

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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ORIGINAL

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

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RECEIVED

OCT 25 2018

SC Court of Appeals

THE STATE,

RÉSPONDÉNT,

V.

THERON MARQUIS MURRAY,

APPELLANT

APPELLATE CASE NO. 2018-000587

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ANDERS BRIEF OF APPELLANT

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ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

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The court erred by summarily denying appellant’s motion for a continuance after hearing from the probation agent where counsel needed time to investigate appellant’s intellectual disability as it related to appellant’s ability to understand the sexual offender class obligations, and counsel also needed time to review documents submitted by the agent in support of revoking appellant’s probation.....4

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**STATEMENT OF ISSUE ON APPEAL**

Whether the court erred by summarily denying appellant's motion for a continuance after hearing from the probation agent where counsel needed time to investigate appellant's intellectual disability as it related to appellant's ability to understand the sexual offender class obligations, and counsel also needed time to review documents submitted by the agent in support of revoking appellant's probation?

## STATEMENT OF THE CASE

Appellant was sentenced on June 4, 2015, to ten years imprisonment suspended upon five years' probation by the Honorable Alison Lee for the offense of assault and battery first degree. Appellant was not required to register as a sex offender, but he was ordered to complete sex offender counseling. R. 22.

Appellant appeared on March 23, 2018, before the Honorable DeAndrea G. Benjamin for a probation revocation hearing. Nathan Rouse represented appellant. The probation agent was Shree Duckett. R. 1.

Judge Benjamin revoked two years of appellant's probation and continued him on probation. R. 15, ll. 18-20; R. 19, ll. 13-15.

This appeal follows.

## STANDARD OF REVIEW

A motion for continuance is addressed to the sound discretion of the trial court and its ruling on such motion will not be reversed without a clear showing of abuse of discretion. State v. Browder, 277 S.C. 206, 284 S.E.2d 775 (1981).

In South Carolina “[t]he grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record.” Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007).

“ ‘The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion.’ ” State v. Geer, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010) (quoting State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005)). “ ‘An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.’ ” Id. (quoting State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001)); see also State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249–50 (Ct. App. 2006) (“An abuse of discretion occurs when the trial court’s ruling is based on an error of law.”). Even if there was no evidentiary support, “ ‘[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant.’ ” Geer, 391 S.C. at 190, 705 S.E.2d at 447 (quoting State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005)); see also State v. Wyatt, 317 S.C. 370, 372–73, 453 S.E.2d 890, 891–92 (1995) (stating that error without prejudice does not warrant reversal).

## ARGUMENT

The court erred by summarily denying appellant's motion for a continuance after hearing from the probation agent where counsel needed time to investigate appellant's intellectual disability as it related to appellant's ability to understand the sexual offender class obligations, and counsel also needed time to review documents submitted by the agent in support of revoking appellant's probation

### **Relevant Facts**

Defense counsel Rouse moved for a continuance. Rouse said going forward would violate appellant's due process rights for several reasons. R. 4, ll. 3-8.

Rouse had just received letters regarding appellant's sexual offender counseling. One letter warned appellant about missing a single sex offender counseling class in July 2017. The second letter in October 2017 terminated appellant from the "SORT – Sex Offender Rehabilitation Treatment program." R. 4, l. 9 – 5, l. 2; r. 23-24.

Rouse also noted that old files in his office stated that appellant:

“Did have an IEP in high school. I believe that there are some issues surrounding that with his actual ability to comply with certain standards of how he needs to perform in class. What I would like going -- before we go forward, just to know exactly how they're saying he was not participating and exactly what sorts of assignments he did and did not complete and whether any sort of assistance has been offered to him based on his disability. I would also like to get a copy of the old file that we have on the last time this happened. I received this report maybe four or five days ago, and basically, we'd just like some more time to be more prepared for future revocation. I believe the State is asking for substantial time.”

R. 5, ll. 3-19.

The judge asked for the position of PPP, and agent Duckett complained that counsel Rouse only asked him four days ago for the information he needed to prepare for the revocation hearing. The agent claimed sentencing Judge Lee gave appellant "a zero tolerance for not completing the class for unsuccessful treatment." The agent maintained a continuance was not necessary in the opinion of PPP. The judge then immediately denied the motion for a continuance without an opportunity for rebuttal from the defense. R. 5, l. 20 – 7, l. 20.

Agent Duckett then claimed that appellant had been evaluated mentally prior to being sentenced by Judge Lee, and implied nothing abnormal was discovered. However, the agent offered that PPP had "begged" Lighthouse Counseling Services to let appellant back into the sex offender counseling classes. R. 8, l. 4 – 11, l. 24.

Defense counsel Rouse continued to argue that he had a "lack of records" to defend appellant, but "I do believe that Theron Murray did not willfully violate his probation." Rouse again told the judge that appellant was intellectually disabled and that it had not been shown that his disability was not a contributing factor in his inability to complete the counseling assignments. R. 12, l. 1 – 13, l. 7.

