STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2013-000696

THE STATE, ...RESPONDENT

v.

REGAN BERKLEY CHRISLEY,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether the circuit court properly affirmed the magistrate court's decision to revoke Appellant's probation where a sufficient factual basis supported the conclusion that Appellant violated the conditions of his probation by failing to remain drug free, and where Appellant was afforded due process by way of notice and a hearing?

STATEMENT OF THE CASE & FACTS

On September 15, 2011, Appellant was arrested for simple possession of marijuana by Sergeant Cox of the Greenwood County Sheriff's Office. (R.p. 45). On November 14, 2011, Appellant and his attorney, Carson Henderson, Esquire, signed a "consent and understanding" to a conditional discharge pursuant to S.C. Code § 44-53-450. On December 12, 2011, Appellant appeared before the Honorable C. Ryan Johnson, Greenwood County magistrate judge, and entered a plea of guilt for simple possession of marijuana. As indicated by his previous signature, Appellant consented to a conditional discharge with the understanding that his plea of guilt would not be entered against him unless he failed to complete the terms and conditions ordered by the court. Judge Johnson issued an "Order for Conditional Discharge Pursuant to S.C. Code § 44-53-450" decreeing that Appellant:

> Is hereby placed under supervision of the court for a maximum term not to exceed Six (6) months, and shall comply with all terms and conditions imposed by the court; and
>
> > Shall remain on good behavior and drug free during the above stated term; and be subject to random Drug and Alcohol tests (if defendant is a minor or other circumstances warrant alcohol tests).
> >
> > The defendant is continued to be subject to the terms and conditions associated with his/her bond on this charge. Defendant is responsible to notify the bondsman, if any, of continued liability on this bond.
> >
> > Other: DEFENDANT SHALL TAKE URINE DRUG TESTS AND THEREAFTER IMMEDIATELY PROVIDE THE RESULTS OF EACH TEST DIRECTLY TO THE COURT DURING THE FIRST WEEK OF JANUARY 2012, DURING THE FIRST WEEK OF MARCH 2012, AND DURING THE FIRST WEEK OF MAY 2012.

(R.p.1-p.2) (emphasis added).

On May 11, 2012, the court, pursuant to the terms of the conditional discharge, requested that Appellant submit to a drug test by hair sample. The court, by telephone, notified the Appellant's attorney of this request. The court received a copy of the results on May 17, 2012. The results showed Appellant testing positive for cocaine. (R.p.14-p.15).

On December 21, 2012, Appellant appeared at a rule to show cause/violation hearing before Judge Johnson. He continued to be represented by Mr. Henderson. At the hearing, Appellant was given an opportunity to dispute the evidence presented to the court. Appellant offered no defense. At the conclusion of the hearing, the court found Appellant in willful violation of the conditions of his discharge by testing positive for cocaine. The court revoked Appellant's probation, entered an adjudication of guilt, and imposed a sentence of thirty (30) days' imprisonment or the payment of a six hundred and twenty dollar ($620) fine. (R.p.23, line 1-p.25, line 19; p.14-p.15).

Appellant timely appealed his conviction and sentence to the Greenwood County Court of Common Pleas (2012-CP-24-1485). On January 3, 2013, pursuant to S.C. Code Section 18-3-40, Judge Johnson filed a "Return to Appeal" wherein he made findings of fact and conclusions of law. Those findings were as follows:

1. On September 15, 2011, the defendant was charged with Possession of Marijuana in violation of § 44-53-370. The defendant, with his attorney Carson Henderson present, pled guilty to the charge on December 13, 2011, and received a conditional discharge sentence. The defendant's attorney prepared and submitted to the court the attached "Order for Conditional Discharge Pursuant to S.C. Code § 44-53-450."

2. On May 11, 2012, the court, pursuant to terms of the conditional discharge, requested for the defendant to submit to a drug test by hair sample. The court, by telephone, notified the defendant's attorney of

this request. The court received a copy of the results on May 17, 2012. The results showed the defendant testing positive for cocaine.

3. On December 21, 2012, a rule to show cause hearing was held. Present at the hearing was [sic] the defendant and his attorney, Carson Henderson.

4. The defendant was given an opportunity to dispute the evidence presented to the court. The defendant offered no defense.

