

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

Appeal from York County

Honorable Daniel D. Hall, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARLTON DENNIS SAUNDERS,

APPELLANT

APPELLATE CASE NO 2018-000176

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
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ATTORNEY FOR APPELLANT

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JUN 29 2018
SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred and abused its discretion in revoking a disproportionate amount of appellant's probation as compared to the time served sentence it imposed on appellant for violating a permanent restraining order?

STATEMENT OF THE CASE

On May 18, 2017, appellant appeared before the Honorable Brian M. Gibbons in York County and pled guilty to domestic violence first degree. He was sentenced to six (6) years suspended upon service of one (1) year with domestic violence probation for three (3) years. A permanent restraining order was also issued. Ivey N. Blair, Esq. was plea counsel.

On September 22, 2017, appellant was served with a probation violation arrest warrant. A probation revocation was heard on January 26, 2018, before the Honorable Daniel Hall. Appellant was present and was represented by Jeffrey Zuschkey, Esq. Ivey Blaire, Esq. was the assistant solicitor. Amber Boyle was the probation agent. At the hearing assistant solicitor Blair explained that appellant was going to enter into a plea for violating a permanent restraining order and for violation of his probation. (R. p. 4, line 3-7). The court sentenced appellant to time served on the permanent restraining order. It revoked all of appellant's probation. (R. p. 15, lines 20-23).

This appeal follows.

STANDARD OF REVIEW

Probation revocation

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 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. 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).

State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655-56 (2006)

ARGUMENT

The court erred and abused its discretion in revoking a disproportionate amount of appellant's probation as compared to the time served sentence it imposed on appellant for violating a permanent restraining order.

In 1972 the United States Supreme Court handed down the opinion of Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593 setting forth minimal due process requirements for the revocation of parole. The Court noted that "revocation deprives an individual... of the conditional liberty properly dependent on observance of special parole restrictions." 408 U.S. at 480, 92 S. Ct. at 2600. The Court went on to write that there must be an orderly process before a liberty protection is terminated. 408 U.S. at 482, 92 S. Ct. at 2601. First, the Court dealt with the parolee's arrest and the need for a preliminary hearing. The Court stated:

Due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Cf. Hyser v. Reed, 115 U.S. App. D.C. 254, 318 F.2d 225 (1963). Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions. Cf. Goldberg v. Kelly, 397 U.S., at 267-271, 90 S. Ct. at 1020-1022, 25 L.Ed2d 287.

408 U.S. at 484, 92 S. Ct. at 2602

With respect to the preliminary hearing before this officer, the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer.

408 U.S. at 486-487, 92 S. Ct. at 2603.

With respect to the revocation hearing the Court wrote:

We cannot write a code of procedure; that is the responsibility of each State. Most States have done so by legislation, others by judicial decision usually on due process grounds. Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

408 U.S. at 488 – 489, 92 S.Ct. at 2604.

In Gagnon v. Scarpelli, 411, U.S. 778, 93 S. Ct. 1756 (1973) the Court made the same procedures set out in Morrissey applicable to probation revocations. A short time later the Court held that due process is violated when the state revokes probation with no evidence that probation was violated. Douglas v. Burden, 412 U.S. 430, 93 S. Ct. 2199 (1973).

In this case appellant was given a sentence of six (6) years suspended upon service of one (1) year with domestic violence probation for three (3) years. A permanent restraining order was also imposed. At the probation revocation hearing, the court sentenced appellant to time served on the restraining ^{order}. But it revoked all of appellant's probation. This clearly was an abuse of discretion to give such disproportionate sentencing.

CONCLUSION

The decision to revoke all of appellant's probation should be reversed.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of June, 2018.

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Honorable Daniel D. Hall, Circuit Court Judge

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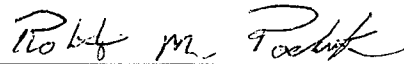
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Carlton Dennis Saunders states:

1. He is 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 Daniel D. Hall, which was held on January 26, 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 Carlton Dennis Saunders.

Respectfully Submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR APPELLANT

This 29th day of June, 2018.

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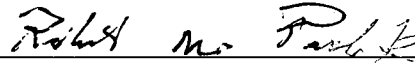
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s):
- (2) May 18, 2018, Guilty Plea Transcript
- (3) January 26, 2018, Probation Revocation Transcript
- (4) Indictment for Domestic Violence
- (5) Indictment for Violation of Permanent Restraining Order
- (6) Probation Violation Arrest Warrant

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

June 29, 2018


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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."

June 29, 2018.


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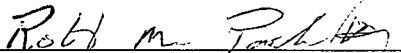
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CARLTON DENNIS SAUNDERS,

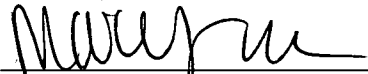
APPELLANT

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 Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Carlton Dennis Saunders, 229437, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 29th day of June, 2018.


Robert M. Pachak
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of June, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.