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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NICHOLAS A. SMITH,

APPELLANT

APPELLATE CASE NO. 2013-000986

ANDERS BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
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

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	4
CONCLUSION.....	7
PETITION TO BE RELIEVED AS COUNSEL	8

TABLE OF AUTHORITIES

Cases

<i>Black v. Romano</i> , 471 U.S. 606, 105 S.Ct. 2254 (1985).....	5
<i>Gagnon v. Scarpelli</i> , 411 U.S. 778 (1973).....	5
<i>State v. Allen</i> , 370 S.C. 88, 634 S.E.2d 653 (2006).....	5
<i>State v. Coker</i> , 397 S.C. 244, 723 S.E.2d 619 (Ct. App. 2012)	6
<i>State v. Hamilton</i> , 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999).....	5
<i>State v. Spare</i> , 374 S.C. 264, 647 S.E.2d 706 (Ct. App. 2007)	5, 6

Constitutional Provisions

U.S. Const. amend. XIV	5
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ISSUE PRESENTED

Whether the lower court erred in revoking Appellant's probation where Appellant could not meet the probation requirements, including reporting to his probation agent, because he struggled to find employment to pay for supervision fees and counseling fees, and where the court did not determine whether Appellant had made a bona fide effort to acquire the money or whether Appellant should have remained on probation with adjusted requirements.

STATEMENT OF THE CASE

In November of 2011, the Lexington County Grand Jury indicted Appellant Nicholas Alexander Smith on one count of use of a firearm while under the influence. On November 2, 2011, Appellant pled guilty before the Honorable William P. Keesley. Judge Keesley sentenced Appellant to two years imprisonment suspended on the service of ninety days. R 19; Tr. 3, ll. 9-17.

Appellant was served a probation revocation warrant on February 27, 2013. Tr. 17, ll. 11-18. On April 26, 2013, Appellant appeared at a probation revocation hearing before the Honorable George C. James, Jr. Sarah Hahn represented Appellant and Lorenzo Jones represented the State. Tr. 1. The probation court found that Appellant violated the terms of his probation by failing to report. It revoked ten months of probation and terminated the remainder of Appellant's sentence. Tr. 18, ln. 21—Tr. 19, ln. 14.

ARGUMENT

THE LOWER COURT ERRED IN REVOKING APPELLANT'S PROBATION BECAUSE IT FAILED TO MAKE THE FINDINGS PRESCRIBED BY LAW BASED ON THE EVIDENCE IN THE RECORD.

STATEMENT OF FACTS

At the probation revocation hearing, the State alleged that Appellant failed to report to his probation agent during October, November, and December of 2012 and January of 2013. The State also alleged that Appellant failed to present a valid resident plan; failed to maintain gainful employment under supervision; failed to complete anger management and substance abuse counseling; and failed to pay various fines and fees. Tr. 4, ll. 5-22.

Appellant informed the trial court that he had recently started reporting and that he had been splitting time residing at his mother's house and a trailer home that he owned

nearby. Tr. 7, ll. 3-24. He also stated that during the months at issue, he struggled to find employment and did not have the funds to pay the fees and fines. He also attended a number of counseling classes and only stopped attending when he could not pay the attendant costs. Tr. 8, ln. 3—Tr. 9, ln. 12.

DISCUSSION

The lower court erred in revoking Appellant's probation because it failed to make the findings prescribed by law based on the evidence in the record. "The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation." *Black v. Romano*, 471 U.S. 606, 610, 105 S.Ct. 2254, 2257 (1985). The procedural limits include affording a probationer a number of rights:

The probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation. . . . The probationer is also entitled to cross-examine adverse witnesses, unless the hearing body specifically finds good cause for not allowing confrontation.

Id. at 611-12 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973)). *Accord State v. Allen*, 370 S.C. 88, 97, 634 S.E.2d 653, 657 (2006). These requirements "protect the defendant against revocation of probation in a constitutionally unfair manner." *Black* at 613.

Although "[p]robation is a matter of grace," the court may only revoke probation "upon an evidentiary showing of fact tending to establish a violation of the conditions." *State v. Hamilton*, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999). In *State v. Spare*, 374 S.C. 264, 647 S.E.2d 706 (Ct. App. 2007), this Court held a circuit court may

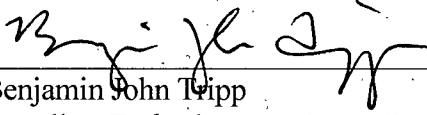
only revoke probation on the basis of a failure to pay money by making the following findings based on sufficient evidence in the record: (1) The State has established that the probationer has violated the conditions of his probation. (2) The probationer's failure to pay was wilful insofar as he either had the funds and chose not to or did not make a bona fide effort to acquire the funds. (3) If the probationer could not acquire the funds despite a bona fide effort, no alternate measures are adequate to meet the State's interests in punishment and deterrence. *State v. Coker*, 397 S.C. 244, 245-46, 723 S.E.2d 619, 620 (Ct. App. 2012).

At the hearing below, Appellant explained he could not meet the probation requirements, including reporting to his probation agent, because he struggled to find employment to pay for supervision fees and counseling fees. Thus, his noncompliance was based on a failure to pay money, and under *State v. Spare*, the court was required to find that the failure to pay was wilful insofar as Appellant did not make a bona fide effort to acquire the funds. The court was also required to determine whether alternate measures were adequate to meet the State's interests in punishment and deterrence. Nevertheless, the court failed to make these inquiries, and its subsequent revocation of Appellant's probation therefore constituted reversible error.

CONCLUSION

For the foregoing reasons, Petitioner Nicholas A. Smith respectfully requests that this Court reverse the lower court's revocation of Appellant's probation.

Respectfully submitted,


Benjamin John Tapp
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of January, 2014.

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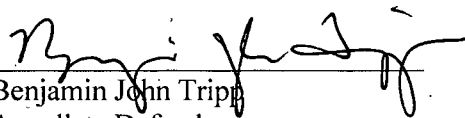
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Nicholas A. Smith 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 George C. James, Jr., which was held on April 26, 2013, 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 Nicholas A. Smith.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of January, 2014.

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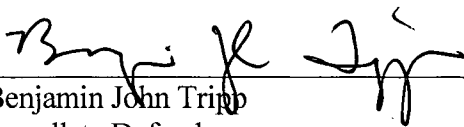
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Entire Parole Hearing Transcript (April 26, 2013)
- (3) Sentencing Sheet

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

January 6th, 2014



Benjamin John Tripp
Appellate Defender

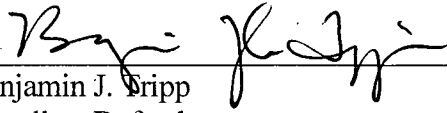
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Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

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."

January 6, 2014


Benjamin J. Tripp
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
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Post Office Box 11589
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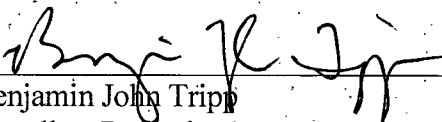
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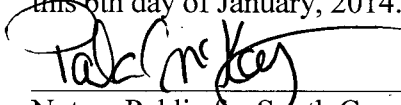
CERTIFICATE OF SERVICE

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 South Carolina Department of Probation, Parole and 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 Nicholas A. Smith, at 103 Pleasant Ridge Lane, West Columbia, SC 29170, this 6th day of January, 2014.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of January, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.