5. The court found the defendant in willful violation of the conditions of his discharge by testing positive for cocaine. The defendant received a sentence of 30 days or the payment of $620.00.

(R.p.14-p.15).

On February 19, 2013, an appellate hearing was convened at the Greenwood County Courthouse before the Honorable Frank R. Addy, Jr., judge of the Eighth Judicial Circuit. Appellant was again represented by Mr. Henderson, and the State was represented by Assistant Solicitor Demetri Andrews of the Eighth Judicial Circuit Solicitor's Office. At the hearing, Appellant argued the magistrate should have granted his request for an "evidentiary hearing" rather than simply relying on a document that was never entered into evidence to revoke his probation. He complained about the entire proceeding and argued the State should have been required to put forth formal evidence that he could either cross-examine or contest. (R.p.29, line 20-p.36, line 2). In response, the State noted that when the court of general sessions places someone on probation, the department of probation[1] monitors and enforces the terms and conditions of probation, but that when a magistrate places someone on probation in the very limited context of the conditional discharge statute, the court itself monitors and enforces compliance. The solicitor further noted that Judge Johnson requested and received a drug test for Appellant, in his role as probation monitor. (R.p.36, lines 5-10).

[1] The Department of Probation, Parole and Pardon Services (DPPPS). S.C. Code Ann. § 24-21-10 (2007).

Appellant complained that the positive test result was never "entered into evidence," arguing it was not competent evidence because it was not properly admitted. (R.p.36, lines 21-23; p.38, lines 4-15; p. 39, lines 2-11). Judge Addy and the solicitor both explained that the violation hearing was handled in the same fashion as a probation violation hearing in the court of general sessions, with the exception that the magistrate was essentially filling the role of probation agent by describing the violation and the evidence. The court noted the probationer typically disputes the allegations if he or she believes they are untrue, which Appellant failed to do. (R.p.39, lines 12-22). Appellant responded that he believed this would be "burden shifting" and complained there was nothing for him to put up in defense with no one to cross-examine. (R.p.39, line 23-p.40, line 19). The solicitor argued that because the magistrate was serving the purpose of a probation agent, referencing the drug test result was introduction into evidence and was sufficient to support revocation. (R.p.40, line 21-p.41, line 10). The court took the matter under advisement.

Later that day, on February 19, 2013, Judge Addy issued a written "Form 4" order affirming the order of the magistrate revoking Appellant's probation. (R.p.5-p.6). On February 26, 2013, Appellant filed a motion to reconsider asking Judge Addy to reverse his probation revocation. (R.p.18-p.22). On March 18, 2013, Judge Addy issued a written "Form 4" order denying Appellant's motion to reconsider. In that order, Judge Addy found Appellant was afforded the minimum due process rights required by receiving adequate notice of a hearing and an opportunity to be heard. He also found the record contained sufficient evidence to support the magistrate's factual finding that Appellant violated the terms of the conditional discharge. (R.p.7-p.8).

Appellant timely filed a notice of intent to appeal the circuit court order affirming his probation revocation and sentence, and subsequently submitted an Initial Brief and an Amended Initial Brief in support of his appeal. This Initial Brief of Respondent follows.

ARGUMENT

I.

The circuit court properly affirmed the magistrate court's decision to revoke Appellant's probation where a sufficient factual basis supported the conclusion that Appellant violated the conditions of his probation by failing to remain drug free during the term of probation, and where Appellant was afforded due process by way of notice and a hearing.

Appellant argues the circuit court erred in affirming the magistrate court's decision to revoke his probation, enter an adjudication of guilt, and impose a sentence for simple possession of marijuana after finding Appellant violated the terms and conditions of his probation. He contends the trial court failed to provide basic due process at his revocation hearing, which resulted in a record devoid of sufficient information and evidence to support a finding that he violated the conditions of his probation. The State disagrees and submits Appellant's argument is entirely without merit.

