STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LUTHER BRIAN MARCUS,

APPELLANT

APPELLATE CASE NO 2017-002622

INITIAL BRIEF OF APPELLANT

VICTOR R SEEGER
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred when it revoked Appellant's probation in full where the trial judge indicated he had no discretion to determine if revocation of Appellant's probation in full was proper and where the judge failed to consider the evidence on the record that Appellant served almost a year imprisonment longer than his original sentence?

STATEMENT OF THE CASE

On April 27, 2010, in front of the Honorable Alexander Macaulay, Appellant pled guilty to second-degree burglary in Oconee County. R. *. Appellant was sentenced to fifteen years' imprisonment, suspended to seven years' imprisonment with five years' probation. R.*; Tr. 143, ll. 23 – 24.

Appellant was indicted for indecent exposure by the Pickens County Grand Jury during the May 2017 term. R. *. Appellant's trial was held on December 11 and 12, 2017, in front of the Honorable Edward W. Miller. Tr. 1. Shannon Swords Odom represented the state. Id. David D. Cantrell, Jr. represented the Appellant. Id.

Appellant was found guilty as indicted. Tr. 140, ll. 21 – 24. Judge Miller sentenced Appellant to three years' imprisonment, and revoked his Oconee probation in full. Tr. 146, ll. 6 – 7.

This appeal follows.

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); 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 trial court erred when it revoked Appellant's probation in full where the trial judge indicated he had no discretion to determine if revocation of Appellant's probation in full was proper and where the judge failed to consider the evidence on the record that Appellant served almost a year imprisonment longer than his original sentence.

Relevant Facts

The state alleged that on December 13, 2016, Appellant willfully exposed himself in a public place. Tr. 5, l. 20 – 6, l. 3.

On December 11-12, 2017, Appellant's trial was held in Pickens County in front of the Honorable Edward W. Miller, and a jury. Tr. 1. Shannon Swords Odom represented the state. Id. David D. Cantrell represented Appellant. Id. Appellant was convicted of indecent exposure. Tr. 140, ll. 21 – 24. At the time of the conviction, Appellant was on probation from a prior conviction in Oconee County. Tr. 145, ll. 2 – 4.

On April 27, 2010, in front of the Honorable Alexander Macaulay, Appellant pled guilty to second-degree burglary in Oconee County[1]. R. *. Appellant was sentenced to fifteen years' imprisonment, suspended to seven years' imprisonment with five years' probation. R.*; Tr. 143, ll. 23 – 24. The Oconee County second-degree burglary conviction imposed the probation sentence which was revoked upon Appellant's conviction in this case.

On December 12, 2017, after the jury found Appellant guilty in the present case, the trial court held a probation revocation hearing on the same day. Tr. 142, ll. 7 – 14.

---

[1] Appellant was also convicted of a second-degree burglary in Pickens County. However, the record indicates that Pickens County dismissed Appellant's probationary sentence prior to Appellant's conviction in this case. Tr. 144, ll. 16 – 23. Thus, only Appellant's probationary sentence in Oconee has been revoked.

Defense counsel argued that there were some legal issues surrounding the circumstances of Appellant's probation that the court needed to consider. Tr. 143, ll. 9 – 11. Defense counsel pointed out that Appellant was sentenced in Pickens County and then subsequently sentenced in Oconee County, "the largest overall sentencing in both were 15 years, in Pickens County suspended to five years' probation. In Oconee county… suspended to seven years and then probation." Tr. 143, ll. 20 – 22. The sentences in Oconee County ran concurrent with the Pickens County sentences and the Pickens County probation violation was dismissed prior to Appellant's indecent exposure conviction. Tr. 143, ll. 18 – 20; Tr. 144, ll. 16 – 23.

Defense counsel argued that after Appellant entered the South Carolina Department of Corrections, hereinafter SCDC, and "he ended up serving… a total time of seven years and 11 months." Tr. 143, l. 24 – 144, l. 1; Tr. 144, l. 4. Defense counsel calculated that if the additional 11 months that Appellant served in prison were counted towards his probationary sentence, his probation would have been maxed out by the time he was arrested on the current charges. Tr. Tr. 143, l. 24 – 144, l. 7.

Even if defense counsel's "max out" calculations were incorrect, if Appellant served an additional eleven months' imprisonment, he was entitled to the that time served credit to go towards the remaining eight years' imprisonment that the trial court imposed when it revoked Appellant's probation in full. The trial court had the ability to exercise its discretion to grant Appellant that time served towards the remaining years on his suspended sentence. If the trial court disagreed with defense counsel's argument he should have ruled against defense counsel, instead he abdicated his responsibility.

The trial court did not believe it had the authority to do anything other than revoke Appellant's probation in full. After defense counsel articulated his entire argument on the probation

time served issue, the court responded that it was, "all not in my jurisdiction, as you are aware." Tr. 144, ll. 24 – 25. Appellant explained the time served issue in his own words as well, and the court responded, "you understand that's not up to me." Tr. 145, ll. 23.

