

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LARRY TODD PERRY,

APPELLANT

ANDERS BRIEF OF APPELLANT

CARMEN V. GANJEHSANI
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AUG 23 2013

SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

The circuit court's ruling that Appellant had willfully and substantially violated the terms and conditions of his probation was not supported by sufficient evidence and therefore, the circuit court erred in revoking Appellant's probation.

STATEMENT OF THE CASE

Appellant Larry Todd Perry appeared before the Honorable Kristi Lea Harrington on October 12, 2012 for a probation revocation hearing. Susan Williams represented Perry and an unidentified probation officer appeared on behalf of the State. R. 1.

In 2007, authorities charged Perry with criminal sexual conduct in the first degree and intimidating a witness. R. 16-21. Perry was sentenced to ten years suspended on the service of five years probation in 2009. Id. Perry began his probation in October 2009. R. 8, ll. 10-13.

In 2012, the South Carolina Department of Probation, Parole, and Pardon Services issued a warrant for Perry for violating the terms of his probation. R. 2, ll. 7-12. According to the probation officer, Perry violated his probation by failing to report to probation and failing to report to court for a revocation hearing. R. 2, ll. 9-13; 5, ll. 5-8. The probation officer recommended full revocation of Perry's probation, contending that Perry had violated probation more than once. R. 10, ll. 15-17; 11, l. 19 – 12, l. 10.

Perry agreed that he had absconded in August and September 2012, but he was afraid to report because he had missed some required counseling sessions that he could not afford. R. 3, l. 16 – 3, l. 16; 4, l. 23 – 4, l. 1. Perry presented evidence to the court that he had been looking for employment and was willing to find full employment. R. 5, ll. 13-25. Perry's attorney also informed the court that he had missed some group counseling sessions due to medical issues. R. 7, l. 6 – 8, l. 2.

Perry also acknowledged that he had one drug relapse and agreed with his probation officer to complete fourteen weeks of drug, alcohol, and anger management to avoid arrest.

R. 9, ll. 6-24. Perry informed the court that he had completed thirteen of the fourteen weeks, but had missed the last week. R. 10, ll. 8-14.

Perry requested the court to consider placing him on electronic monitoring or returning him to his mother's home so that he could restart his counseling sessions and complete the terms of his probation. R. 3, ll. 3-16; 11, ll. 2-5. Perry was also willing to find a facility for drug treatment. R. 11, ll. 6-16.

At the conclusion of the hearing, Judge Harrington found that Perry willfully and substantially violated the terms and conditions of his probation and revoked Perry's probation in full. R. 14, ll. 9-12.

ARGUMENT

The circuit court's ruling that Appellant had willfully and substantially violated the terms and conditions of his probation was not supported by sufficient evidence and therefore, the circuit court erred in revoking Appellant's probation.

The circuit court's ruling that Perry had "willfully and substantially" violated the terms and conditions of his probation was not supported by sufficient evidence.

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; see also State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655-56 (2006). The authority of the court to revoke probation may not be capriciously or arbitrarily exercised, but should always be predicated upon an evidentiary showing of fact tending to establish violation of the conditions. White, 218 S.C. at 135, 61 S.E.2d at 756.

Here, the court in revoking Perry's probation made a finding that he had "willfully and substantially" violated the conditions of his probation. R. 14, ll. 9-12. The evidence presented at the hearing does not support this finding.

Perry had been on probation from October 2009 until August 2012 without any violation of the condition that he report. R. 3, ll. 5-6. While Perry did miss some counseling sessions, he did not willfully fail to attend these sessions. Perry had medical issues and also could no longer afford to pay for these sessions. R. 2, ll. 22-24; 7, l. 18 - 8, l. 2. Revoking Perry's probation due to his inability to afford his counseling sessions is akin to punishing him for being poor. Bearden v. Georgia, 461 U.S. 660 (1983); see also State v. Hamilton, 333 S.C. 642, 649, 511 S.E.2d 94, 97 (Ct. App. 1999); Nichols v. State, 308 S.C. 334, 337, 417 S.E.2d 860, 862 (1992); Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986).

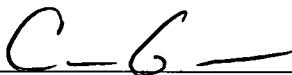
The probation officer also presented evidence that Perry had tested positive for amphetamines and opiates, but Perry presented to the court his pharmacy records for hydrocodone and Percocet. R. 3, l. 17 - 4, l. 8. While Perry acknowledged that he relapsed one time and used methamphetamines, he substantially completed treatment for that relapse by completing thirteen weeks of drug, alcohol, and anger management. R. 6, ll. 8-19; 9, l. 17 - 10, l. 14.

Perry expressed to the court his willingness to be placed on electronic monitoring to complete the terms of his probation and to restart his counseling sessions. R. 3, ll. 9-15; 11, ll. 2-5. Until August 2012 when he could no longer afford his counseling sessions, Perry had complied with the terms of his probation and was still attempting to comply the best he could. Therefore, the circuit court's ruling that Perry "willfully and substantially" violated the terms of his probation is not supported by the evidence and the order revoking Perry's probation should be reversed.

CONCLUSION

Based upon the foregoing arguments, Appellant Larry Todd Perry requests that the revocation of his probation be reversed.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of August, 2013.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Larry Todd Perry states:

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

2. She has reviewed the record of appellant's probation revocation hearing before Judge Kristi Lea Harrington, which was held on October 12, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She 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, she asks the Court to relieve her as counsel for Larry Todd Perry.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of August, 2013.

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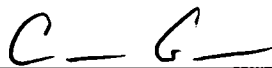
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments;
- (2) Sentencing sheets; and
- (3) Transcript of hearing held on October 12, 2012.

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

August 23rd, 2013



Carmen V. Ganjehsani
Appellate Defender


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PO Box 11589
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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 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."

August 23rd, 2013



Carmen V. Ganjehsani
Appellate Defender

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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 Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Larry Todd Perry, #333088 at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 23rd day of August, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of August, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.