

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Chester County

Honorable Roger E. Henderson, Circuit Court Judge  
\_\_\_\_\_

**ORIGINAL**  
**RECEIVED**  
FEB 11 2019  
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ASHLEY MARIE MCKENZIE,

APPELLANT

APPELLATE CASE NO 2018-000114  
\_\_\_\_\_

ANDERS BRIEF OF APPELLANT  
\_\_\_\_\_

TAYLOR D GILLIAM  
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 probation revocation judge abused his discretion in revoking two years of probation, where the probation revocation judge was the same judge who accepted the guilty plea and sentenced Appellant originally, and where Appellant was unable to pay restitution?

## STATEMENT OF THE CASE

On March 29, 2016, Appellant pled guilty to petit larceny before the Honorable Roger E. Henderson. Appellant was represented by Devon Nelson, and Karen Fryar appeared on behalf of the State. R. 1.

Appellant was charged with petit larceny and falsely passing or forgetting or altering or uttering counterfeiting of lottery tickets. R. 5, l. 20 – R. 6, l. 5. The latter charge was dismissed, and Appellant pled guilty to petit larceny. The State recommended that Appellant be made to pay \$600 to the South Carolina Education Lottery. *Id.* The State asked that Appellant be sentenced to thirty days' incarceration but that the sentence be suspended if Appellant could pay the \$600 within thirty days. R. 6, ll. 6 – 13.

Appellant pled guilty and Judge Henderson accepted her plea. R. 7, ll. 3 – 5; R. 11, ll. 4 – 10. Appellant was sentenced to a term of thirty days' incarceration which was waived if she paid back the South Carolina Education Lottery \$600. R. 13, ll. 15 – 23.

On October 11, 2016, Appellant pleaded guilty to grand larceny valued at between \$2,000 and \$10,000 before the Honorable Brian M. Gibbons. R. 15. She was represented by Bob Fitzsimons, and Croom Hunter appeared on behalf of the State. The State alleged that Appellant took coins and guns from her grandfather. R. 19, ll. 3 – 24. She was sentenced to five years' incarceration suspended to five years of probation. R. 24, ll. 1 – 13.

The State issued a warrant for Appellant's arrest, alleging violations of the terms of her probation, including failure to follow the advice and instruction of her supervising agent, failure to report since May 15, 2017, failure to follow direct instruction, failure to report for a financial roll call on October 19, 2017, failure to pay monetary obligations, failure to pay restitution, and failure to notify her agent of an address change. R. 28, ll. 1 – 13.

At a hearing on January 8, 2018 before the Honorable Brian Gibbons, two years of Appellant's probation was revoked. R. 30. At that hearing, Appellant was represented by Kay Boulware. Agent Joanna Wix appeared on behalf of the State.

Wix recommended revocation. R. 28, ll. 15 – 18. Judge Gibbons revoked two years and terminated her probation. R. 30, ll. 16 – 21.

This appeal follows.

## **STANDARD OF REVIEW**

The appellate court's authority to review a decision revoking probation 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. State v. Hamilton, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct. App. 1999).

## ARGUMENT

**The probation revocation judge abused his discretion in revoking two years of probation, where the probation revocation judge was the same judge who accepted the guilty plea and sentenced Appellant originally, and where Appellant was unable to pay restitution.**

At the time of the revocation, Appellant was twenty-six years old and cared for her two children, ages five and six. R. 28, l. 21 – R. 29, l. 15. She did not receive any child support payments from the children's father. Id. The crux of her violations stemmed from inability to pay the restitution, approximately \$350 per month. Id. Appellant moved around with her children frequently; she was unable to afford the electricity bill in one home. Id. According to her counsel, the failure to report was a product of fear and apprehension. Id.

Appellant noted that this was her first time violating. R. 30, ll. 4 – 9. She clarified that all of her money was going towards her children, and that she was caring for her sick grandmother. Id. After she requested a second chance, the probation agent noted that Appellant had two pending charges for forgery. R. 30, ll. 10 – 15.

