

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable DeAndrea Benjamin, Circuit Court Judge

Appellate Case No. 2018-000724

THE STATE,.....RESPONDENT

RECEIVED

v.

JUL 23 2018

SC Court of Appeals

KIVVEN JETT THOMPSON,.....APPELLANT

FINAL BRIEF OF RESPONDENT

**Matthew Buchanan
General Counsel**

**South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250**

ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the trial court abused its discretion when it denied Appellant's request for a continuance because the Probation Agent was deployed to Kuwait and would not return for six months.**
2. **Whether the paperwork review process is a valid procedure for the courts to approve changes to offenders' supervision when revocation is not sought.**

STATEMENT OF THE CASE

On December 8, 2015, the Appellant pled guilty to two drug offenses under Indictment numbers 2015-GS-40-7099 and 2015-GS-40-2675 before the Honorable Robert Hood in Richland County General Sessions Court. The court sentenced him on each count to five years incarceration suspended to probation for eighteen months. The sentences were run concurrently. For the offense under Indictment 7099, the boxes for special conditions of substance abuse counseling (SAC) and random drug/alcohol testing were checked. (R. p.1-p.2).

Upon his intake to probation, the Appellant tested positive for THC and Cocaine. In response to the positive drug tests, the probation agent completed Form 1182 Notice of Violation and Response on December 14, 2015, requiring the Appellant to continue to be retested for drugs at the Agent's discretion. The Appellant was also required to enroll in SAC. (R. p.3).

As the Appellant's supervision period was approaching its expiration date¹, the Department staffed the case with the agent and his supervisor. After determining the Appellant had failed to complete his court-ordered SAC within the eighteen months of probation, Agent Nikesha Jacobs issued a citation on May 30, 2017. (R.p.4-p.5). The Appellant was served with the citation on May 31, 2017. On that same day, the Appellant signed a "Waiver of Notice, Right to Attorney, and Hearing" document wherein he agreed to waive his rights to an attorney and a probation violation hearing, with the condition that his probation be extended for one additional year. The conditions also included PTUP upon completion of SAC. The Honorable Judge R. Knox McMahon signed the documents on June 7, 2017 and filed the next day. (R. p.7-p.8)

The Appellant continued to violate the conditions of his supervision, as described in the arrest warrant served upon him on January 22, 2018, which included failure to complete SAC,

¹ The Appellant's supervision began on the date he pled, December 8, 2015, and would have completed his probation on June 8, 2017 absent a court order extending his probation.

failure to report, having positive drug tests, possession of dangerous weapons, and being arrested for additional criminal offenses. (R. p.9-p.11)

The Appellant appeared before the Honorable Judge DeAndrea Benjamin for the probation violation hearing on April 13, 2018. Due to the criminal charges still pending, the agents for the Department focused their presentation on the failed drug tests, the failure to complete SAC, and the missed reporting. The judge revoked the Appellant in full, ordered ATU, and terminated probation while converting fines and fees to a civil judgment. (Tr. p. 28, ll. 22-25 – p. 29, l.1).

This appeal follows.

ARGUMENT

1. The trial court did not abuse its discretion when it denied Appellant's request for a continuance because the Probation Agent the Appellant wished to cross-examine was deployed to Kuwait and would not return for six months.

The Appellant argues that the judge's decision to deny his motion for a continuance for six months was arbitrary and capricious. The reason for his motion was so that he could cross examine the probation agent first assigned to his case – Agent Kelly – who had been deployed to Kuwait for military service and was therefore unavailable for the hearing. He cites Ståte v. Hamilton, 333 S.C. 642, 511 S.E.2d 94, (Ct. App. 1999), which describes this Court's right to review the trial court's decisions as limited to errors of law or if there is a lack of legal or evidentiary basis for those decisions.

However, there is ample evidence that shows the court's decision to deny the motion for a continuance was not arbitrary or capricious. Agent Kelly had been deployed to Kuwait and would not return for six months. That is an extreme length of time for a continuance for a probation violation, and the judge clearly deemed it too long a time to wait. (R. p.14, l. 6-8).

Furthermore, the Appellant's reasons to have Agent Kelly present to testify are not compelling. He cites State v. Pauling, 371 S.C. 435, 639 S.E.2d 680 (Ct. App. 2006), but seems to conflate the opinion's stated limitation of a defendant's Sixth Amendment rights to mean that the offenders have the right to demand a specific probation officer be present in court. Instead, Pauling clearly holds that the offender has *no* Confrontation Clause rights in probation revocation proceedings.

To rule that for a probation hearing to go forward, the agent who supervised that specific offender be present to render testimony about a particular violation would be impractical at best and impossible to enforce at worst. Supervision on probation can last up to five years.² A probationer can abscond, and even more years may elapse before the offender caught and brought before the court.³ Within that lengthy time frame, probation agents can move to other counties, change jobs, are promoted, or retire in that span of time. And some can be deployed overseas by the military. Calling back agents who may no longer be readily available to render testimony about a particular violation would be unwieldy and against the general informality of probation violation hearings that courts have repeatedly held them to be.⁴

For this reason, the General Assembly has mandated an obligation for agents to thoroughly document their work. *See* S.C. Code § 24-21-280(A), "A probation agent must *keep detailed records of his work*, make reports in writing, and perform other duties as the director may require." (Emphasis added.) Therefore, the records kept by Agent Kelly could be used and presented to the trial court as it was in this case as a valid substitute for his actual presence.

