State v. Sowell, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006); Bearden v. Georgia, 461 U.S. 660 (1983); Barlet v. State, 288 S.C. 481, 483, 643 S.E.2d 620, 622 (1986).

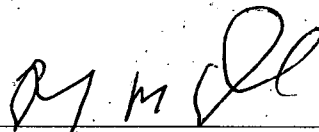
In this case, defense counsel Banks argued that appellant was doing his best to meet the financial obligations imposed by probation, and otherwise. Appellant had found a good job but it was expensive for him to pay for transportation to his pet store job in Blythewood.

In addition, appellant had large medical and dental bills beyond his control. Appellant had also recently been ordered to pay child support, and counsel argued this case did not present a situation where appellant deserved a full revocation of his probation.

The judge did not make a finding that appellant's inability to pay his probation financial obligations was a willful, intentional, and conscious disregard of his economic obligations, and the revocation of appellant's probation should therefore be vacated. See State v. Spare; Barlet v. State; Bearden v. Georgia, supra.

CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of June, 2018.

STATE OF SOUTH CAROLINA

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Appeal from Orangeburg County

Honorable Diane Schafer Goodstein, Circuit Court Judge

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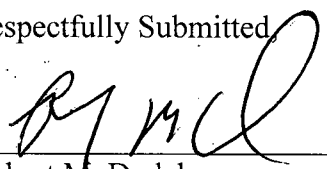
APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gregory O. Dash 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 Diane Schafer Goodstein, which was held on September 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 revocation hearing.
- WHEREFORE, He asks the Court to relieve him as counsel for Gregory O. Dash.

Respectfully Submitted



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 29th day of June, 2018.

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Appeal from Orangeburg County
Honorable Diane Schafer Goodstein, Circuit Court Judge

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

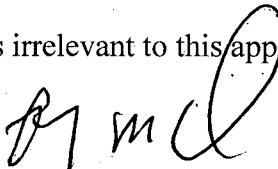
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Appellant proposes the following be included in the Record on Appeal:

- (1) Probation revocation hearing transcript;
- (2) Probation revocation sentencing sheet dated September 18, 2017;
- (3) Sentencing sheet continuing probation dated March 4, 2017;
- (4) Arrest warrant for probation

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

June 29, 2018



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent
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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."

June 29, 2018.



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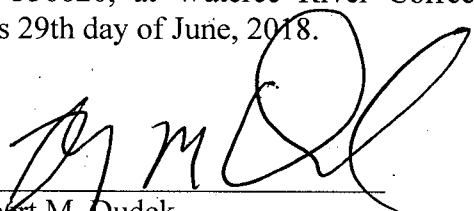
V.

GREGORY O. DASH,

APPELLANT


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 South Carolina Department of Probation, Parole, and Pardon Services, Post Office Box 50666, Columbia, SC 29250; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Gregory O. Dash, 336826, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 29th day of June, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of June, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 2, 2027.