

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Barnwell County

Honorable William P. Keesley, Circuit Court Judge

RECEIVED
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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

BARRINGTON WAYNE GRANT,

APPELLANT

APPELLATE CASE NO. 2018-000134

ANDERS BRIEF OF APPELLANT

VICTOR R. SEEGER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the lower court abused its discretion by revoking fifteen years of Appellant's probationary sentence following his Alford¹ plea to a firearms offense where he denied ownership of the weapons but feared a conviction by a jury, and where Appellant had a history of substantial compliance with the terms of his probation despite his drug addiction?

¹ North Carolina v. Alford, 400 U.S. 25 (1970)

STATEMENT OF THE CASE

During the January 2018 term, the Barnwell County Grand Jury indicted Appellant for two counts of possession of a firearm by a convicted felon and possession of a stolen pistol. R. 29 – 34.

On January 16, 2018 Appellant pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) before the Honorable William P. Keesley. R. 1. Wallis Alves represented Appellant. Id. David Miller represented the state. Id.

Judge Keesley found Appellant's guilty plea was a free, knowing, voluntary, and intelligent decision. R. 15, ll. 14 – 19. Appellant was sentenced to five years' imprisonment on each charge. R. 26, ll. 7 – 19.

Appellant had been previously convicted of assault and battery of a high and aggravated nature and was on probation at the time of the incident. R. 5, l. 14 – 6, l. 1. Judge Keesley also found that Appellant violated the terms and conditions by failing to refrain from violations of federal, state or local law. R. 26, l. 20 – 27, l. 3. Judge Keesley revoked fifteen years of Appellant's probation to run concurrent to his present charges. R. 27, ll. 4 – 5.

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. 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. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006). In reviewing a trial court's decision to terminate probation, the question is simply whether there has been an abuse of discretion and this question is to be determined in accordance with familiar principles governing the exercise of judicial discretion. "That exercise implies conscientious judgment, not arbitrary action... It takes account of the law and the particular circumstances of the case and is 'directed by the reason and conscience of the judge to a just result.... 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.'" State v. White, 218 S.C. 130, 61 S.E.2d 754, 756 (1950).

ARGUMENT

The lower court abused its discretion by revoking fifteen years of Appellant's probationary sentence following his Alford plea to a firearms offense where he denied ownership of the weapons but feared a conviction by a jury, and where Appellant had a history of substantial compliance with the terms of his probation despite his drug addiction.

Relevant Facts

The state alleges the facts as follows. On June 8, 2017, law enforcement went to Appellant's home. R. 10, l. 21 – 11, l. 3. The officers thought they smelled marijuana coming from the window unit air condition at Appellant's home. R. 11, ll. 3 – 8. The officers then looked in trash cans outside and saw "items" that "they thought consistent with the distribution of marijuana and narcotics." R. 11, ll. 9 – 12.

The officers obtained a search warrant and searched Appellant's home. R. 11, ll. 14 – 15. The officers allegedly found two hand guns in Appellant's possession, one of which had been reported stolen. R. 11, ll. 14 – 18. At the time of the incident, Appellant on probation from an assault and battery of a high and aggravated nature arrest. R. 11, ll. 22 – 25. The state alleged that possession of the aforementioned hand guns violated the probationary sentence. R. 11, ll. 22 – 25.

Judge Keesley found that Appellant made a free, knowing, voluntary decision to waive presentment and enter pleas of guilty under North Carolina v. Alford, 400 U.S. 25 (1970). R. 15, ll. 14 – 19.

During the sentencing phase, plea counsel spoke in mitigation. R. 17, l. 19 – 23, l. 4. Plea counsel stated appellant pled under Alford, because he still denied being in possession of the hand guns in question. R. 19, ll. 12 – 11. Veronica Hardy, a second person who lived in

Appellant's home, first stated that the guns were hers. R. 19, l. 12 – 22. However, after learning that the guns were stolen, claimed they belonged to Appellant instead. R. 19, l. 22 – 20, l. 3.

Due to the statement by Hardy, “[Appellant] is realistic and knows that a jury hearing all of those statements could go either way and that he could... get convicted of those charges... [Appellant] didn't want to take his chances and that is why he's pleading under... North Carolina versus Alford.” R. 20, ll. 5 – 11.

Plea counsel continued that Hardy admitted to the marijuana use that precipitated the search that produced the handguns. R. 20, l. 12 – 19. There was no evidence Appellant was smoking marijuana in the home. Id. The photographs taken by law enforcement of money inside the home came from a settlement check that Appellant received after being involved in a car accident earlier that year. R. 20, l. 24 – 21, l. 10.