The trial court abused its discretion by failing to recognize that it had the discretion to alter Appellant's probationary sentence in any manner it deemed proper. Even if defense counsel and Appellant's calculations regarding the "max out" of Appellant's sentence were incorrect, the determination of how much of the probationary sentence should be revoked is still solely within the trial court's jurisdiction. Tr. 143, l. 24 – 144, l. 7. Therefore, the trial court's failure to recognize that it had the discretion to determine Appellant's probationary sentence was an error, and that error prejudiced Appellant.

Discussion

In the present case the trial court did not exercise its discretion to revoke Appellant's probation in full, but based its refusal to modify Appellant's probationary sentence on an erroneous view of the law that it had no jurisdiction to exercise discretion over Appellant's probationary sentence.

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). 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.

Failure to exercise discretion is an abuse of discretion. State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981). "It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." Id. at 498, 280 S.E.2d at 202.

(*see also* State v. King, 422 S.C. 47, 68-69, 810 S.E.2d 18, 29 (2017); State v. Hughes, 346 S.C. 339, 343, 552 S.E.2d 35, 37 (2001); State v. Mansfield, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (2000)).

In State v. Hawes, 411 S.C. 188, 767 S.E.2d 707 (2015) the defendant Alonzo Hawes killed his estranged wife and pled guilty to voluntary manslaughter. Id. at 189, 767 S.E.2d at 707. At the sentencing hearing, Hawes moved for early parole eligibility pursuant to S.C. Code Ann. § 16-25-90. That statute provides that an inmate who commits an offense against a household member "is eligible for parole after serving one-fourth of his prison term when the inmate... present[s] credible evidence of a history of criminal domestic violence... suffered at the hands of the household member." S.C. Code Ann. § 16-25-90; Id. at 190, 767 S.E.2d at 708.

The trial court "concluded that it was 'compelled' to grant Hawes early parole eligibility in view of the 'shall be' language," in the statute. Id. The Court of Appeals affirmed the trial court's decision. Id.

On appeal to the South Carolina Supreme Court, the state argued that the Court of Appeals erred in affirming the trial court because the trial court failed to exercise discretion. Id. The South Carolina Supreme Court agreed and held that, "the trial court must exercise discretion based on the evidence presented." Id. at 191, 767 S.E.2d 708. In Hawes, the Court concluded that the trial court's perceived limitation of discretion was reflected in the trial court's comments during sentencing that it was, "compelled" to find in favor of Hawes and that the use of the word "shall" in the statute notes mandatory, not precatory, language. Id.

In State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981) the defendant, Alton Smith, appealed the trial court's refusal to modify or vacate his sentence. Smith, at 496, 280 S.E.2d at 201. Smith was tried and convicted in his absence for his third offense of driving under the

influence. Id. Smith argued that the trial judge erred in ruling he could not modify Smith's sentence because he did not have jurisdiction. Id. at 497, 280 S.E.2d at 201.

In Smith, the Supreme Court of South Carolina held that a judge is only "without authority to alter, amend or modify a sentence imposed by him (1) after the expiration of the term of court at which the sentence was imposed or (2) within the same term of court unless the State is afforded due notice." Id. The Court determined that the sentence was published to Smith on April 29, 1980, and the motions to modify or vacate his sentence were marked that same day. Id. at 498, 280 S.E.2d at 201. Therefore, "the motion [to modify or vacate] was made within the term of court at which the sentence became the judgment of the court and the sentencing judge had jurisdiction to alter, amend or modify [Smith's sentence]". Id. at 498, 280 S.E.2d at 201-202.

Additionally, the Court held, "the authority to change a sentence rests **solely and exclusively in the hands of the sentencing judge** within the exercise of his discretion. Id. at 498, 280 S.E.2d at 202. (emphasis added) In Smith, the Court held the judge did not exercise his discretion because he based his ruling on an erroneous view of the law. Id. The Court added that the exercise of discretion must not be illusory, "the mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. **It should be stated on what basis the discretion was exercised.**" Id. (emphasis added)

In the instant case the trial court failed to recognize that it had discretion over Appellant's probationary sentence. As in Hawes, the trial court's "perceived limitation of discretion," in the instant case, was reflected by the comments the trial judge made during the probation revocation hearing. The judge stated the probation time served issue was, "all not in my jurisdiction," and that the determination of Appellant's probationary sentence was, "not up to me." Tr. 144, ll. 24 – 25; Tr.

145, ll. 23. Moreover, the trial court failed in the same manner as in Smith, in that the trial court did not state on what basis its discretion was exercised.

Therefore, the trial court abused its discretion when it failed to recognize it had the ability to exercise discretion over Appellant's probationary sentence. That failure prejudiced Appellant because there was evidence on the record that Appellant served almost a year imprisonment longer than the original sentence imposed and the trial court could have taken that evidence into consideration under its discretion.

CONCLUSION

By reason of the foregoing arguments Appellant respectfully requests that his case be remanded to the Pickens County Court of General Sessions for a hearing to determine the amount of time served credit he is entitled to receive.

Victor R. Seeger

Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of August, 2018.