

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Sumter County

Honorable George M. McFaddin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MIKEL TERRELL FRANCIS,

APPELLANT

APPELLATE CASE NO. 2018-001415

INITIAL 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) 734-1330

ATTORNEY FOR APPELLANT

RECEIVED
JUN 03 2019
SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT

The court erred by revoking appellant’s probation for not reporting where the state failed to prove that appellant was notified that when he was released by the Florida Department of Corrections that he had to report to the Department Office in Sumter by November 25, 2009 since it was fundamentally unfair to revoke appellant’s probation, and activate a dated twenty year prison sentence where appellant never received the bare minimum due process notice that he had to report.....4

Relevant Facts.....4

Discussion.....6

CONCLUSION.....9

TABLE OF AUTHORITIES

Cases

Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986)..... 8

Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987) 3

Martin v. State, 338 S.C. 401, 526 S.E.2d 713 (2000) 8

S.E.C. v. TheStreet.Com, 273 F.3d 222 (2d Cir.2001)..... 3

State v. Archie, 322 S.C. 135, 470 S.E.2d 380 (Ct. App. 1996)..... 7

State v. Brannon, 407 S.C. 293, 755 S.E.2d 117 (Ct. App. 2014)..... 7

State v. Brown, 349 S.C. 414, 563 S.E.2d 339 (Ct. App. 2002)..... 6, 8

State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999)..... 3, 6, 8

State v. King, 221 S.C. 68, 69 S.E.2d 123 (1952) 3

State v. Proctor, 345 S.C. 299, 546 S.E.2d 673 (Ct. App. 2001)..... 6

State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950)..... 3, 6

State v. Woveris, 138 N.H. 33, 635 A.2d 454 (1993)..... 6

Turner v. State, 384 S.C. 451, 682 S.E.2d 792 (2009) 8

Constitutional Provisions

U.S. Const. amend. V..... 7

U.S. Const. amend. XIV 7

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by revoking appellant's probation for not reporting where the state failed to prove that appellant was notified that when he was released by the Florida Department of Corrections that he had to report to the Department Office in Sumter by November 25, 2009 since it was fundamentally unfair to revoke appellant's probation, and activate a dated twenty year prison sentence where appellant never received the bare minimum due process notice that he had to report?

STATEMENT OF THE CASE

Appellant pled guilty in Sumter County on April 20, 1999 to the offense of attempted armed robbery. He was sentenced by the R. Markley Dennis to twenty years' imprisonment, suspended upon the service of five years imprisonment, and four years' probation. R. 14.

A probation arrest warrant was issued against appellant on December 31, 2009. This warrant alleged, inter alia, "Mr. Francis violated condition #1 by failing to report. He was released from prison in Florida on 11-19-09 and has failed to report to the Sumter County Probation Office . . ." R. 13.

A probation revocation hearing was heard on July 20, 2018, before the Honorable George M. McFaddin. Jason Bridges represented appellant, and a probation agent represented the state. R. 1. At the conclusion of the revocation hearing, Judge McFaddin revoked appellant's probation in full, and activated the full twenty year sentence. R. 10, ll. 7-10; R. 14.

This appeal follows.

STANDARD OF REVIEW

The appellate court's authority to review a decision revoking probation is confined to correcting errors of law unless the lack of a legal or evidentiary basis indicates the circuit judge's decision was arbitrary and capricious. State v. Hamilton, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct. App. 1999).

The trial court must determine whether the State has presented sufficient evidence to establish that a probationer has violated the conditions of his probation. State v. King, 221 S.C. 68, 73, 69 S.E.2d 123, 125 (1952); State v. White, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950); State v. Hamilton, 333 S.C. 642, 648-49, 511 S.E.2d 94, 97 (Ct.App.1999). "While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice." White, 218 S.C. at 136, 61 S.E.2d at 756.

An appellate court will not reverse the trial court's decision unless that court abused its discretion. White, 218 S.C. at 135, 61 S.E.2d at 756; Hamilton, 333 S.C. at 647, 511 S.E.2d at 96. An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987); S.E.C. v. TheStreet.Com, 273 F.3d 222, 229 n. 6 (2d Cir.2001).