² S.C. Code §24-21-440.

³ State v. Miller, 404 S.C. 29, 35, 744 S.E.2d 532, 536.

⁴ *See* State v. Franks, 276 S.C. 636,638, 281 S.E.2d 227, 228 (1981). "[T]he probation revocation proceeding is not a criminal trial of those charges ... but a more informal proceeding with respect to notice and proof of the alleged violations." *Citations omitted. See also* State v. Hill, 368 S.C. 649, 655, 630 S.E.2d 274, 278 (2006) and State v. Barlow, 372 S.C. 534, 538, 643 S.E.2d 682, 684 (2007).

The Appellant insists that Agent Kelly's presence was vital so he could be cross-examined, or to be present to support the Appellant's mistaken belief that he was no longer on probation. Pauling, however, makes it clear he has no right of confrontation. Id. at 439, 682. Furthermore, this also presumes that had Agent Kelly been present, he would have testified that that he told the Appellant he was off probation despite there being an order by a circuit judge extending the probation for an additional year. This understandably stretches credulity. Consequently, the trial court's decision to deny the motion for a continuance was proper, and clearly not arbitrary or capricious.

2. The paperwork review process is a valid procedure for the courts to approve changes to offenders' supervision when revocation is not sought.

The Appellant contends that the paperwork review that allows for an offender to address violations with his or her agent and avoid going to court is a faulty process that ultimately caused his probation revocation. This ignores the fact that the Appellant himself violated the special conditions of probation by not completing Substance Abuse Counseling, was given additional time to fulfill the obligation, and still failed to comply. The professed confusion of the Appellant was his own, because the paperwork review process is clear and based upon statutory authority.

As the trial court explained, "[W]e do this – I do this all the time. [Agents] do the paperwork review. They get them to sign it when they do the administrative hearing. Then they bring a stack to us to the office and then we sign them and get them back to them." (R. p. 20, ll. 6-10.) While the probation hearing in question referred to this procedure as a paperwork review, the statutory basis is found in S.C. Code § 24-21-110 Administrative Sanctions. This section of the Code gives the agents the authority to respond to violations with an alternative to warrants or citations back to court. Subsection (B) is particularly applicable to the issue at bar:

If the offender agrees in writing to the additional conditions set forth in the notice or order of administrative sanctions, the conditions must be implemented with swiftness and certainty. If the offender does not agree, or if after agreeing the offender fails to fulfill the additional conditions to the satisfaction of the probation agent and his supervisor, then the probation agent may commence revocation proceedings.

The Appellant agreed to the sanctions – extending the probation for one year so that he could complete the special condition of SAC – so he could avoid returning to court and facing a possible revocation. The agreement was then presented to Judge McMahon because § 24-21-440 allows the court to extend probation so long as the extension does not exceed five years.

The Appellant makes an issue that the order should not be valid because he claims to have never seen a copy of the signed order. This is not required. The order was final when it was clocked in on June 8, 2017. As the Appellant cites in his Brief, 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). Whether the offender then receives a copy of the filed document has no bearing on the validity of the order.

Furthermore, the Appellant contends that his violation would not be willful if he believed that he was off probation. However, a showing of willfulness is not a requirement in probation violation proceedings. Hamilton, 333 S.C. at 648, 511 S.E.2d at 97.

The Appellant received an act of grace⁵ when he received a probationary sentence. He had been ordered to complete Substance Abuse Counseling while on probation, which he failed to do in the allotted time of eighteen months. Instead of being brought back to court to answer for his failure to meet the requirements of probation, he and his agent agreed to an extension of his probation to give him more time to complete the SAC. The fact that he never received a copy of

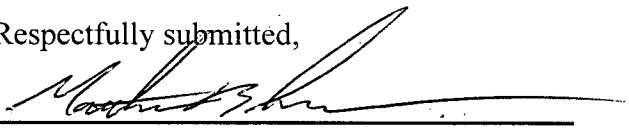
⁵ State v. White, 218 S.C. 130, 136, 61 S.E.2d 754, 756 (1950).

the signed, clocked order extending that probation does not make his continued violations of failed drug tests, and failure to complete SAC non-willful, even if willfulness were required.

CONCLUSION

The trial court was well within its authority to deny the request for a continuance because it is not necessary in an informal violation hearing to have the original agent present to testify. Furthermore, the paperwork review process is a valid means to deal with violations when revocation is not sought. The agreement between the offender and the agent can be later submitted to the judge to make the modifications to the conditions of probation the formal order of the court. The delivery of the signed order to the offender is not required to make it valid. Therefore, this Court should affirm the trial court's denial of the motion for continuance and the revocation of the Appellant's probation.

Respectfully submitted,



Matthew C. Buchanan
General Counsel

South Carolina Department of Probation
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

Attorney for the Respondent

Columbia, South Carolina
July 19, 2018

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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.



Matthew C. Buchanan
General Counsel

July 19, 2018