

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Florence County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PEPPER ROSE RATHBURN,

APPELLANT

APPELLATE CASE NO. 2017-002560

ANDERS BRIEF OF APPELLANT

RECEIVED

AUG 29 2018

SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Whether the probation revocation judge abused his discretion when he revoked Appellant's probation, where Appellant pled guilty to a separate offense in North Carolina, and where she was promised by the North Carolina district attorney that her probation would not be revoked if she pled guilty?

STATEMENT OF THE CASE

On September 29, 2016 the Florence County Grand Jury indicted Appellant for unlawful conduct towards a child. R. 13. On October 18, 2016, Petitioner pled guilty and the Honorable William H. Seals Jr. sentenced her to seven years' imprisonment, suspended on three years' probation. R. 3, ll. 16 – 22. Emily M. Crayton represented Appellant. David A. Richardson Jr. represented the state¹.

Appellant moved to North Carolina and her case was transferred through the Interstate Compact Offender Tracking System (ICOTS), which is now known as the Interstate Commission for Adult Offender Supervision (ICAOS). R. 3, ll. 22 – 24. On September 20, 2017, Appellant pled guilty in North Carolina to possession with intent to distribute methamphetamine. R. 4, ll. 5 – 12. Appellant received a sentence of four to fourteen months, suspended to eighteen months' probation. R. 4, ll. 12 – 14. Appellant also failed to pay drug test fees, an application fee, and fines. R. 4, ll. 14 – 16.

Appellant's guilty plea in North Carolina constituted a violation of her probation sentence in South Carolina. R. 4, ll. 9 – 12. Appellant's probation revocation hearing was held on December 8, 2017, in front of the Honorable D. Craig Brown in Florence County. R. 1. Emily M. Crayton represented Appellant. Id. Judge Brown revoked thirty months of Appellant's probation and ordered that she go to the Addictions Treatment Unit while she is in SCDC custody. R. 11, ll. 11 – 14.

This appeal follows:

¹ This information was not in the record and found upon review of the publicly available records on: <https://publicindex.sccourts.org/Florence/PublicIndex/PISearch.aspx>, (August 29, 2018).

STANDARD OF REVIEW

The determination of whether to revoke probation in whole or part rests within the sound discretion of the trial court. State v. Miller, 122 S.C. 468, 474-75, 115 S.E. 742, 745 (1923); State v. Proctor, 345 S.C. 299, 301, 546 S.E.2d 673, 674 (Ct.App.2001); S.C.Code Ann. § 24-21-460 (1989). The trial court must determine whether the State has presented sufficient evidence to establish that a probationer has violated the conditions of his probation. State v. King, 221 S.C. 68, 73, 69 S.E.2d 123, 125 (1952)**Error! Bookmark not defined.**; State v. White, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950); State v. Hamilton, 333 S.C. 642, 648-49, 511 S.E.2d 94, 97 (Ct.App.1999). “While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice.” White, 218 S.C. at 136, 61 S.E.2d at 756. An appellate court will not reverse the trial court's decision unless that court abused its discretion. White, 218 S.C. at 135, 61 S.E.2d at 756; Hamilton, 333 S.C. at 647, 511 S.E.2d at 96. An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987); S.E.C. v. TheStreet.Com, 273 F.3d 222, 229 n. 6 (2d Cir.2001). State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655-56 (2006)

ARGUMENT

The probation revocation judge abused his discretion when he revoked Appellant's probation, where Appellant pled guilty to a separate offense in North Carolina, and where she was promised by the North Carolina district attorney that her probation would not be revoked if she pled guilty.

Relevant Facts

On September 29, 2016 the Florence County Grand Jury indicted Appellant for unlawful conduct towards a child. R. 13. Judge Seals sentenced her to seven years' imprisonment, suspended to three years' probation. R. 3, ll. 16 – 22.

Pursuant to the procedure of ICAOS, Appellant moved to and her case was transferred to North Carolina. R. 3, ll. 22 – 24. Appellant paid her accounts up to date, but failed to “refrain from violating state and local laws being that she'd been convicted in... North Carolina... for possession with intent to distribute drugs.” R. 4, ll. 4 – 12. In North Carolina, Appellant received a sentence of, “4 to 14 months suspended to 18 months supervised supervision,” when she pled guilty to possession with intent to distribute methamphetamine. R. 4, ll. 12 – 14. The North Carolina district attorney promised Appellant that if she pled guilty her probation would not be revoked. R. 5, ll. 11 – 14; R. 7, ll. 12 – 20.