Standard of Review

In criminal cases the appellate court sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. State v. Parker, 391 S.C. 606, 611, 707 S.E.2d 799, 801 (2011); State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but instead, simply determines whether the trial judge's ruling is supported by any evidence. Parker , 391 S.C. at 611-12, 707 S.E.2d at 801. Thus, the circuit court was bound, and likewise this Court is bound, by the factual findings in the magistrate's return. See State v. Brown, 358 S.C. 382, 388, 596 S.E.2d 39, 41 (2004) (noting that in a criminal appeal from magistrate's court, where a fact is clearly stated in the magistrate's return, the Court of Appeals was bound by this factual

determination). Consequently, the magistrate's findings of fact must direct this Court's substantive analysis on appeal.

Sufficient Factual Basis for Revocation

The South Carolina Code allows for conditional discharge and expungement of convictions for first offense simple possession of certain controlled substances. S.C. Code Ann. § 44-53-450 (Supp. 2013). It provides that when a person pleads guilty or is found guilty of a qualifying offense: "the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions as it requires . . . ." S.C. Code Ann. § 44-53-450(A) (Supp. 2012). "Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided." Id. When the court of general sessions places a defendant on probation, pursuant to the conditional discharge statute or any other provision of law, DPPPS has jurisdiction to monitor and enforce the conditions of probation. See S.C. Code Ann. §§ 24-21-280, -410 to -490 (2007 & Supp. 2012). By comparison, although a magistrate may suspend the imposition or execution of a sentence upon terms and conditions the magistrate considers appropriate, a magistrate does not generally have the right to place a person on probation. S.C. Code Ann. § 22-3-800 (Supp. 2012). Thus, when a magistrate attempts to place a person on "probation upon terms and conditions as it requires" under the conditional discharge statute, those terms and conditions must be monitored and enforced by the magistrate.[2]

[2] Arguably, any attempt by a magistrate to utilize the conditional discharge statute to impose a "conditional sentence" is, as the statute suggests, effectively the imposition of probation and would accordingly constitute an illegal sentence. See Talley v. State, 371 S.C. 535, 545-46, 640 S.E.2d 878, 882-83 (2007). If, as in Talley, the probationary portion of the sentence was vacated, Appellant would be in the same position as when his "probation" was revoked – facing an adjudication of guilt and imposition of the sentence. Nevertheless, to the extent § 44-53-450 allows a magistrate to place a person on probation under

The decision to revoke probation is addressed to the sound discretion of the revoking court. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2007); State v. White, 218 S.C. 130, 134-35, 61 S.E.2d 754, 756 (1950); State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999). The appellate court's authority to review such a decision is confined to correcting errors of law unless the lack of a legal or evidentiary basis indicates the lower court's decision was arbitrary and capricious. Allen, 370 S.C. at 94, 634 S.E.2d at 656; State v. Spare, 374 S.C. 264, 268, 647 S.E.2d 706, 708 (Ct. App. 2007). Probation is a matter of grace; revocation is the means to enforce the conditions of probation. Spare, 374 S.C. at 268, 647 S.E.2d at 708; Hamilton, 333 S.C. at 97, 511 S.E.2d at 648. However, the authority of the revoking court should always be predicated upon an evidentiary showing of fact tending to establish a violation of the conditions. Spare, 374 S.C. at 268, 647 S.E.2d at 708. Thus, before revoking probation, the judge must determine if there is sufficient evidence to establish that the probationer has violated his probationary conditions. Id. In revocation cases based entirely on the failure to pay fines or restitution, the judge must, in addition to finding sufficient factual evidence of the violation, make an additional finding of willfulness. Id. at 268-69, 647 S.E.2d at 708. Otherwise, a finding of willfulness is not required. Hamilton, 333 S.C. at 97, 511 S.E.2d at 649.

Here, the magistrate made findings of fact that Appellant tested positive for cocaine, was given an opportunity to dispute the evidence presented to the court, and chose to offer no challenge or defense to the drug test results. As noted above, the circuit

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the limited circumstances of the conditional discharge statute, nothing in that statute authorizes or places the monitoring and enforcement of such "probation" with DPPPS.

court was bound by those factual findings, Brown, supra, and the findings were clearly sufficient to support revocation of Appellant's probation.

In his brief, Appellant seems to challenge whether the positive drug test results were properly before the revocation court. He complains that the magistrate failed to require the State "to lay a proper foundation and otherwise make a lawful introduction of purported drug test results into evidence." (Amended Initial Brief of Appellant p.7). Yet, no such formalities were required for the magistrate to consider the drug test results. Indeed, the South Carolina Rules of Evidence do not apply to hearings regarding "granting or revoking probation." Rule 1101(d)(3), SCRE. For these reasons, the State submits the circuit court properly affirmed the probation revocation because there was an evidentiary basis for the decision and because it was not arbitrary or capricious.

