

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED

JUN 10 2013

Appeal from Lancaster County

SC Court of Appeals

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

OSLES CUNNINGHAM,

APPELLANT

Appellate Case No. 2012-212762

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Whether the court erred by revoking appellant's probation, inter alia, for failing to pay his restitution and other monetary obligations without a finding that appellant failed to make a bona fide effort to pay, and that his monetary violations were willful?

### STATEMENT OF THE CASE

Appellant was indicted by the Lancaster County Grand Jury for two counts of forgery, less than five thousand dollars. R. 17. He was sentenced by the Honorable Brooks Goldsmith on November 18, 2010 to five years imprisonment suspended upon five years probation. R. 3, ll. 1-15.

A probation revocation hearing was held on August 13, 2012 before the Honorable D. Craig Brown. William Frick represented appellant. Probation Agent Burch appeared for the state. R. 1.

At the conclusion of the probation revocation hearing, Judge Brown revoked appellant's probation in full, and then terminated after the conclusion of the sentence. The monetary obligations were reduced to a civil judgment. R. 13, l. 21 – 14, l. 17.

## ARGUMENT

The court erred by revoking appellant's probation, inter alia, for failing to pay his restitution and other monetary obligations without a finding that appellant failed to make a bona fide effort to pay, and that his monetary violations were willful.

### **Relevant Facts**

Probation Agent Burch told the probation revocation judge that appellant was one hundred twenty-six dollars in arrears on repaying the public defender fund, that he was one hundred twenty dollars in arrears on paying for a drug test, and one hundred eighty dollars in arrears on restitution. The agent asserted "he has never paid anything on any of his accounts." The probation agent also asserted appellant had failed to report since June 6, 2011, and that he also did not receive permission to move from his agent. R. 3, l. 12 – 4; l. 10.

Defense Counsel Frick told the judge that appellant had to move to obtain work and that he moved with his wife to Tennessee. Also, Frick said appellant owed approximately two thousand dollars in restitution, and that appellant wanted to pay off the restitution, and that they were now prepared to do so. R. 5, l. 25 – 6, l. 24.

Appellant's wife told the judge that appellant had been able to find opportunities in Tennessee and she asked the judge to give appellant a chance to pay off his debts. R. 8, l. 20 – 9, l. 23.

Appellant told the judge that he had a drug addiction but that he now wanted to make good on his debts. Appellant told the judge: "There's nothing for me here in Lancaster, nothing. I can't get a job here, nothing." Appellant asked for a chance to pay off his debts. R. 10, ll. 1-13. Defense counsel said appellant was prepared that day in court to

pay off his restitution. The judge responded that appellant should have paid the restitution before court that day, and he revoked appellant's probation in full and terminated it after service of the sentence. R. 11, l. 5 – 14, l. 10.

### **Discussion**

In State v. Spare, 374 S.C. 364, 647 S.E.2d 706 (2007) the Supreme Court held the evidence was insufficient to establish that Spare's failure to pay his restitution was willful. Consequently the lower court erred by revoking his probation. Spare had been ordered to pay thirty-four thousand, four hundred seventy-five dollars restitution to the victim, plus a twenty percent collection fee. Spare was ultimately terminated for his failure to be able to pay this restitution.

On appeal, the Supreme Court agreed that Spare should not have had his probation revoked for failure to pay without a finding that his failure to pay was willful and that he was not making a bona fide effort to pay his court ordered obligations.

The decision to revoke probation is addressed to the sound discretion of the trial court. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006). However, probation cannot be revoked for failing to make required payments of fines or restitution or other monetary obligations without the circuit court judge first determining that the probationer has failed to make a bona fide effort to pay. State v. Hamilton, 333 S.C. 642, 649, 511 S.E.2d 94, 97 (Ct. App. 1999).

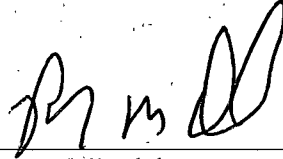
In Bearden v. Georgia, 461 U.S. 660 (1983) the United States Supreme Court noted that a sentencing court must inquire into the reasons for failing to pay restitution before probation is revoked, and a probationer is incarcerated. See, also, Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986).

Here, Defense Counsel Frick told the judge appellant was making every effort to pay his restitution and other obligations and he was prepared to pay his restitution in full that day in court. However, the judge reasoned appellant should have paid off his restitution before coming to court that day. Since this record does not support a finding that appellant did not make a bona fide effort to pay -- and that his failure to pay was willful -- the revocation of his probation was error.

CONCLUSION

The order revoking appellant's probation should be vacated, and a new probation revocation hearing ordered.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of June, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Lancaster County

D. Craig Brown, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

OSLES CUNNINGHAM,

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\_\_\_\_\_  
PETITION TO BE RELIEVED AS COUNSEL  
\_\_\_\_\_

Counsel for Osles Cunningham states:

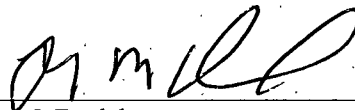
1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's probation revocation hearing before Judge D. Craig Brown, which was held on August 13, 2012, 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 Osles Cunningham.

Respectfully submitted,



\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of June, 2013.

STATE OF SOUTH CAROLINA

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Appeal from Lancaster County

D. Craig Brown, Circuit Court Judge  
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THE STATE,

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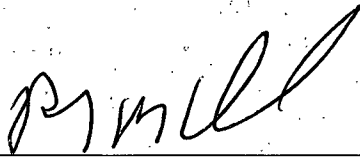
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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**  
\_\_\_\_\_

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

- (1) True-billed indictments;
- (2) Probation Revocation Hearing Transcript;
- (3) Probation Revocation Warrant.

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

June 10th, 2013

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

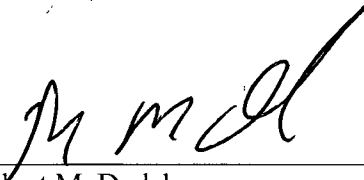
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 10, 2013



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Robert M. Dudek  
Chief Appellate Defender

S.C. Commission on Indigent Defense  
Division of Appellate Defense  
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Post Office Box 11589  
Columbia, South Carolina 29211-1589

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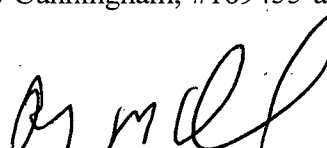
V.

OSLES CUNNINGHAM,

APPELLANT


\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney 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 & Pardon Services, PO Box 50666, Columbia, SC 29250; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Osles Cunningham, #189455 at McCormick Correctional Institution, this 10th day of June, 2013.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 10th day of June, 2013.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 2, 2013