At the probation revocation hearing, Appellant admitted, and the Court found, that she willfully violated the terms of her probation. R. 4, l. 25 – 5, l. 8. Defense counsel explained that Appellant's guilty plea in North Carolina was not knowingly, intelligently, and voluntarily made because she was under the impression that she would not get a probation revocation charge if she pled guilty. R. 5, ll. 11 – 14. Appellant would not have pled guilty if not for the promise from the

North Carolina district attorney that her probation would not be revoked if she pled guilty. R. 5, ll. 21 – 24; R. 7, ll. 12 – 15.

Judge Brown disregarded the involuntary nature of Appellant's plea and revoked thirty months of her probation. He also ordered that she go to the Addictions Treatment Unit while she is in incarcerated. R. 11, ll. 11 – 14. That was an error, and that error prejudiced Appellant.

Discussion

South Carolina became a member state of ICAOS pursuant to S.C. Code Ann. § 24-21-1120. The Interstate Compact for Adult Offender Supervision, is a formal agreement among member states that controls the interstate movement of certain adult offenders. *See: Penland v. Adger*, 2017 WL 2628008, at 4 (D.S.C. May 25, 2017). *See also:* Interstate Commission for Adult Offender Supervision Rules ["ICAOS Rules"] at 1, available at <http://www.interstatecompact.org>.

Each ICAOS member state has an interstate compact office that is charged with authorizing the transfer of an offender from one member state to another. *Id.* at 10. Under the ICAOS Rules, "retaking" is defined as "the act of a sending state in physically removing an offender, or causing to have an offender removed, from a receiving state." *Id.* at 7. "Behavior Requiring Retaking" is defined under the ICAOS as, "an act or pattern of non-compliance with conditions of supervision that could not be successfully addressed through the use of documented corrective action or graduated responses and would result in a request for revocation of supervision in the receiving state." *Id.* at 5.

Pursuant to Rules 5.102 and 5.103 of ICAOS, the South Carolina interstate compact office in Columbia issued warrants for Appellant's "retaking," because Appellant pled guilty to possession with intent to distribute methamphetamine in North Carolina. *Id.* at 58-59; R. 4, ll. 5 –

12. Since Appellant's guilty plea to possession of methamphetamine with intent to distribute would constitute "Behavior Requiring Retaking" in North Carolina, the sending state, South Carolina, was required to issue warrants to retake Appellant. R. 8, ll. 11 – 14.

However, Appellant's North Carolina guilty plea to possession with intent to distribute methamphetamine was induced through misrepresentation. The North Carolina district attorney made an unfulfillable promise that Appellant's probation would not be revoked if she pled guilty to possess with intent to distribute methamphetamine. Brady v. United States, 397 U.S. 742, 755 (1970). Appellant would not have pled guilty but for the misrepresentation that her probation would not be revoked. R. 5, ll. 21 – 24; R. 7, ll. 12 – 15

Plea bargains are essentially contracts. See Mabry v. Johnson, 467 U.S. 504, 508 (1984). The party injured by the breach will generally be entitled to some remedy, which might include the right to rescind the contract entirely. See 26 R. Lord, Williston on Contracts, § 68.1 (4th ed.2003); Puckett v. United States, 556 U.S. 129, 137 (2009). "When a defendant agrees to a plea bargain, the Government takes on certain obligations. If those obligations are not met, the defendant is entitled to seek a remedy, which might in some cases be rescission of the agreement, allowing him to take back the consideration he has furnished, i.e., to withdraw his plea." Id., 556 U.S. 129, 137 (2009). In the instant case, Appellant was promised that her probation would not be revoked if she pled guilty to possession with intent to distribute methamphetamine in North Carolina.

