

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NELSON SENTELLE COOK,

APPELLANT

APPELLATE CASE NO 2018-000578

ANDERS BRIEF OF APPELLANT

VICTOR R SEEGER

Appellate Defender

South Carolina Commission on Indigent Defense

Division of Appellate Defense

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the lower court err when it revoked Appellant's probation in full where Appellant made an adequate showing that he violated his no-contact order out of necessity to satisfy the child-support obligations of his probation?

STATEMENT OF THE CASE

During the October 2016 term, the York County Grand Jury indicted Appellant for first degree domestic violence. R. 12 – 13. On October 12, 2016, Judge Hall sentenced Appellant to five years' imprisonment suspended upon two years of probation. R. 11.

On March 26, 2018, Appellant's probation revocation hearing was held in front of the Honorable R. Keith Kelly. R. 1. Jeffrey Zuschke represented Appellant. Id.

Judge Kelly revoked Appellant's probation in full for violating the no-contact provision of his probationary sentence. R. 9, ll. 13 – 15.

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 lower court erred when it revoked Appellant's probation in full where Appellant made an adequate showing that he violated his no-contact order out of necessity to satisfy the child-support obligations of his probation.

Relevant Facts

On October 12, 2016, Judge Hall sentenced Appellant to five years' imprisonment suspended upon two years of probation for criminal domestic violence in the first degree. R. 14.

One of the conditions of that probationary sentence was a no-contact order that prevented Appellant from contacting Christy Guess, the alleged victim. R. 5, ll. 4 – 12. However, Appellant also was obliged by a previous order to pay child support to Guess. Id. Guess was Appellant's significant other at the time Appellant allegedly committed criminal domestic violence and they maintained a relationship through his probation being revoked. R. 5, ll. 12 – 15.

Appellant moved, and his child support obligation was transferred. R. 5, ll. 4 – 8. Petitioner did not realize that there was an outstanding balance that transferred as well. Id. Due to confusion about the county in which he needed to pay his child support, Appellant was picked up by police for failure to pay child support. Id.

At the probation revocation hearing on March 26, 2018, defense counsel explained that it was necessary for Appellant to contact Guess because she was the only person, other than Appellant himself, who had control over Appellant's finances. R. 5, ll. 12 – 15; R. 8, ll. 22 – 24.

Guess testified at the probation revocation hearing as well and corroborated everything that Appellant and defense counsel stated. R. 7, l. 23 – 9, l. 2. She stated that Appellant had

“done everything on probation as he should have.” R. 8, ll. 7 – 8. She stated she was not aware there was a no-contact order condition as part of his probationary sentence. R. 8, l. 15. Guess informed the court that she and appellant planned on moving back in together once his probation was over. R. 8, ll. 12 – 15. Guess characterized Appellant’s violation of his probation as, “it was five seconds.” R. 9, ll. 1 – 2.

Judge Kelly stated, “[Appellant’s] been before Judge Hayes, Judge Hall, Judge Hayes and now Judge Kelly; he’s revoked in full.” R. 9, ll. 13 – 15.

This appeal follows.

Discussion

Appellant’s case concerned a five-second-violation that turned into a five-year-sentence. R. 9, ll. 1 – 2. He violated the no-contact provision of his probationary sentence by making a phone call to Christy Guess. R. 5, ll. 12 – 21. That phone call, “was five seconds.” Id. For that violation, Appellant was revoked in full and must serve five years’ imprisonment. R. 9, ll. 13 – 15.

Appellant was picked up when he was reporting to jail for failure to pay child support from another county. R. 5, ll. 1 – 5. Appellant’s child support duties transferred to York County, and unbeknownst to him, there was an outstanding balance. R. 5, ll. 6 – 8.

The no contact condition of Appellant’s probationary sentence conflicted with his child support obligation when Appellant was picked up for failure to pay child support and Appellant had to violate one condition of his probation to satisfy the debt.

Other than himself, the only person who could access Appellant’s money to pay his child support obligation was, Christy Guess, the person with whom he was ordered to not contact. R.

5, l. 1 – 6, l. 6. Appellant was incarcerated for failure to pay child support and was unable to go back to work at McDonald's to earn the money to continue to pay child support. R. 5, ll. 3 – 9.