Plea counsel explained the negotiated sentence to which Appellant and the state agreed to for his present charges. R. 22, ll. 10 – 24. Plea counsel then requested that if the judge decided to revoke Appellant's probationary sentence, to revoke five years to align that sentence with his negotiated sentence for the current charges. Id.

Appellant admitted to having a drug problem and that his problems with law enforcement stemmed from that. R. 24, ll. 11 – 15. Appellant had consistently reported to the probation office as required. R. 24, ll. 16 – 20. Appellant paid the fees required by his probationary sentence. R. 24, l. 21 – 25, l. 2.

The probation officer at the hearing wrongfully cited to the judge that Appellant had a prior violation for unlawfully possessing a firearm. R. 25, ll. 9 – 10. Plea counsel had to correct the record by explaining that Appellant was found not guilty of the prior gun charge on May 11, 2016, that the probation officer cited. R. 25, ll. 19 – 24.

Judge Keesley sentenced Appellant to five years' imprisonment for two counts of possession of a fire arm by a convicted felon and one count of possession of a stolen hand gun. Tr. 26, ll. 7 – 19.

Judge Keesley found that Appellant violated the terms and conditions of his probationary sentence and revoked fifteen years of Appellant's probation to run concurrent to his present charges. R. 26, l. 20 – 27, l. 5.

Discussion

The lower court abused its discretion by revoking fifteen years of Appellant's probationary sentence. Plea counsel asked the trial court to consider revoking five years of Appellant's probationary sentence so that this sentence would align with the negotiated sentence for the current charges. R. 22, ll. 10 – 24. The lower court denied plea counsel's request and revoked fifteen years of Appellant's probation. R. 26, l. 20 – 27, l. 5.

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)).

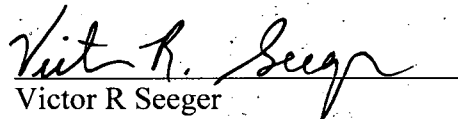
Here, Appellant had a history of substantial compliance with the terms of his probation. Appellant paid his probation fees on time. R. 24, l. 21 – 25, l. 2. Appellant reported to his probation officer on time as well. R. 24, ll. 16 – 20. Plea counsel explained that Appellant's drug problems were the cause of his problems with the law all of his life. R. 24, ll. 11 – 15.

Moreover, probation officer Graham misled the plea court by stating Appellant had violated the terms of his probation in the same manner as he was alleged to currently. R. 25, ll. 9 – 10. Plea counsel corrected that misrepresentation by explaining that Appellant went to trial on the prior possession of a firearm by a convicted felon charge *and was found not guilty*. R. 25, ll. 19 – 24.

Therefore, the lower court abused its discretion when it denied plea counsel's sentencing request and revoked fifteen years of Appellant's probationary sentence. Appellant's probation revocation sentence should be vacated and he should be granted a new probation revocation hearing to receive a proper sentence. Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986).

CONCLUSION

By reason of the foregoing arguments Appellant respectfully requests that the revocation of fifteen years of his probationary sentence be vacated and that his case be remanded to the circuit court for resentencing.


Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of February, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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BARRINGTON WAYNE GRANT,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Barrington Wayne Grant 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 William P. Keesley, which was held on January 16, 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 Barrington Wayne Grant.

Respectfully Submitted,



Victor R Seeger

Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of February, 2019.

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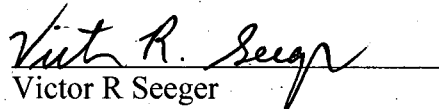
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictments;
- (2) Transcript of record dated January 16, 2018;
- (3) Sentence Sheets.

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

February 1, 2019


Victor R Seeger
Appellate Defender

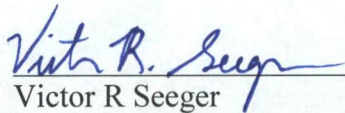
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ATTORNEY FOR APPELLANT

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."

February 1, 2019.



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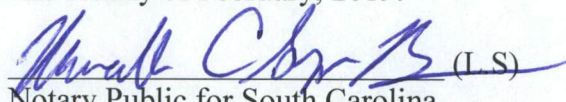
APPELLANT

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 Barrington Wayne Grant, 375088, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 1st day of February, 2019.


Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of February, 2019.

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