

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JONATHAN MALLORY,

APPELLANT

APPELLATE CASE NO. 2013-000811

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by revoking appellant's probation for failure to be current on payments where even appellant's probation agent did not seem to dispute the fact that appellant was making sincere efforts to meet his probation financial obligations since the judge's finding that appellant's violation was "willful" was not supported by the record?

STATEMENT OF THE CASE

Appellant was indicted at the April 2010 term of the Lexington County grand jury for the offense of burglary in the first degree. R. 27. On March 2, 2011 appellant appeared before the Honorable R. Ferrell Cothran, Jr. and waived grand jury presentment on another indictment for burglary in the third degree. He also pled guilty to the lesser included offense of burglary in the third degree on the true-billed indictment. R. 29. (indictment and sentencing sheet dated March 2, 2011).

Judge Cothran sentenced appellant to five years imprisonment, suspended upon the service of ninety days and two years probation on one count of third degree burglary. He imposed a concurrent four years sentence, suspended upon time served and two years probation on the non-indicted charge. R. 13. (Sentencing sheets).

A probation citation was issued against appellant on December 18, 2012 alleging his failure to pay certain fees and fines, and alleging he failed to report for four consecutive weeks. The affidavit also alleged appellant failed to complete public service employment. R. 11. (Probation citation).

Appellant appeared on April 12, 2013 before the Honorable Clifton Newman for a probation revocation hearing. David Mauldin represented appellant, and Probation Officer Lyons appeared on behalf of the Department of Probation, Parole and Pardon Services. R. 1.

At the conclusion of the probation revocation hearing the judge revoked appellant probation in full, and imposed a five year sentence.¹ R. 8, ll. 22-23. This appeal follows.

¹ The sentencing sheet indicates the sentence was changed to four years and nine months to seemingly give appellant credit for his ninety days time served. R. 14.

ARGUMENT

The court erred by revoking appellant probation for failure to be current on payments where even appellant's probation agent did not seem to dispute the fact that appellant was making sincere efforts to meet his probation financial obligations since the judge's finding that appellant's violation was "willful" was not supported by the record

Relevant Facts

The probation agent told the judge that he thought he could help appellant with his slow payments. "I had previously felt that we may still be able help Mr. Mallory. He had come to me and told me he was having problems within his family that was causing these financial issues for him; however at this point Mr. Mallory is now incarcerated for some significant charges." R. 3 ll. 19-24. The charge appellant had been arrested for was **not an issue before the court.** R. 5, ll. 13-25. The probation agent also noted that appellant had not reported for four visits in a row and failed to do community service hours but the focus of the state's presentation was "financial." R. 3, ll. 14 -18; R. 4, ll. 13 - 24.

Defense counsel Mauldin told the judge that appellant had paid seven hundred and twenty five dollars (\$725.00) towards his supervision fees, and three hundred and thirty dollars (\$330.00) towards restitution. "And so he has paid over a thousand dollars for the time he has been on probation." R. 4, l. 2 - 5, l. 14. Appellant had been "self-employed since 1997. He had mainly done floor covering installation for a period of about ten years, and when that business went downhill, or the demand for it went downhill, he started doing scrap metal business, learned how to do some P.C. repair and has been doing that through Craig's list." R. 4, ll. 2-8.

Mauldin also told the judge that appellant did everything he could to report to the probation office, “even if he had to hitch hike or trade somebody something to get a ride over there.” R. 5, ll. 6-12. Mauldin asked the judge to continue appellant on probation. R. 5, ll. 13-15.

Appellant informed the judge that he had made every effort to meet his financial obligations: “I tried to keep things paid up, one thousand thirty dollars has been paid total, and eighteen hundred is the total to be paid, and I will get it paid. I pray the court will at least continue this until – continue my supervision until disposition of this new charge.” R. 6, ll. 15-23.

The probation agent reasoned: “*If you continue him* when he comes forward on the new charges, we can violate him at that time for that. Like I said, *it’s mostly monetary* *If we can just even get that part settled today*” R. 6, l. 25- 7, l. 8. Instead, and surprisingly, the judge revoked appellant probation in full. R. 8, ll. 22- 23.

Discussion

In State v. Spare, 374 S.C. 264, 647 S.E.2d 706 (Ct. App. 2007) this Court held the circuit court judge abused his discretion by concluding that Spares’ failure to pay his considerable financial obligations was willful. This Court found the judge failed to make the requisite inquiry into Spares’ ability to pay, and his reasons for failing to pay. The judge could not reasonably determine from the record that the probationer’s failure in Spare to pay was willful. This Court noted that Spare was making progress, “albeit slow”, towards paying his obligations.

In Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986) the Supreme Court found that before probation can be revoked solely for failure to make required

payments the circuit court judge must first determine that the probationer had failed to make a bona fide effort to pay. *Citing Bearden v. Georgia*, 461 U.S. 660 (1983).

In this case appellant was making efforts to pay just as had the probationer in Spare. A fair reading of this record shows the probation agent expected to judge to continue appellant on probation -- the agent noted he was trying to assist appellant but his current arrest complicated those attempts to assist. Immediately before the judge revoked appellant the probation agent was talking about continuing appellant on probation. The judge surprisingly revoked appellant's probation in full.

Since the judge did not make a further inquiry into appellant's ability to pay in full, especially where appellant and even his probation agent stressed his good faith attempts to comply, the judge abused his discretion by revoking appellant's probation. The short failures to report and do community service were **not the focus of the revocation hearing**. Further, appellant could not be revoked based on his prior record which was going to be his prior record regardless for the remainder of his life.

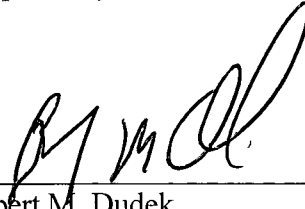
The revocation in his case for failure to pay was, most respectfully, arbitrary given the judge's failure to make the requisite inquiry into whether appellant was making a bona fide effort to pay.² Spare v. State; Barlet v. State, *supra*.

² The judge revoked appellant's probation for a "willful violation." Again, the only fair reading of this record was that this was the monetary obligations since that was the focus of the hearing. Appellant in this state is given an attorney to represent him at the revocation hearing and fundamentally fairness and due process demand that if the judge was revoking appellant for something other than the monetary obligations that were the focus of the hearing he was obligated to so rule.

CONCLUSION

By reason of the foregoing argument the revocation of appellant's probation should be reversed, and this case remanded for a new revocation hearing.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 9th day of June, 2014.

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

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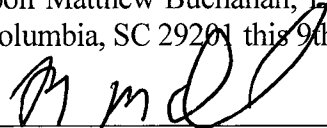
JONATHAN MALLORY,

APPELLANT

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CERTIFICATE OF SERVICE

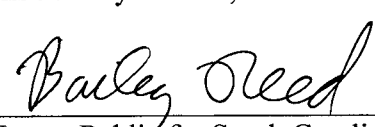
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Matthew Buchanan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 9th day of June, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of June, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021