Appellant had no option other than contacting Guess to release the funds for his overdue child support payment, either directly or through an agent, which violated the no contact order of his probationary sentence. R. 5, ll. 11 – 15. There is no evidence in the record that Appellant was appointed an attorney at the time he was picked up for failure to pay child support or at the time he contacted Guess.

The South Carolina Constitution Article 1, Section 24 reads in part: “(A) to preserve and protect victims’ right to justice and due process regardless of race, sex, age, religion, or economic status, victims of crime have the right to: ... (6) be reasonably protected from the accused or persons acting on his behalf throughout the criminal justice process.” S.C. Const. art. I, § 24 (A)(6).

On June 2, 2015, the “Crime Victims’ Ombudsman” sought guidance from the Office of the Attorney General for clarification of what a no contact order entails, specifically if there is a narrow exception for defense attorneys to contact the complainant. 2015 WL 3636394 (S.C.A.G. June 2, 2015). The Office of the Attorney General’s response was that usually anyone acting on behalf of the accused cannot contact the complainant; however, a defense attorney *may* contact the complainant under certain circumstances. *Id.* at 1. (emphasis added)

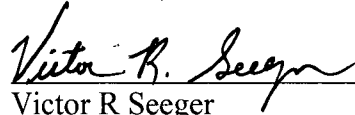
Appellant was not afforded an attorney when he was arrested for failure to pay child support and contacted the Guess to access the funds necessary to pay his child support payment. According to the Office of the Attorney General’s interpretation of a no-contact provision, Appellant could not have satisfied the payment of child support provision of his probationary sentence without violating the no-contact provision of his probationary sentence because

directing any third party, other than his attorney, to contact Guess for him would have also been a violation of the no-contact order.

Christy Guess told the court she was not aware that a no-contact order was in place. R. 8, l. 15. She told the court that Appellant had completed all of the requirements of his probationary sentence. R. 8, ll. 8 – 9. Guess informed the court that the two were still in a committed relationship and that they were going to move back in together after his probation ended. R. 8, ll. 12 – 15. Therefore, the lower court abused its discretion when it revoked Appellant's probation in full because Appellant was put in a situation where he violated the no-contact provision of his probationary sentence out of necessity to comply with his child support provision obligations.

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests this court vacate the sentence of the lower court and remand for resentencing.

_____

Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NELSON SENTELLE COOK,

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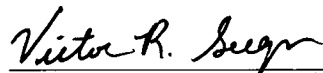
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Nelson Sentelle Cook 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 R. Keith Kelly, which was held on March 26, 2018, 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 Nelson Sentelle Cook.

Respectfully Submitted,



Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

This 31st day of October, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

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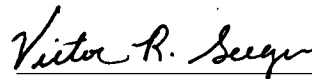
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Trial Transcript;
- (3) Probation Revocation Order

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

October 31, 2018



Victor R Seeger
Appellate Defender

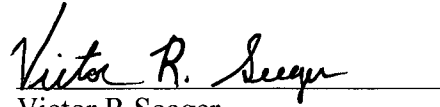
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(803) 734-1330

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."

October 31, 2018.

A handwritten signature in black ink, reading "Victor R. Seeger", is written over a horizontal line.

Victor R Seeger
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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STATE OF SOUTH CAROLINA

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Appeal from York County

Honorable R. Keith Kelly, Circuit Court Judge

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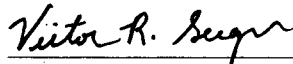
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NELSON SENTELLE COOK,

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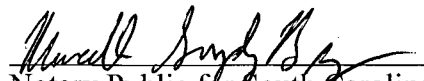
CERTIFICATE OF SERVICE

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 Nelson Sentelle Cook, 301494, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 31st day of October, 2018.



Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of October, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from York County
Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

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NELSON SENTELLE COOK,

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SC Court of Appeals

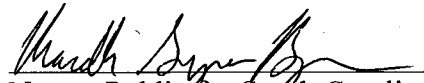
CERTIFICATE OF SERVICE

I certify that a copy of the Record on Appeal in the above-referenced case has been served upon Matthew Buchanan, Esquire, at the South Carolina Department of Probation, Parole and Pardon Services, Post Office Box 50666, Columbia, SC 29250, this 31st day of October, 2018.



Tyler Cheney
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 31st day of October, 2018.

 (L.S.)
Notary Public for South Carolina

My Commission Expires July 26, 2028.