Rouse also told the judge he would like to know if appellant was, in fact, evaluated. He needed a "previous file" reviewed to be properly prepared to answer that question. R. 13, ll. 5-25.

When the judge asked about Judge Lee's "zero tolerance" policy, Rouse responded that PPP was violating appellant "for having an intellectual disability . . ." The probation agent then asserted this was the first time PPP had heard of an intellectual disability. Rouse again insisted that he needed a continuance to obtain the documents showing appellant had an intellectual

disability. The judge then revoked two years of appellant's probation, resulting in his current incarceration. R. 14, l. 1 – 15, l. 20.

### **Discussion**

The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of abuse of discretion. See State v. Tanner, 299 S.C. 459, 462, 385 S.E.2d 832, 834 (1989); State v. Mansfield, 343 S.C. 66, 72, 538 S.E.2d 257, 260 (Ct. App. 2000). Here, the revocation judge did not give any reason for denying the motion for a continuance. An abuse of discretion occurs when the conclusions of the judge either lack evidentiary support or are controlled by an error of law. State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-250 (Ct. App. 2006).

What is evident from this record is that defense counsel Rouse told the judge he had not had sufficient time to review the records in question in this unusual case. This was a highly unusual case because appellant suffered from an intellectual disability which was discovered in high school or before. The agent and trial judge challenged counsel to prove appellant had an intellectual disability. Counsel was also asked to refute an allegation that appellant had been mentally evaluated, and no evidence of any problem discovered.

Defense counsel correctly asserted that despite the sentencing judge's "zero tolerance policy" on sexual counseling classes, appellant could not be violated if his intellectual disability prevented him from being able to comply. The judge challenged Rouse to prove appellant had an intellectual disability, and she also called upon him to refute the allegation that appellant had been evaluated and no mental deficits found.

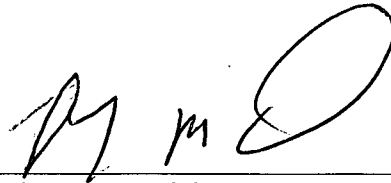
All of which is fine, but Rouse need a continuance to do so. The judge abused her discretion in summarily denying a good faith continuance motion. Appellant provided compelling reasons for needing a continuance, and the judge abused her discretion in denying it. See State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002).

Further, as seen, much of defense counsel's compelling argument, and his reasons for needing a continuance, came after the judge had already summarily denied the motion for a continuance. The judge respectfully accepted the apparent annoyance of the probation agent at the continuance motion with conclusive proof of her assertion that appellant was a normal person, who had been evaluated, and had no intellectual disfunction.

The prejudice from the judge's abuse of discretion in this case resulted in appellant presently being incarcerated for two years. The ruling of the revocation court should be reversed. See State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005); State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002).

**CONCLUSION**

By reason of the foregoing argument, the revocation of appellant's probation should be vacated.

A handwritten signature in black ink, appearing to read 'R M D', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of October, 2018.

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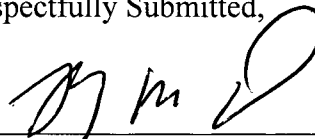
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Theron Marquis Murray 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 hearing before Judge DeAndrea G. Benjamin, which was held on March 23, 2018, 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 Theron Marquis Murray.

Respectfully Submitted,



Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR APPELLANT

This 25th day of October, 2018.

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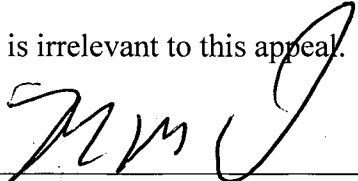
**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Sentencing sheet;
- (3) Defendant's Ex #1 (Warning letter);
- (4) Defendant's Ex #2 (Termination letter)

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

October 25, 2018

  
Robert M. Dudek  
Chief Appellate Defender

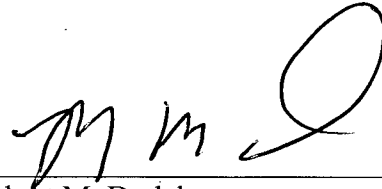
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Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

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 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."

October 25, 2018.



Robert M. Dudek  
Chief Appellate Defender

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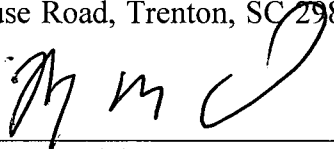
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THERON MARQUIS MURRAY,

APPELLANT

\_\_\_\_\_  
CERTIFICATE OF SERVICE

The undersigned 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 SCPPPS, Post Office Box 50666, Columbia, SC 29250; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Theron Marquis Murray, 375822, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 25th day of October, 2018.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 25th day of October, 2018.

Cartney Powers (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 2, 2027.