Procedural Due Process

Both the United States and the South Carolina Constitutions provide that "no person shall be deprived of life, liberty, or property without due process of law." U.S. Const. amends. V and XIV, § 1; S.C. Const. art I, § 3. "Substantive due process" relies upon a line of United States Supreme Court cases that interprets the Fourteenth Amendment's guarantee of "due process of law" to include a substantive component which forbids the government from infringing upon certain "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. Reno v. Flores, 507 U.S. 292, 301 (1993). Thus, the due process clause protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them."

Washington v. Glucksberg, 521 U.S. 702, 719 (1997) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

By comparison: "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the due process clause of the Fifth or Fourteenth Amendment." Mathews v. Eldridge, 424 U.S. 319, 322 (1976); see also Harbit v. City of Charleston, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009). "Application of this prohibition requires a familiar two-stage analysis: the court must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty or property"; if protected interests are implicated, the court then must decide what procedures constitute "due process of law." Ingraham v. Wright, 430 U.S. 651, 672 (1977). Absent state interference with a protected property or liberty interest, an individual is entitled to no pre-deprivation process whatsoever. It has long been established that an individual on probation or parole has a conditional liberty interest which entitles him or her to due process protections. Morrissey v. Brewer , 408 U.S. 471, 480 (1972). In the instant case, the State submits the procedure employed by the revocation court provided Appellant with all the constitutional process he was due.

The fundamental requirements of due process include fair notice and proper standards for adjudication, such as an opportunity to be heard in a meaningful way and judicial review. State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012); Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991); Harbit, 382 S.C. at 393, 675 S.E.2d at 781. However, procedural due process requirements are not technical, and no particular form of procedure is necessary. Jones v.

S.C. Dep't of Health and Envtl. Control, 384 S.C. 295, 682 S.E.2d 282 (2009). Indeed, due process is flexible and calls for such procedural protections as the particular situation demands. State v. Binnar, 400 S.C. 156, 165, 733 S.E.2d 890, 894 (2012); Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008); Harbit, 382 S.C. at 393, 675 S.E.2d at 781.

Because a probation violation hearing is not a criminal prosecution, the State submits the process due is much more limited than the full protection afforded in a criminal prosecution. Cf. State v. Franks, 276 S.C. 636, 281 S.E.2d 227 (1981) (holding the Fourth Amendment requirement that a magistrate issue an arrest warrant does not apply to warrants for probation violations). In Franks, the defendant argued the issuance of a probation arrest warrant by a probation agent rather than a magistrate violated the Fourth Amendment to the United States Constitution. Our supreme court disagreed and held the Fourth Amendment's requirement that a magistrate issue an arrest warrant does not apply to a warrant for violation of probation conditions. In reaching this conclusion, the Court explained that:

> Probation is an act of grace extended to one already convicted of a crime at a trial in this state providing the full protection of due process of law. A proceeding for the revocation of this privilege of probation is more in the nature of an extension of the original proceedings than it is a separate criminal prosecution.
>
> While the underlying violations may themselves be criminal offenses, the probation revocation proceeding is not a criminal trial on those charges, but a more informal proceeding with respect to notice and proof of the alleged violation.
>
> The penalty imposed upon a finding of violation of probation conditions is a forfeiture of the act of grace extended and reimposition of the unserved portion of the original sentence. No additional punishment is invoked.

> So there is quite a difference between a criminal prosecution and a probation revocation hearing.

Id. at 638-39, 281 S.E.2d at 228 (emphasis added).

This distinction between criminal prosecutions and probation revocation hearings has been long recognized by the United States Supreme Court. It held that since the probation revocation is not part of a criminal prosecution, the full panoply of rights due a defendant in such a proceeding does not apply. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey, 408 U.S. 471 (1972). Instead, only minimum requirements of due process must be met. Morrissey, supra. The court found that these rights include:

> (a) written notice of the claimed violations of [probation]; (b) disclosure to the [probationer] of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation].