Probation is a matter of judicial grace, and revocation is committed to the sound discretion of the trial court. S.C. Code §§ 24-21-450, et. seq.; State v. Lee, 350 S.C. 125, 564 S.E.2d 372 (Ct. App. 2002); State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950). Nevertheless, a circuit court should not order revocation unless "predicated upon an evidentiary showing of fact tending to establish violations of conditions." Id.; State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999).

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).

Appellant previously showed an ability to secure employment and pay restitution. R. 11, l. 14 – R. 12, l. 20. She should have been allowed additional time to pay back the money she owed her grandfather. As a single mother to two children, she was working hard to provide for her family. The \$11,000 which she owed was converted to a civil judgment based upon a finding that she was unable to pay restitution. R. 30, ll. 16 – 21. There was no finding of a willful failure to pay.

The decision to revoke her probation was therefore arbitrary and capricious; without the opportunity to work and receive an income, Appellant will be unable to satisfy the judgment.

She will face hardship upon release from prison, both in potentially caring for her children and gaining a job in order to pay back her debts. When asked to explain the gap in her work history, Appellant will be forced to notify her future potential employers of her prison time. This will undoubtedly make securing employment even more difficult.

Furthermore, the probation revocation judge was the same judge who accepted Appellant's guilty plea. At the revocation hearing, the judge indicated that he remembered Appellant's matter. R. 29, ll. 19 – 20. He may therefore have relied on knowledge of the facts and circumstances of her case in order to arrive at the decision to revoke two years. This is information that a different judge sitting in an identical capacity would not have had.

Appellant accepted responsibility for her actions but was unable to satisfy the restitution payments. The judge failed to exercise discretion in considering Appellant's circumstances and instead revoked her probation, thereby leaving her in a more precarious position and jeopardizing her ability to pay the restitution. The decision of the plea-turned-probation revocation judge to revoke should be arbitrary and capricious, and it should be reversed.

**CONCLUSION**

Based on the foregoing, Appellant requests that this Court reverse the revocation of probation and remand for a new revocation hearing, or grant such other relief as justice may require.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of February, 2019.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Chester County

Honorable Roger E. Henderson, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

ASHLEY MARIE MCKENZIE,

APPELLANT

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PETITION TO BE RELIEVED AS COUNSEL

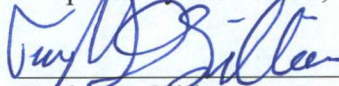
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Counsel for Ashley Marie McKenzie states:

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 Roger E. Henderson, which was held on January 8, 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 Ashley Marie McKenzie.

Respectfully Submitted,



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Taylor D Gilliam

Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of February, 2019.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Chester County  
Honorable Roger E. Henderson, Circuit Court Judge

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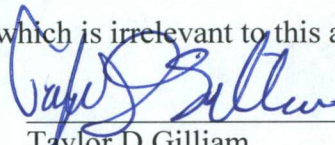
**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment and sentencing sheet;
- (2) Entire transcript of guilty plea hearing held March 29, 2016;
- (3) Entire transcript of guilty plea hearing held October 11, 2016;
- (4) Entire probation revocation hearing transcript held January 8, 2018;
- (5) Probation Revocation Order.

I certify that this designation contains no matter which is irrelevant to this appeal.  
February 11, 2019



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Division of Appellate Defense  
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ATTORNEY FOR APPELLANT

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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."

February 11, 2019.



\_\_\_\_\_  
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Appellate Defender

South Carolina Commission on Indigent  
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THE STATE,

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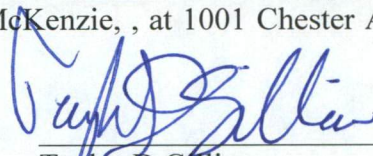
V.

ASHLEY MARIE MCKENZIE,

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, Post Office Box 50666, Columbia, SC 29250; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Ashley Marie McKenzie, , at 1001 Chester Ave, Great Falls, SC 29055, this 11th day of February, 2019.



\_\_\_\_\_  
Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 11th day of February, 2019.

Mary Allgood (L.S)

Notary Public for South Carolina  
My Commission Expires: May 12, 2027.