ARGUMENT

The court erred by revoking appellant's probation for not reporting where the state failed to prove that appellant was notified that when he was released by the Florida Department of Corrections that he had to report to the Department Office in Sumter by November 25, 2009 since it was fundamentally unfair to revoke appellant's probation, and activate a dated twenty year prison sentence where appellant never received the bare minimum due process notice that he had to report

Relevant Facts

The probation agent told the judge that appellant was sentenced by Judge Dennis "who gave him 20 years, provided upon the service of five years, and payment of \$103.00 court costs, balance suspended with four years' probation. Credit for jail time of four months. Your honor, he had some special conditions. Alcohol and drug counseling. Obtain his GED. And the first six months of probation were to be intensive. Your honor, he has never reported to (sic) this probation hearing case. He never reported upon release, and I'll go into detail of that shortly, but the warrant, which was issued December 31st, 2009, charges him with failing to report. *He was released, released from prison on November 19th, 2009, and was told to report to the Sumter County South Carolina Probation Office. Failed to work diligently at a lawful occupation having never reported employment. He left the state without permission. He was arrested in Cincinnati, Ohio, on December 21st, 2009, and he's failed to notify his agent of arrest. He violated Condition Number 8 by leaving the state without permission as evidenced by that arrest. Failed to pay his Court surcharge. Failed to follow the advice and instruction of his agent by failing to ever report to Sumter County, South Carolina. . . .*" R. 3, l. 17 – 4, l. 16. (emphasis added).

The probation agent also told the judge that appellant's former probation agent, Sharon Hollins, wrote appellant a letter dated August 3rd, 2008, telling him that upon his release from the [Florida] Department of Corrections he was required to report to the probation office in Sumter, South Carolina. The agent said, "Our record indicates a release date of November 19th, 2009. *If you have not reported or made contact by November 25th, 2009, a warrant will be issued for your arrest.*" R. 5, l. 19 – 6, l. 1. (emphasis added).

The agent offered that the sentence was handed down in 1999, and he claimed "he's [Appellant's] just never complied with it, and we're seeking a full revocation just based on the severity of the charge, and carrying him in absconded status, and though he was up in Cincinnati, Cincinnati on a crime spree, he did a little stint in jail here, an little stint in prison here, that should not -- we don't see that that should -- that he should get any credit for doing wrong, you know. He was here and was to be here in South Carolina, *and neglected to do what Judge Dennis originally sentenced him to.* So, we're seeking a full revocation based on the fact that he's really and truly rejected the conditions of probation." R. 6, l. 15 – 7, l. 6. (emphasis added).

Defense counsel Bridges told the judge that appellant served his five years in prison, he was then on community supervision, and "ended up in [a] Florida correctional institution." Appellant had never seen the letter relied on by the probation agent telling him where and when he was to report. Bridges noted the letter was not sent certified mail to appellant. R. 7, l. 9 – 8, l. 15. Bridges repeated that appellant "[h]e was not aware of his probationary status at that time" because he never received the letter sent by the probation department in Sumter. R. 8, l. 24 – 9, l. 3.

Bridges explained that appellant was originally sentenced in April of 1999, and a lot of events – including community supervision and incarceration in Florida followed. Given the

passage of time and intervening events appellant was not aware of his obligation to report for probation in Sumter in 2009 since he never received the probation letter. R. 9, l. 9 – 10, l. 10. As stated, the judge revoked appellant's probation in full. R. 10, ll. 7-10.

Discussion

“Although a decision to revoke probation generally rests within the circuit court's discretion, an appellate court should reverse when that decision is based on an error of law or lack of supporting evidence.” State v. Brown, 349 S.C. 414, 417-418, 563 S.E.2d 339, 340-341 (Ct. App. 2002), *citing* State v. Proctor, 345 S.C. 299, 546 S.E.2d 673 (Ct. App. 2001); State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999). “While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice.” White, 218 S.C. at 136, 61 S.E.2d at 756.

In State v. Brown, 349 S.C. 414, 563 S.E.2d 339, 340 (Ct. App. 2002), the probation order unambiguously stated Brown was to “obtain treatment” for his problem while on probation. However, this Court found the order did not mandate that Brown *complete* treatment. The probation order also did not specify that Brown had to follow all of the advice of his probation agent.

