

ORIGINAL

RECEIVED
MAY 23 2014
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MCIVER REMBERT FEAGIN,

APPELLANT

APPELLANT CASE NO. 2012-213695

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

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT

The court erred by revoking appellant’s probation for having contact with the victim where the victim in fact contacted appellant, for not reporting, and not paying fees since these violations were caused by circumstances beyond appellant’s control 5

Relevant Facts 5

Discussion 6

CONCLUSION 8

PETITION TO BE RELIEVED AS COUNSEL 9

TABLE OF AUTHORITIES

Cases

<u>North Carolina v. Alford</u> , 400 U.S. 25 (1970).....	4
<u>State v. Coker</u> , 397 S. C. 244, 723 S.E.2d 619 (Ct. App. 2012).....	6
<u>State v. Garrard</u> , 390 S.C. 146, 700 S.E.2d 269 (Ct. App. 2010).....	7

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by revoking appellant's probation for having contact with the victim where the victim in fact contacted appellant, for not reporting, and not paying fees since these violations were caused by circumstances beyond appellant's control?

STATEMENT OF THE CASE

Appellant was indicted at the June 3, 2010 term of the Florence County grand jury for the offense of burglary in the first degree. R. 17-18. He appeared on September 20, 2010 before the Honorable Thomas a Russo and entered a plea pursuant to North Carolina v. Alford.¹ R. 19. Judge Russo sentenced appellant to fifteen years imprisonment, suspended upon the service of two hundred seventy-nine days, and five years probation. Special conditions of probation were that appellant was not to have any contact with the victim, and he was to undergo mental health counseling. R. 19.

An arrest warrant was issued on January 20, 2011 alleging appellant violated the terms of his probation for not reporting, and not following the instructions of his probation agent. The arrest warrant also alleged appellant had not paid all of his fees. R. 20.

A probation revocation hearing was held on December 10, 2012 before Judge Russo. William Grove represented appellant at the revocation hearing. R. 1. The state was represented by a probation agent. R. 1. At the conclusion of the probation revocation hearing Judge Russo revoked appellant's probation in full. R. 13, l. 11 – 15, l. 8.

This appeal follows.

¹ North Carolina v. Alford, 400 U.S. 25 (1970).

ARGUMENT

The court erred by revoking appellant's probation for having contact with the victim where the victim in fact contacted appellant, for not reporting, and not paying fees since these violations were caused by circumstances beyond appellant's control.

Relevant facts

Much of appellant's probation revocation hearing focused on the fact that he had contact with the victim in violation of the special condition of his probation. The probation agent told the judge that appellant had also not paid his probation fees. R. 3, l. 21 – 5, l. 24.

Defense counsel Grove informed the court that the victim had sent appellant "a handful of text messages." The judge interjected that appellant should have ignored the text messages since he was under a "no contact" probation order. R. 6, l. 8 - 12, l. 14.

Defense counsel also told the court that appellant had been working, and that things were going well for him. However, the victim, who had lived with appellant in the past, approached appellant and told him she was homeless. She asked to reconcile with appellant. R. 6, l. 8 - 12, l. 14.

Defense counsel said that appellant was in love with the victim and felt compelled to offer "her assistance." The judge summarily rejected this assertion stating, "You're not good for her, and she is not good for you, either." Appellant also offered that he had attempted to report and had at one time walked thirty miles "from where I live" to report. R. 9, l. 14 – 12, l. 14.

The probation agent then offered that appellant had a “substantial record.” The judge said that he was aware of that fact, and he revoked appellant’s probation in full. R. 13, l. 6 – 15, l. 7.

Discussion

The judge did not make any inquiry into appellant’s ability to pay his probation fees. In State v. Coker, 397 S. C. 244, 245, 723 S.E.2d 619, 620 (Ct. App. 2012), this Court noted:

In Bearden v. Georgia, 461 U.S. 660, 672, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), the Supreme Court of the United States held that a court may not revoke probation solely on the basis of the failure to pay money unless the court makes certain findings of fact regarding the willfulness of the failure to pay. In Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986), our supreme court stated: “Probation may not be revoked solely on the ground the probationer failed to pay fines or to make restitution. The judge must determine on the record that the probationer failed to make a bona fide effort to pay.” 288 S.C. at 483, 343 S.E.2d at 622 (citing Bearden, 461 U.S. at 672, 103 S.Ct. 2064).

