STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
The Honorable George M. McFaddin, Circuit Court Judge

Appellate Case No. 2018-001415

THE STATE,..RESPONDENT

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SC Court of Appeals

v.

MIKEL TERRELL FRANCIS,...APPELLANT

INITIAL BRIEF OF RESPONDENT

Octavia Wright
Legal Counsel

South Carolina Department of Probation, Parole and Pardon Services
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Columbia, South Carolina 29250

ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the trial court abused its discretion or jurisdiction when it imposed its sentence during a probation revocation hearing**

2. **Whether the Court erred by revoking appellant's probation for repeatedly violating the law and blatant noncompliance with his probation conditions from the time of his initial probationary sentence in which he was notified of the requirements of his sentence upon submitting his guilty plea**

STATEMENT OF THE CASE

On April 20, 1999, the Appellant pled guilty to two counts each of Robbery/Attempted Armed Robbery, Weapons/Possession of a weapon during a violent crime, Larceny/Breaking into motor vehicle or tanks, weapons/sale or delivery of pistol to, and Possession by, certain persons unlawful; stolen pistol; and sixteen counts of Larceny/Breaking into motor vehicle or tanks, pumps, where fuel, lubricants stored under Indictment numbers 1999-GS-43-00294A, 1999-GS-43-00293, and 1999-GS-43-00294 before the Honorable R. Markley Dennis, Jr. in Sumter County General Sessions Court. The court sentenced him concurrently to twenty years suspended upon five years of incarceration followed by probation for four years. Additional conditions of alcohol and drug counseling and testing, first six months on intensive supervision, and obtain GED were added to the sentence.

After receiving this sentence, the Appellant was released on the Community Supervision Program (hereinafter, "CSP") on December 1, 2003. The Appellant signed the Certificate on this date acknowledging that he understood the supervisory conditions of CSP. On January 19, 2005, his agent issued a citation on the Appellant for violating the following conditions: failing to report and leaving the Probation Office before submitting a urine sample on January 6, 2005; failing to provide a urine sample as instructed and failure to refrain from using controlled substances; failure to pay supervision fees as instructed, being $160 in arrears with a balance of $640, having last made a payment on October 12, 2004; and failure to follow the advice and instructions of the agent by failing to bring in a doctor's excuse as instructed. This citation was served upon the Appellant on January 20, 2005.

On February 28, 2005, an Administrative Hearing was held to develop findings from the violations noted on the citation. The Hearing Officer found that the aforementioned violations did

in fact constitute a willful failure to follow the advice and instructions of the supervising agent based upon the testimony and evidence submitted by his supervising agent. The Hearing Officer also concluded that the Appellant's actions proved his willingness to resort to deceit to hide his continued involvement in criminal actions since he admitted that he committed another crime, which was possession of marijuana and that he was using it. Ultimately, the Officer found him to be a high risk to continue under CSP and recommended that it be revoked. The officer also included a note to the Court that the Appellant was given due and timely written notice of the hearing, but failed to appear. See the attached Administrative Hearing Summary.

On March 17, 2005, the Honorable Paula H. Thomas issued a CSP Revocation Order after finding that the Appellant had not complied with his CSP, but willfully violated its terms. Thus, he was ordered to be placed in the custody of the South Carolina Department of Corrections (SCDC) for no more than one year. On February 28, 2006, the Appellant signed a CSP Certificate for the *second* time that certified that he had read the conditions of supervision and that they had been explained to him. On this Certificate, he was directed to report to the Clarendon County Probation Office upon his release from SCDC on March 1, 2006. The Certificate also states that his CSP was scheduled to end on February 29, 2008 upon his successful completion and notes that he had also been sentenced to four years of probation to follow at the end of this term. See the attached CSP Certificates.

On April 3, 2006, the Appellant completed an Interstate Commission for Adult Offender Supervision (hereinafter, "ICOTS") Transfer Request to have his supervision transferred from South Carolina to Florida. On August 1, 2006, his request was approved as noted on his ICOTS' Request for Reporting Instructions Form and Reply to Transfer Form in which he was given until August 9, 2006 to report in person to his Supervising Officer at the Tallahassee, Florida location.

See the attached. On August 8, 2006, the State of Florida sent an ICOTS' Notice of Arrival Form to South Carolina to inform of the Appellant's arrival and in person report to his Supervising Officer in Florida on that date.

