

STATE OF SOUTH CAROLINA
COURT OF APPEALS
APPEAL FROM RICHLAND COUNTY
COURT OF GENERAL SESSIONS

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SC Court of Appeals

The Honorable DeAndrea Benjamin, Circuit Court Judge

Indictments Nos. 2015-GS-40-02657 and 2015-GS-40-07099

Appellate Case No.: 2018-000724

The State of South Carolina Respondent,

v.

Kivven Jett Thompson Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

The Trial Judge erred in revoking the probation of Appellant.

- A. The Trial Judge erred by not granting Appellant's request for a continuance of the revocation hearing when the necessary witnesses as to the facts were not available.**

- B. The procedure that was used to extend Appellant's probation for an additional year was faulty and led to confusion in Appellant's understanding as to whether he was on probation or not, ultimately leading to Appellant's probation revocation.**

STATEMENT OF THE CASE

On December 8, 2015, the Honorable Robert Hood sentenced Appellant, Kivven Jett Thompson, to a sentence of five (5) years, suspended to eighteen (18) months probation on Indictment No. 2015-GS-40-070099 (Drugs/MDP, Narcotic drugs Scheduled I (b) & (e), LSD, and Schedule II - 1st offense) and sentenced him to five (5) years, suspended to eighteen (18) months probation on Indictment No. 2015-GS-40-02657 (Drugs/Manuf., poss of other sub. In Sch. I, II, III or fluitrazepam or analogue, w.i.t.d. 1st). Both sentences were to run concurrently.

On May 20, 2017, a Probation Citation was prepared by Agent Nikesha D. Jacobs alleging violations of Appellant's probation on Indictment Nos. 15-GS-40-07099 and 15-GS-40-02657. This citation was served on Appellant on May 31, 2017.

On May 31, 2017, Appellant signed a "Waiver of Notice, Right to Attorney, and Hearing" as to Indictment Number 15-GS-40-07099.

On that same date, Appellant signed the bottom of two (2) documents that were subsequently signed by the Honorable Knox McMahan on June 7, 2017. These documents were Orders that had handwritten conditions stating that Appellant's probation was extended one (1) year, that he must complete SAC, PTUP upon completion of SAC. Both of these Orders were filed on June 8, 2017.

On January 22, 2018, Appellant was served with Arrest Warrant W-40-17-0451 alleging he had violated the terms of his probation regarding Indictment Nos. 15-GS-40-07099 and 15-GS-40-02657.

On April 13, 2018, Appellant appeared before the Honorable Deandrea G. Benjamin to hear the allegations raised in Arrest Warrant W-40-17-0451 concerning violation of his

probation. Present before the Court on this date was a representative of the Department of Probation, Pardon & Parole, Appellant, and Appellant's attorney, Robert T. Williams, Sr.

The Trial Judge revoked eighteen (18) months, terminated probation, ATU, and converted fees and fines to a civil judgment.

On April 18, 2018, Appellant served his Notice of Intent to Appeal on opposing counsel and filed said Notices with the Circuit Court and the S.C. Court of Appeals on April 20, 2018.

Appellant requested a transcript of the proceedings on April 20, 2018 and received same on May 15, 2018.

ARGUMENT

A. The Trial Judge erred by not granting Appellant's request for a continuance of his probation revocation hearing when the necessary witnesses to the facts were not available.

The decision to revoke probation is left to the discretion of the Circuit Court Judge. The Appellate Court's right to review the Judge's decision is confined to correcting errors of law unless the lack of the legal or evidentiary basis indicates the Circuit Court Judge's authority was arbitrary and capricious. State v. Hamilton, 333 S.C. 642, 511 S.E. 2d 94, (Ct. App. 1999).

Appellant contends that the Trial Judge's decision was arbitrary and capricious because the Court conducted the hearing without the sworn testimony, or, in fact, any testimony, from those witnesses who had direct knowledge of the facts that were being offered to terminate Appellant's probation.

At the beginning of the hearing Appellant's counsel requested a continuance until Agent Kelly, Appellant's probation officer, could be present to resolve the discrepancies between Appellant's testimony regarding the facts and the allegations being brought forward. (R. p. 13, l. 2 - l. 19).

The Probation Agent handling the hearing stated that Agent Kelly was away in service and that Agent Kelly had documented every office meeting he had had with Thompson (Appellant). (R. p. 13, l. 20 - p. 14, l. 11).

The Court denied this request and the hearing went forward. It is important to note from the outset that the Transcript prepared by the Court Reporter reflects that there were no witnesses sworn nor any exhibits offered. (R. p. 12).

The Probation Agent at the hearing alleged that Appellant had failed his drug tests, failed

to attend substance abuse counseling, and that by reason thereof, had gotten his probation extended. She further stated that Appellant was then transferred to Agent Sellers for supervision until he was subsequently arrested on his probation violation warrant. (R. p. 14, l. 13 - p. 17, l. 24).

Appellant's counsel again brought up the problem that there was no Agent there with direct knowledge of what was told to Appellant and that he could not simply cross-examine a piece of paper. (Agent Sellers was also not present to testify to any matter; nothing was offered by the Probation Officer as to why he could not be there.) (R. p. 18, l. 1-16).

Appellant testified that he reported every time on time and that he was never behind on his payments all the way up to 2016. He further stated that he was told that he was off probation with no more report dates even though his probation was not supposed to be over until June of 2017. (R. p. 22, l. 1-8).

Appellant further testified that he then began smoking until he received a call in February or March (2017) requiring him to take a drug test. He testified that he had not been told to take drug classes and had not taken a drug test from December 2015 until November 2016. The call received in February or March was four (4) months after he had been told he was off probation. (R. p. 22, l. 9-18).