This Court in State v. Brown found the facts similar to those in State v. Woveris, 138 N.H. 33, 635 A.2d 454 (1993), where the New Hampshire Supreme Court had affirmed a probation revocation but only after the original probation order was clarified, and Woveris given adequate notice and a chance to conform his conduct to that notice. This Court in State v. Brown found the defendant was not sufficiently on notice of what he was required to do so that a revocation of his probation could be justified. State v. Brown, 349 S.C. 414, 419-420, 563 S.E.2d 339, 342 (Ct. App. 2002).

Here, the situation was even more fundamentally unfair than in Brown given the lack of notice to appellant of what was required of him. Appellant's only notice of probation came at the time of his sentencing in 1999, and no details were forthcoming until the 2008 probation letter at issue here. His defense was that he never received the letter from the probation office in Sumter telling him -- while he was incarcerated within the Department of Corrections in Florida -- that he had to report of the Sumter Probation Office by November 25, 2009 upon his release in Florida.

The imposition of sentencing is a judicial function. State v. Archie, 322 S.C. 135, 470 S.E.2d 380 (Ct. App. 1996). Here, the probation department, a component of the executive branch, claimed appellant was obligated to report to the probation department in Sumter when he was released from the Florida Department of Corrections. Appellant maintained he never received this letter, and that he therefore was not on notice that he was to report for probation on a given date. Making the situation even more complicated, appellant had an intervening time on community supervision, and his only notice of probation was in 1999 when he was sentenced. The probation department could claim appellant should have received notice, but the judicial department had to ensure proof of that notice to appellant before activating a prison term -- twenty years -- for noncompliance with that notice. See, State v. Archie, 322 S.C. 135, 470 S.E.2d 380 (Ct. App. 1996).

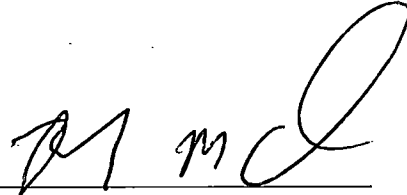
Appellant, as all probationers, was entitled to basic due process notice of what he was obligated to do on probation, and the right to defend himself against the accusation he violated the terms of his probation pursuant to the Due Process Clauses of the Fifth and Fourteenth Amendments. See, State v. Brannon, 407 S.C. 293, 755 S.E.2d 117 (Ct. App. 2014); Martin v.

State, 338 S.C. 401, 405, 526 S.E.2d 713, 715 (2000); Turner v. State, 384 S.C. 451, 682 S.E.2d 792 (2009); Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986).

In this case, defense counsel correctly argued appellant did not have the most basic due process notice, since he never received the letter telling him where and when he was to report to begin his probation. The state did not prove that appellant was ever notified, and it only made a bare assertion that it sent the letter it claimed appellant received. However, delivery of mail within a large Department of Corrections is, respectfully, not reliable. There should have been at least the production of an institutional mail log or certified receipt as proof of delivery before a twenty year prison sentence was activated for noncompliance with probation. The revocation of appellant's probation under these circumstances -- which indicates the lack of the most due process notice -- was fundamentally unfair. The revocation of appellant's probation should be vacated. See, State v. Brown; State v. Hamilton, supra.

CONCLUSION

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

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

Robert M. Dudek
Chief Appellate Defender.

ATTORNEY FOR APPELLANT

This 3rd day of June, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable George M. McFaddin, Circuit Court Judge

RECEIVED
JUN 03 2019
SC Court of Appeals

THE STATE,

RESPONDENT,

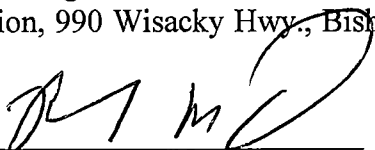
v.

MIKEL TERRELL FRANCIS,

APPELLANT

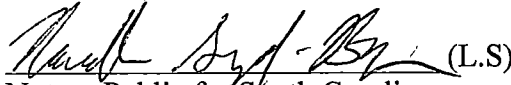
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter 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 Initial Brief of Appellant and Designation of Matter have been served on Mikel Francis, #257790, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 3rd day of June, 2019.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of June, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028