On October 24, 2006, the Appellant's Supervising Officer in Florida sent an ICOTS' Offender Addendum Violation Report to South Carolina advising that the Appellant had been arrested in Florida for committing robbery by sudden snatching without a firearm or weapon. On November 1, 2006, South Carolina's Interstate Compact Office sent an ICOTS' Response to Violation Report Form to its corresponding office in Florida acknowledging receipt of Florida's October 24, 2006 Violation Report. The Report Form also requested that Florida notify South Carolina upon disposition of the pending charges against the Appellant as South Carolina would make a decision based upon the outcome of those charges. There was also a note to elevate the level of supervision to intensive if the Appellant was released prior to the charges being disposed. On September 6, 2007, the Supervising Officer in Florida sent South Carolina an ICOTS' Case Closure Notice which stated that the Appellant was now serving a new three-year sentence in Florida for the charges for robbery and burglary of conveyance. He had been adjudicated guilty and given credit for 315 days served. For more information regarding the Interstate Compact for Adult Supervision, please see SC Code §§24-21-1100-1220.

On March 6, 2008, the Sumter County Probation Office received a letter from the Appellant asking about the warrant that was issued on him in October 2007 while he was incarcerated in Florida. From the letter, it is apparent that the Appellant incorrectly assumed that his South Carolina case had been transferred under Florida's jurisdiction. He also asked what a judge would do upon his return to South Carolina. On March 12, 2008, the Agent-in-Charge ("AIC") of the Sumter County Probation Office sent the Appellant a letter in response stating that his arrest and

convictions for new offenses in Florida constituted violations of his CSP in South Carolina. The letter further clarified that SC had retained jurisdiction of his case even though he had been transferred to Florida for supervision of the SC sentence, but now that he had been sentenced for new charges in Florida, his supervision of the SC sentence had ended. He was further advised that due to this reason, he would need to return to Sumter to have his case heard before a Circuit Court judge, who would make an independent decision on his case.

On August 3, 2009, the AIC sent the Appellant a letter stating that he still had four years of probation to serve in South Carolina and that he was required to report to the South Carolina Probation Office in Sumter, South Carolina upon his release from the Florida Department of Corrections. The letter noted that the Department was aware that he was to be released on November 19, 2009 and went on to state that if he has not reported or made contact with the office by November 25, 2009, a warrant would be issued for his arrest.

The Appellant did not report to the Sumter County Probation Office as instructed. On December 30, 2009, the Office was advised that the Appellant had been arrested in Cincinnati, Ohio on December 21, 2009. As a result of the Appellant not reporting to the Sumter County Probation Office as instructed by November 25, 2009, a warrant was issued for his arrest on December 31, 2009. This warrant also noted his multiple violations of his probation from his absconsion, which included: failing to report, failing to work diligently at a lawful occupation, failing to refrain from the violation of Federal, State, & Local Laws and noting his arrest in Cincinnati, Ohio on December 21, 2009 and failure to notify his agent of this arrest, leaving the state without permission of his supervising agent and noting that he was in the state of Ohio on December 21, 2009, failing to pay his court ordered surcharge. He had an arrearage of $40 with a

balance of $1236, and failing to follow the advice & instructions of his agent, who instructed him to report to the Sumter County Probation office upon his release from prison in Florida.

On February 26, 2010, the FBI informed the Sumter County Probation Office that the Appellant had been arrested on January 25, 2010 in Cincinnati, Ohio. On September 26, 2014, the Department received notice from the Ohio Department of Corrections that the Appellant was to be released on October 18, 2014. On May 22, 2018, the Department received notice from the police department in Dayton, Ohio that they would hold him in custody until he was extradited back to South Carolina.

On July 20, 2018, a probation revocation hearing was held in Sumter County's Court of General Sessions before the Honorable George M. McFaddin. After admitting that the Appellant was in fact on probation, the Appellant advised that he simply didn't know he had to report after being released from Florida. Judge McFaddin noted that when the Appellant signed the Standard Conditions of Probation Form in April of 1999 it stated that he shall report to his agent as a condition. The Appellant advised that because of the passage of time and events that happened since 1999 that he wasn't aware of his obligation to report. Afterwards, Judge McFaddin revoked the Appellant in full after finding that there had been no substantial compliance, but rather there was clear disregard of his obligations and requirements under probation.

On August 7, 2018, the Appellant filed and served a Notice of Appeal. This appeal follows.

ARGUMENT

1. The trial court did not abuse its discretion or jurisdiction when it imposed its sentence at a probation revocation hearing.

The Appellant argues that the judge's decision to revoke his probation in full did not meet sufficient legal or evidentiary basis. However, the judge's ruling was vested with discretion based upon the range of appropriate decisions made in similar cases. In the case at hand, the

Appellant received a suspended sentence. This sentence was under the discretion of the judge who handled the revocation pursuant to Section 24-21-460 of the SC Code of Laws as stated below.

