

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

RECEIVED

AUG 27 2019

SC Court of Appeals

RESPONDENT,

THE STATE,

V.

JAMES MICHAEL BROOKS,

APPELLANT

APPELLATE CASE NO 2018-002075

ANDERS BRIEF OF APPELLANT

VICTOR R SEEGER
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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STATEMENT OF ISSUE ON APPEAL

Whether the probation revocation court erred when it denied Appellant's motion to reconsider the full revocation of his probation, without a hearing, where mitigating evidence was presented to the probation revocation court that it failed to consider?

STATEMENT OF THE CASE

During the May term, the Berkeley County Grand Jury indicted Appellant for Petit Larceny (Enhancement). R.8.

On November 16, 2016, Appellant pled guilty to petit larceny. R.10. The petit larceny charge was enhanced under S.C. Code Ann. 16-01-57. Id. Appellant was sentenced to five years' imprisonment, but that sentence was suspended upon five years' probation. Id. On July 10, 2018, Appellant was arrested for domestic violence in 2nd the degree and breach of trust. R.11.

On September 10, 2018, a probation revocation hearing was held before the honorable J.C. Buddy Nicholson, Jr. R. 1. Stephen Michael Bowden represented Appellant. Id.

Judge Nicholson revoked Appellant's probation in full and sentenced Appellant to serve fifty-eight months' imprisonment. R. 5, ll. 21 – 24. Defense counsel Bowden filed a motion to reconsider the sentence on the same day. R. 13.

On November 8, 2018, Judge Nicholson Jr. denied Appellant's motion to consider without a hearing. R.14.

This appeal follows.

STANDARD OF REVIEW

The determination of whether to revoke probation in whole or part rests within the sound discretion of the trial court. State v. Miller, 122 S.C. 468, 474-75, 115 S.E. 742, 745 (1923); State v. Proctor, 345 S.C. 299, 301, 546 S.E.2d 673, 674 (Ct.App.2001); S.C.Code Ann. § 24-21-460 (1989). 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.

ARGUMENT

The probation revocation court erred when it denied Appellant's motion to reconsider the full revocation of his probation, without a hearing, where mitigating evidence was presented to the probation revocation court that it failed to consider.

Relevant Facts

Appellant allegedly violated the conditions of his probation. R. 2, ll. 2 – 23. Appellant had been arrested for domestic violence with his “live-in – common-wife, girlfriend.” Id. Appellant had also been charged with breach of trust. Id. Lastly, Appellant failed to report for probation. R. 2, l. 24 – 3, l. 18.

Defense counsel Bowden explained that Appellant's failure to report was due to his occupation as a crab fisherman. Id. Appellant's work schedule was such that he had to choose between earning a living and reporting to his probation officer. Id. Moreover, defense counsel informed the court that SCDC diagnosed Appellant with anxiety and bipolar disorder. R. 3, l. 24 – 4, l. 4.

The court was not concerned with Appellant's failure to report. R. 4, l. 25 – 5, l. 3. The court was more concerned with Appellant's domestic violence arrest. R. 5, ll. 4 – 11.

Defense counsel requested that the court only partially revoke Appellant's probation because his pending charges were, “still there to deal with.” R. 5, ll. 13 – 20. However, the court revoked Appellant's probation in full. R. 5, ll. 21 – 24.

Defense counsel filed a motion to reconsider the full revocation of Appellant's probation because it was “unnecessarily severe under the circumstances.” R.12. Without explaining his reasoning, Judge Nicholson denied that motion. R.14.

Discussion

The trial court abused its discretion by revoking Appellant's probation in full without considering the mitigating evidence presented at the probation revocation hearing.

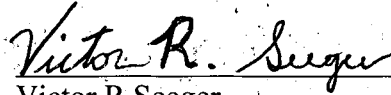
The "[circuit] court may impose by order duly entered and may at any time modify the conditions of probation." S.C. Code Ann. § 24-21-430 (1976); State v. Allen, 370 S.C. 88, 96, 634 S.E.2d 653, 656 – 57 (2006). The authority of the circuit court to revoke probation "may not be capriciously or arbitrarily exercised," but should be based upon "an evidentiary showing of fact tending to establish violation of the conditions." State v. Williamson, 356 S.C. 507, 510, 589 S.E.2d 787, 788 (2003) (citing State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (1999)).

Here, the court abused its discretion by revoking Appellant's probation in full because there was mitigating evidence presented at the probation revocation hearing that was not considered. Defense counsel argued for only partial revocation. R. 5, ll. 13 – 20. Appellant presented evidence that he suffered from mental illness, SCDC diagnosed him with anxiety and bipolar disorder. R. 3, l. 24 – 4, l. 23. Appellant explained that he did not willfully fail to report to his probation officer, but that his work schedule prevented him from reporting. Id.

Therefore, the lower court abused its discretion when it revoked Appellant's probation in full because the court did not consider the mitigation evidence Appellant presented and revoking Appellant's probation in full was "unnecessarily severe" in light of that mitigation evidence.

CONCLUSION

By reason of the foregoing argument, Appellant respectfully requests that this Court vacate his probationary sentence and remand his case to the Berkeley County Court of General Sessions for resentencing.



Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of August, 2019.

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Appeal from Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

THE STATE,

RESPONDENT,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Michael Brooks states:

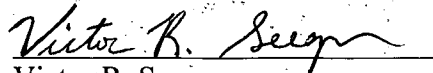
(1) He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.

(2) He has reviewed the record of Appellant's trial before Judge J. C. Buddy Nicholson, which was held on September 10, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

(3) Pursuant to Anders v. California, 386 U.S. 738 (1967), he has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for James Michael Brooks.

Respectfully Submitted,


Victor R. Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

This 27th day of August, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Honorable J. C. Buddy Nicholson, Circuit Court Judge

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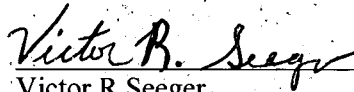
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Probation violation hearing transcript dated Sept. 10, 2018;
- (2) True-billed indictment;
- (3) Sentence sheet;
- (4) Arrest warrant;
- (5) Motion to Reconsider Sentence;
- (6) Order Denying Defendant's Motion to Reconsider Sentence.

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

August 27, 2019.



Victor R Seeger

Appellate Defender

South Carolina Commission on Indigent Defense

Division of Appellate Defense

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Columbia, SC 29211-1589

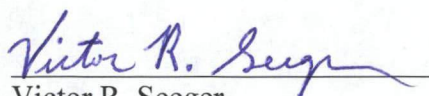
(803) 734-1330

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."

August 27, 2019.



Victor R. Seeger
Appellate Defender

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Division of Appellate Defense
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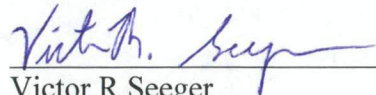
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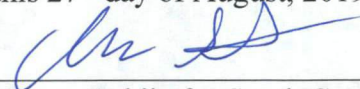
CERTIFICATE OF SERVICE

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 C. Buchanan, Esquire, at South Carolina Department of Probation, Parole and Pardon Services, 2221 Devine Street, Suite 600, Columbia, SC 29250; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on James Michael Brooks, #289106, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 27th day of August, 2019.



Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of August, 2019.



(L.S)
Notary Public for South Carolina
My Commission Expires: October 26, 2019