In State v. Spare, 374 S.C. 264, 647 S.E.2d 706 (Ct.App.2007), we provided the trial bench a roadmap for making the findings required under Bearden and Barlet. We held the circuit court may not revoke probation solely on the basis of a failure to pay money unless the record reflects the court made the following findings:

(1) “[T]he State has presented sufficient evidence to establish that a probationer has violated the conditions of his probation.” 374 S.C. at 268, 647 S.E.2d at 708 (internal quotation marks omitted).

(2) “[T]he probationer made a willful choice not to pay” in that the probationer had the funds to pay and chose not to do so or lacked the funds to pay and did not make a bona fide effort to acquire the funds. 374 S.C. at 268–69, 268 n. 2, 647 S.E.2d at 708–09, 708 n. 2 (internal quotation marks omitted).

(3) “[I]f the court finds the probationer ‘could not pay despite sufficient bona fide efforts to acquire the resources to do so,’ ” the court may not imprison the probationer unless it also finds that “‘alternate measures are not adequate to meet the State's interests in punishment and deterrence.’” 374 S.C. at 268 n. 2, 270, 647 S.E.2d at 708 n. 2, 709 (quoting *Bearden*, 461 U.S. at 672, 673 [103 S.Ct. 2064]).

There is no evidence in this record that appellant made a willful choice not to pay. To the contrary the record shows appellant was working until he got in trouble because the victim contacted him in an attempt to reconcile. Appellant was then arrested for harassment, jailed, and apparently lost his job. Incarcerating appellant under the circumstances did not serve the state’s interest in legitimate punishment and deterrence.

Further, there was no evidence of a willful violation of the “no contact” provision of probation since the victim contacted appellant and an attempt to reconcile. The same can be said as for the allegation that appellant failed to report. Appellant told the judge at one time he had even walked 30 miles to purport, and the judge also did not make any finding that this violation of probation was willful.

A willful violation is an intentional and voluntary act done in conscious disregard of the probation order. *State v. Garrard*, 390 S.C. 146, 151, 700 S.E.2d 269, 272 (Ct. App. 2010). Since the judge did not find that appellant’s alleged violations of probation were willful, the order revoking his probation should be vacated.

CONCLUSION

By reason of the foregoing arguments, the order revoking appellant's probation should be vacated, and this matter remanded to the Florence County Court of General Sessions for a new probation revocation hearing.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of May, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MCIVER REMBERT FEAGIN,

APPELLANT

APPELLANT CASE NO. 2012-213695

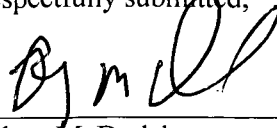
PETITION TO BE RELIEVED AS COUNSEL

Counsel for McIver Rembert Feagin 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 before Judge Thomas A. Russo, which was held on December 10, 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 McIver Rembert Feagin.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of May, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MCIVER REMBERT FEAGIN,

APPELLANT

APPELLANT CASE NO. 2012-213695


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

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

- (1) Entire Probation Revocation Transcript;
- (2) True-billed indictment;
- (3) Sentencing Sheet from guilty plea;
- (4) Probation Arrest Warrant;
- (5) Sentencing Sheet from Revocation Hearing.

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

May 23rd, 2014



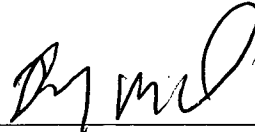
Robert M. Dudek
Chief Appellate Defender

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

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."

May 23rd, 2014



Robert M. Dudek
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
MAY 23 2014
SC Court of Appeals

Appeal from Florence County
Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

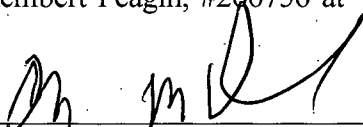
MCIVER REMBERT FEAGIN,

APPELLANT

APPELLANT CASE NO. 2012-213695

CERTIFICATE OF SERVICE

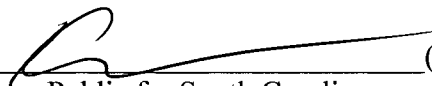
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon Matthew Buchanan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on McIver Rembert Feagin, #266756 at Wateree River, this 23rd day of May, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of May, 2014.



Notary Public for South Carolina

(L.S.)

My Commission Expires: August 21, 2023