> Upon such arrest the court, or the court within the venue of which the violation occurs, shall cause the defendant to be brought before it and *may revoke the probation* *<u>or</u>* *suspension of sentence and shall proceed to deal with the case as if there had been no probation or suspension of sentence except that the circuit judge before whom such defendant may be so brought shall have the right, in his discretion, to require the defendant to serve* *<u>all</u>* *or a portion only of the sentence imposed. Id.* (Emphasis added.)

Thus, the statute clearly gives the Court the right to revoke the sentence as if no suspension or probation of the sentence existed while giving the judge discretion to require the Appellant to serve all or a portion of the sentence imposed.

To that end, it's important to revisit the multiple charges that the Appellant pled guilty to at his initial sentencing. A single charge of attempted armed robbery results in a defendant being mandatorily sentenced to prison for twenty years. See §16-11-330(B). A single charge of Weapons/Possession of a weapon during a violent crime results in a defendant being mandatorily sentenced to prison for five years. See §16-23-490(A). A single charge of larceny/breaking into motor vehicles or tanks, pumps and other containers where fuel or lubricants are stored can result in a defendant being sentenced to prison for up to five years. See §16-13-160(B). A single charge of Possession by, certain persons unlawful; stolen pistol can result in a defendant being sentenced to prison for up to five years. See §16-23-50(A)(1).

In this matter, it is clear that Judge Dennis considered these statutory factors at the time of the Appellant's initial sentencing. These factors were then again considered by Judge McFaddin at his probation revocation hearing along with the evidentiary factors involved with the facts that

resulted from his absconding supervision, which included being sentenced with new additional charges that indicated repeated offenses in both Florida and Ohio.

2. The trial court did not err by revoking appellant's probation for repeatedly violating the law and blatant noncompliance with his probation conditions from the time of his initial probationary sentence in which he was notified of the requirements of his sentence upon submitting his guilty plea.

Despite these facts, the Appellant insists that he never received a letter from the Department telling him where and when he was to report. He claims this is true even though he clearly knew the address to the Sumter County Probation Office as he had written a letter there inquiring about what would happen if he returned to South Carolina. It should be noted that his letter to the Department was also not sent certified nor was the initial letter of response that the AIC sent back to him in response. Thus, it's impossible for the Appellant to truthfully claim that he never received correspondence from the Department in this manner.

Regardless of whether or not the initial order stated that he was to report to probation or complete it, the conditions of probation are further mandated in SC Code §24-21-430, which grants the Department the authority to impose conditions of probation. Subsection (13) specifically states that probationers should follow their probation agent's instructions. As part of the Department's statutory authority, the Standard Conditions of Probation Form is used to further elaborate upon what the probationary conditions are and every probationer including the Appellant is required to sign the form at the beginning of their supervision.

The facts of the Appellant's case are clearly distinguishable from State v. Brown, 349 S.C. 4114, 563 S.E.2d 339 (Ct. App. 2002) in the sense that the probationer stated that ambiguity existed on the face of the probation order in that case regarding a condition to "obtain treatment for his problem". In *this* case, the Appellant never met any of the conditions specifically stated in §24-21-430, on his order, nor as instructed by his probation agent. The original sentence

issued by Judge Dennis was clear and needed no clarification unlike the cases of Brown and State v. Woveris, 138 N.H. 33, 635 A.2d 454 (1993). Also, the Defendant Brown had complied with *all other aspects* of his probationary sentence, which further distinguishes the Appellant from him and Woveris in the case at hand.

In Woveris, the court noted that the Defendant was hard-pressed to argue that he was not on notice of his probationary requirements, particularly given that he had violated the same condition in a prior revocation hearing. Id. In the case at hand, the Appellant not only was placed on notice at the time of his initial sentencing about his requirement to report to his agent but he was reminded of it *again* when he went through a revocation of his CSP for failing to report to his agent among other violations as ordered by Judge Thomas on March 17, 2005.

In addition, the court in Woveris further determined that the Defendant had been given notice of his condition by his probation officer, who discussed it with him at the commencement of his probation. The Appellant in this case was consistently and continuously apprised of his need to report to his agent from the time of his initial sentencing, two CSP revocations, *and two letters* of correspondence that the Department sent to him while he was incarcerated in Florida.

The Appellant "has failed to show that the evidence, viewed in the light most favorable to the State, fails to support the court's decision" to revoke his probation as noted in State v. Kochvi, 140 N.H.662, 664, 671 A.2d. 115, 117 (1996). Thus, his arguments must fail. As stated earlier, the Appellant was well aware of the fact that he had a SC probation sentence to serve once he was released from prison in Florida given the fact that he initiated correspondence with the Department to find out what would happen when he returned to South Carolina. As noted in Kochvi, "the fair warning doctrine does not provide a safe harbor for probationers who choose to ignore the obvious." Id. at 667, 119.

