

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

RECEIVED
JUL 18 2018
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

WILLIE HOWARD SMALLWOOD,

APPELLANT

APPELLATE CASE NO. 2017-001987

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by revoking appellant's supervision without finding that his failure to pay GPS and other fees were willful failures, since appellant could not be revoked for failing to pay monetary obligations that were beyond his control?

STATEMENT OF THE CASE

Appellant was sentenced to ten years imprisonment for criminal sexual conduct with a minor in the second degree on January 5, 2010. The Honorable Edward Miller was the sentencing judge. Appellant was released from prison on community supervision on March 1, 2017. R. 2, ll. 7-15; R. 9 (Sentencing Sheet).

An administrative hearing was held on August 31, 2017, regarding appellant's failure to pay his GPS and other fees. In addition to the failure to pay fees, the administrative hearing officer found appellant willfully did not keep his GPS monitor charged. R. 10 – 11.

A community supervision revocation hearing was held on September 18, 2017, before the Honorable R. Scott Sprouse. Victoria Gurney represented appellant. A probation officer appeared for the state. R. 1. At the conclusion of the hearing, the judge revoked appellant's community supervision. R. 7, ll. 13-15.

This appeal follows.

STANDARD OF REVIEW

“The decision to revoke probation is addressed to the sound discretion of the trial court.” State v. Spare, 374 S.C. 264, 268, 647 S.E.2d 706, 708 (Ct. App. 2007)(citing State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006)). The appellate court’s “‘authority to review such a decision is confined to correcting errors of law unless the lack of a legal or evidentiary basis indicates the circuit judge’s decision was arbitrary and capricious.’” Id. (quoting State v. Hamilton, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct. App. 1999)).

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, 103 S.Ct. 2064, 76 L.Ed.2d 221 (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); State v. Spare, 374 S.C. 264, 268–69, 647 S.E.2d 706, 708–09 (Ct. App. 2007).

ARGUMENT

The court erred by revoking appellant's supervision without a finding that his failure to pay GPS and other fees were willful, since appellant could not be revoked for failing to pay monetary obligations that were beyond his control.

Relevant Facts

The probation officer told the judge that appellant had not paid his fees, and he had allowed his GPS unit to "go dead." R. 2, l. 7 – 3, l. 16. Appellant admitted he had violated his "probation." R. 3, l. 19 – 4, l. 2.

Defense counsel Gurney explained that appellant did not have the money to pay for transitional housing, and he tried to talk to his agent "about his money situation" but the agent was not at work when appellant went by his office. Appellant ended up at the hospital due to a panic attack about this matter. R. 4, l. 3 – 6, l. 3.

Gurney asked that the judge to place appellant in a six-month rehabilitation program where he would wear a GPS monitor. R. 6, ll. 11-18. Instead, the judge revoked appellant's supervision without any finding his failure to pay his monetary obligations was willful. R. 7, ll. 13-15.

Discussion

In State v. Spare, 374 S.C. 264, 647 S.E.2d 706 (Ct. App. 2007), the Court held that there was insufficient evidence to establish that the probationer's failure to pay his restitution was willful. Consequently, it was improper to revoke his probation. The Court of Appeals therefore vacated the revocation.

As a preliminary matter, the revocation court must determine whether the state has presented sufficient evidence to establish the probationer has violated the terms of his probation.

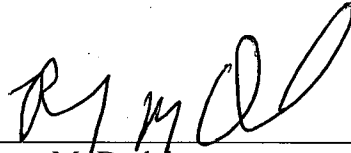
State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006). Probation cannot be revoked unless the defendant has failed to make a bona fide effort to pay. See Bearden v. Georgia, 461 U.S. 600 (1983); Barlet v. State, 268 S.C. 481, 483, 643 S.E.2d 620, 622 (1986). There is no reason the law on a community supervision revocation would be any different since a revocation results in imprisonment.

Here, appellant had a difficult time finding a place to live because he was a sex offender. He was evicted from transitional housing because of his inability to pay, and his apparent drug problem. Appellant had also been unable to pay supervision fees and other fees as well. R. 9.

Defense counsel asked that the court allow appellant to be permitted to enter a six-month drug rehabilitation program, and she correctly argued appellant's failure to abide by all the conditions of his community supervision was not a willful of his obligations. The court erred in revoking appellant's community supervision under these circumstances.

CONCLUSION

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

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of July, 2018.

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Appeal from Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

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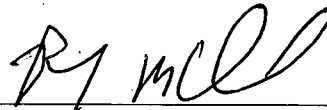
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Willie Smallwood 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 community service revocation hearing before Judge R. Scott Sprouse, 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 trial.

WHEREFORE, He asks the Court to relieve him as counsel for Willie Smallwood.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 18th day of July, 2018.

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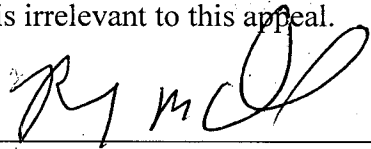
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Community Supervision Revocation Hearing Transcript;
- (2) Sentencing Sheet;
- (3) Summary of Administrative Hearing;
- (4) Revocation Order.

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

July 18, 2018


Robert M. Dudek
Chief Appellate Defender

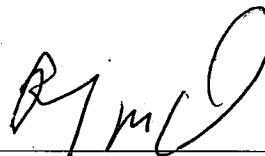
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ATTORNEY FOR APPELLANT

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."

July 18, 2018.



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Chief Appellate Defender

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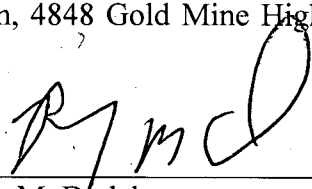
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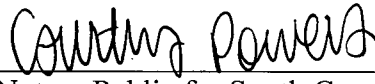
APPELLANT

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; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Willie Smallwood, 338651, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 18th day of July, 2018.


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of July, 2018.

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