The determination of whether to revoke probation in whole or part rests within the sound discretion of the trial court. State v. Miller, 122 S.C. 468, 474-75, 115 S.E. 742, 745 (1923); State v. Proctor, 345 S.C. 299, 301, 546 S.E.2d 673, 674 (Ct.App.2001). The trial court must determine whether the State has presented sufficient evidence to establish that a probationer

has violated the conditions of his probation. State v. King, 221 S.C. 68, 73, 69 S.E.2d 123, 125 (1952); State v. White, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950); State v. Hamilton, 333 S.C. 642, 648-49, 511 S.E.2d 94, 97 (Ct.App.1999). “While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice.” White, 218 S.C. at 136, 61 S.E.2d at 756; State v. Allen, 370 S.C. 88, 96, 634 S.E.2d 653, 657 (2006) (“[A] probationer or parolee has a constitutionally protected liberty interest and cannot be denied due process simply because probation has been described as an act of grace.”).

An appellate court will not reverse the trial court’s decision unless that court abused its discretion. White, 218 S.C. at 135, 61 S.E.2d at 756; Hamilton, 333 S.C. at 647, 511 S.E.2d at 96. “An abuse of discretion occurs when the trial court’s ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.” Allen, 370 S.C. at 94, 634 S.E.2d at 656.

The difference “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. Hill v. Lockhart, 474 U.S. 52 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) to claims of the same against plea counsel):

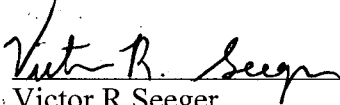
First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Id. The prejudice requirement focuses on whether “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Id. at 59, 106 S.Ct. at 370. “[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea....” Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011). Additionally, a guilty plea that was entered by one fully aware of the direct consequences “must stand unless induced by . . . misrepresentation (including unfulfilled or unfulfillable promises)...” Brady v. United States, 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (1957)).

In the instant case, the probation revocation court abused its discretion when it revoked Appellant’s probation because the guilty plea she made in North Carolina was not knowingly, intelligently, and voluntarily made because she was under the impression that she would not get a probation revocation charge when she pled guilty. R. 5, ll. 11 – 14. Appellant would not have pled if not for the promise from the North Carolina district attorney that her probation would not be revoked if she pled guilty. R. 5, ll. 21 – 24; R. 7, ll. 12 – 15. Therefore, the guilty plea, which is her cause for the probation revocation, was induced by misrepresentation.

Since Appellant’s guilty plea in North Carolina was involuntary, the court should not have relied on her guilty plea to revoke her probation. Without Appellant’s involuntary guilty plea, there is no basis to find that she violated her probation. Therefore, the lower court abused its discretion when it relied on an involuntary guilty plea to revoke Appellant’s probation and sentence her to thirty months imprisonment.

CONCLUSION

By reason of the foregoing arguments Appellant respectfully requests that the revocation of her probation be vacated.



Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of August, 2018.

STATE OF SOUTH CAROLINA

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Honorable D. Craig Brown, Circuit Court Judge

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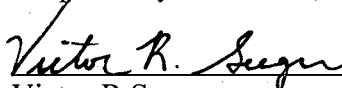
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Pepper Rose Rathburn states:

1. He is 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 trial before Judge D. Craig Brown, which was held on December 8, 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 Pepper Rose Rathburn.

Respectfully Submitted,



Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

This 29th day of August, 2018.

STATE OF SOUTH CAROLINA
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Honorable D. Craig Brown, Circuit Court Judge

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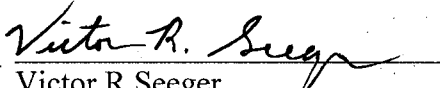
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Probation Revocation Hearing Transcript.

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

August 29, 2018



Victor R Seeger
Appellate Defender

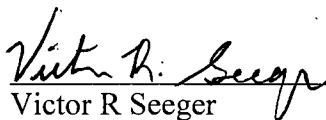
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ATTORNEY FOR APPELLANT

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."

August 29, 2018.



Victor R Seeger
Appellate Defender

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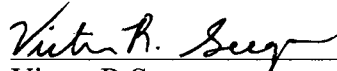
V.

PEPPER ROSE RATHBURN,

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 Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Pepper Rose Rathburn, 374891, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 29th day of August, 2018.

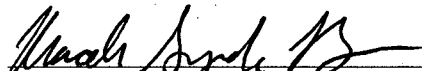


Victor R Seeger

Appellate Defender

ATTORNEY FOR APPELLANT

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

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 26, 2028