Appellant stated that he then began to deal with Agent Sellers.

Appellant stated that this is the time period that he started to take the drug class but failed the test offered by Agent Kelly because he thought he was off probation for the last four (4) months. He was subsequently told again by Agent Kelly on Friday, September 15, 2017 after he passed the drug test and that he was off probation. (R. p. 22, l. 23 - p. 24, l. 15).

The Agent handling the probation revocation hearing actually admits that "I'm not sure of

the conversation he had with Agent Kelly.” (R. p. 26, l. 19-20). Her testimony is essentially hearsay from what allegedly Agent Sellers told her (R. p. 25, l. 13 - p. 26, l. 2) and what she allegedly sees in a computer. (R. p. 26, l. 23-24). Again, no exhibits were offered into the record showing any kind of a computer entry and, neither Agent Kelly or Sellers were present at the hearing.

State v. Pauling, 371 S.C. 435, 635 S.E. 2d 680 (Ct. App. 2006) sets the standard in regards to the calling of witnesses and confrontation of witnesses as provided in the Sixth Amendment, and whether a probationer is extended the same protection as afforded a defendant in a criminal prosecution. This case concludes that a defendant’s rights are limited to the testimony of a probation officer, or as in that case to affidavits of victims or police officers.

In the case of Appellant, no sworn statements or affidavits were presented and no police officers or agents with direct knowledge of the probationer testified. This does not appear to be due process of law. The only one to have direct knowledge of the events was the probationer whose testimony was clearly not in accord with the allegations raised by the Department of Probation.

B. The procedure that was used to extend Appellant’s probation for an additional year was faulty and led to confusion in Appellant’s understanding as to whether he was on probation or not, ultimately leading to Appellant’s probation revocation.

Appellant was sentenced on both indictments by Judge Robert Hood to five years, suspended to eighteen (18) months probation on December 8, 2015. (R. p. 1-2).

Therefore, Appellant was to be released from probation as of June 8, 2017 unless his probation was extended or shortened by a Court Order.

The probation violation warrant that was dated October 25, 2017 was served on Appellant

on January 22, 2018:

Appellant's attorney initially brought up the Order signed by Judge McMahon as being part of the problem which led to Appellant's revocation when he stated that Appellant never received a copy of it. (R. p. 18, l. 17 - p. 21, l. 25). The Trial Judge went through a discussion with the Probation Agent and Appellant's attorney essentially settling on the decision that the process involved amounted to a paperwork review. (R. p. 20, l. 5-25).

Appellant's testimony indicates that he thought he was off probation first approximately four (4) months before a phone call of February or March of 2017. (R. p. 22, l. 1-18).

The Orders signed by Judge McMahon indicate that Appellant's probation was extended for one (1) year as of June 7, 2017. (R. p. 7-8). These same documents are dated as having been seen by Appellant on May 31, 2017. (R. p. 7-8).

There is no evidence in the record that Appellant actually received a copy of the signed Order by Judge McMahon. There is only a blanket statement made by the Trial Judge that this is a paperwork review where stacks of orders are presented to the Judge wherein they are signed and given back to the agent. (R. p. 20, l. 5-13). As the Judge stated in the record "so that is probably what happened." (R. p. 20, l. 7-11).

Appellant contended that there never was an administrative hearing, that he could not have had legal notice of the order until after it was signed by the Judge, and lastly that the part of the order regarding extending his probation was not on the Order when he signed it. (R. p. 20, l. 14-24).

It is a well-known principle that "until an order is written and entered, the trial judge retains discretion to change his mind and amend his oral order." Ford v. State Ethics Commission, 344 S.C. 642, 545 S.E. 2d 821 (2001). An order is not final until it is written and

entered by the Clerk of Court. First Union National Bank of South Carolina v. Hitman, Inc., 306 S.C. 327, 411 S.E. 2d 681 (Ct. App. 1991) aff'd 308 S.C. 421, 418 S.E. 2d 545 (1992).

“Until the paper has been delivered by the Judge to the Clerk of Court to be filed by him as an order in the case, it is subject to the control of the Judge and may be withdrawn at any time before such delivery. Bayne v. Bass, 302 S.C. 208, 394 S.E. 2d 726 (Ct. App. 1990).

The signature on the bottom of the above referenced order indicates that Appellant had the Order read to him on May 31, 2017, seven (7) days before the Judge signed it.

Appellant thought that his probation was over and there is no evidence that he received the Order after the Judge signed it. (R. p. 19, l. 17 - p. 20, l. 24).

All of these further point to the importance of having the proper witnesses to explain (1) why Appellant did not get a copy of an Order extending his probation; (2) whether Appellant wilfully did not comply with probation; (3) and whether Appellant was justified in not thinking he was on probation where he had been told he was off and had not received an Order extending it.

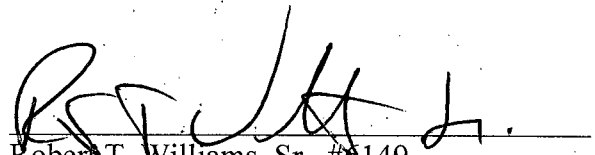
CONCLUSION

Appellant should have been granted a continuance to allow (and require) the appearance of individuals with knowledge as to how he did on probation and as to whether he was justified into thinking he was off probation.

The extension of one (1) year of probation by Judge McMahon should not have been binding because there was no evidence that Appellant received a copy of same. If the procedure used in Appellant's case is the standard procedure that is used in all extension of probation cases where there is no appearance before the Trial Judge, but merely the submission of documents, a requirement that the Order be served after it is signed might be more appropriate.

Respectfully submitted,

July 12, 2018


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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b). SCACR.

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