Morrisey, 408 U.S. at 489 (emphasis added). Although it listed the right to confront and cross-examine adverse witnesses, the Supreme Court immediately qualified this right by noting it could be denied for "good cause," an exception not recognized in traditional confrontation clause analysis. In addition, the Court followed its list of minimal due process rights with the following explanation:

> We emphasize there is no thought to equate this second stage of [probation] revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

Id. Here, Appellant's minimal due process rights were afforded because he had notice of the alleged violation, disclosure that there had been a positive drug test on a particular date, and the opportunity to be heard in person and to present evidence in defense.

Appellant references a series of cases from our supreme court and contends they support his contention that he was not afforded due process. However, the State submits these cases merely confirm that Appellant's minimal due process rights were indeed protected. In Dangerfield v. State, 376 S.C. 176, 656 S.E.2d 352 (2008), the court held a magistrate's imposition of a sentence without an evidentiary hearing violated the defendant's right to due process. Referencing the United States Supreme Court decision in Morrissey, supra, the court noted that: "minimum due process requirements afford a parolee the right to 'an informal hearing structured to assure the finding of a parole violation will be based on verified facts and that the exercise of [the court's] discretion will be informed by an accurate knowledge of the parolee's behavior.'" Dangerfield, 376 S.C. at 179, 656 S.E.2d at 354 (quoting Morrisey, 408 U.S. at 484). Here, the magistrate certainly had an "accurate knowledge" of Appellant's behavior because Appellant: (1) was being "supervised by the court;" (2) had been ordered to "remain . . . drug free . . . and be subject to random Drug and Alcohol tests;" and (3) had tested positive for drug use in a test specifically requested by the court. More critically, and unlike Dangerfield, Appellant was given a hearing before his probation was revoked.

In Moore v. Moore, 376 S.C. 467, 657 S.E.2d 743 (2008), in an appeal from a family court matter, the court held that conducting an emergency hearing within twenty-four hours of filing a petition for protection from abuse order did not violate procedural due process. In analyzing Husband's due process challenge, the court noted: "Husband

was provided notice of the hearing and given an opportunity to actively participate in terms of questioning Wife and answering the court's questions. Husband, however, chose not to participate in the hearing and, thus, failed to take advantage of the procedural safeguards established by the Act." Id. at 477, 657 S.E.2d at 748. Here, Appellant likewise was provided notice of the proceeding and given an opportunity to participate in terms of objecting to or challenging the drug test result, but failed to take advantage of this opportunity at the hearing. The court held due process required a procedure that would "enable a petitioner and a respondent to procure counsel in order to actively and thoroughly participate in an adjudicative hearing on the merits of the action." Id. at 481, 657 S.E.2d at 750. Appellant had counsel and the opportunity to actively and thoroughly participate in the violation hearing, but he refused to do so.

In State v. Perkins, 378 S.C. 57, 661 S.E.2d 366 (2008), the court affirmed Perkins' termination from the drug court program and imposition of the original sentence after finding Perkins violated a condition of his suspended sentence. Specifically, the court held:

> In the instant case, it is undisputed that a condition of [Perkins'] suspended sentence was the successful completion of the Drug Court Program and that Perkins was terminated from the Program. Thus, the trial court correctly determined that Perkins violated a condition of his suspended sentence, and therefore, properly imposed Perkins' original sentence.

Id. at 61, 661 S.E.2d at 368. Here, it is undisputed that a condition of Appellant's probation was to remain drug free. At the violation hearing, the magistrate noted he had received results back from a drug testing agency saying Appellant tested positive for cocaine and advised he would be happy to hear anything Appellant had to say about the situation. (R.p.24, lines 1-8). Appellant declined a request to challenge the results of the

drug test, and instead repeatedly stated he was "requesting an evidentiary hearing." (R.p.24, line 9-p.25, line 15). As in Perkins, the revocation court correctly determined Appellant violated a condition of his probation, and therefore, properly revoked probation and imposed a sentence. Thus, Dangerfield, Moore, and Perkins all support the circuit court's conclusion that the magistrate afforded Appellant afforded due process at his revocation hearing.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the circuit court's decision to affirm Appellant's probation revocation in magistrate's court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated March 19, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 19th, day of March, 2014.

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