The Appellant's reliance upon the State v. Archie, 322 S.C. 135, 470 S.E.2d 380 (Ct. App. 1996) is also misplaced. In the Archie decision, a situation occurred where the Administrative Hearing Officer imposed additional probationary conditions at a probation revocation hearing based upon Archie's failure to report violation. The distinctive point is that the Archie court noted that the Hearing Officer's *addition of conditions was a function of the executive branch* but did *not* challenge the underlying failure to report violation as an unconstitutional exercise of judicial power. In the Appellant's case, his Hearing Officer never added any additional conditions, but recommended a revocation of his CSP. Thus, the Appellant's apparent analogy that the department's standard condition of requiring offenders to report to their supervising agent is an executive or judicial function does *not* apply.

Despite the Appellant's argument about being entitled to 'due process notice' as an outgrowth of protections provided under the Fifth and Fourteenth Amendments as noted in State v. Brannon, 407 S.C. 293, 755 S.E.2d 117 (Ct. App. 2014) and Turner v. State, 384 S.C. 451, 682 S.E.2d 792 (2009), it is important to note that these cases solely discuss a probationer's *right to counsel* under the Fifth and Fourteenth Amendments. For further clarity, the court in Turner stated, "In our view, a probationer should *not* be afforded additional protections in a probation revocation hearing, a proceeding that is not a stage of criminal prosecution and that occurs after sentencing, which are not constitutionally mandated in a guilty plea hearing." Id. at 457. Thus, the Appellant in the case at hand should not be allowed to misuse the due process clauses of the Constitution to vacate a probationary sentence that was administered based upon the evidence and the law.

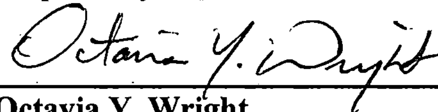
Additionally, the court in State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (1999) made it clear that a circuit court was not required to find that the defendant's violation of probation was

willful. Under the guise of the argument of not receiving notice, the Appellant appears to be making this same argument in the sense that he wants this Court to believe that the reason he didn't report was not his fault. Even assuming *arguendo* that this were true, the Hamilton decision has clarified that willfulness does not have to be proven for a revocation to occur. Id. In this case, there was a wealth of evidence that proved that the Appellant violated the conditions of his probation repeatedly beyond just failing to report as stated herein.

CONCLUSION

The trial court was well within its authority to revoke the appellant's probation in full at a revocation hearing based upon its statutory authority. Furthermore, the Appellant failed to meet his burden to show evidence to overturn the trial court's decision. The revocation judge was not required to find that the Appellant's multiple probation violations were willful. The Appellant was in fact given fair notice of the ramifications of his sentence from the time it was issued up until he was revoked in full and his revocation should be upheld as such pursuant to the relevant and applicable case laws as discussed herein. Therefore, this Court should affirm the trial court's Order of Revocation accordingly.

Respectfully submitted,



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Attorney for the Respondent

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July 1, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
The Honorable George M. McFaddin, Circuit Court Judge

Appellate Case No. 2018-001415

THE STATE,..RESPONDENT

v.

MIKEL TERRELL FRANCIS,..APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within *Initial Brief and Designation of matter* on Appellant this 1st day of July, 2019, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

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Robert Dudek, Appellate Defender
S.C. Commission on Indigent Defense
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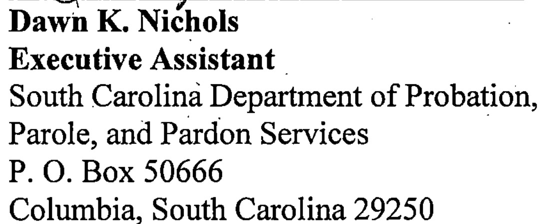
I further certify that all parties required by Rule to be served have been served.



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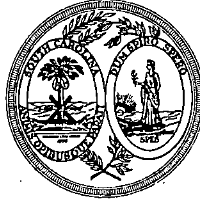

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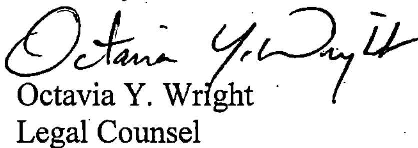
The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

Re: <u>State v. Mikel Francis</u>

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Respondent and Designation of Matter dated July 1, 2019, along with proof of service in the above referenced case.

Sincerely,



Octavia Y. Wright
Legal Counsel

OYW:dn

Enclosures

cc: Robert Dudek, Esquire

State of South Carolina

Department of Probation, Parole and Pardon Services

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RE: State v. Mikel Francis

Dear Mr. Dudek:

Please find enclosed copies of the matter we designated for inclusion in the Record on Appeal.

Sincerely,

Octavia Y. Wright
Legal Counsel

OYW:dn

cc: The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals

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