

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMMIE DWAYNE WILSON,

APPELLANT

APPELLATE CASE NO. 2018-000213

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by ordering a partial revocation of appellant's probation where the court was repeatedly informed appellant could not pay the \$1,375 in arrears and \$10.25 per day fee to wear an alcohol monitoring device, and where the judge refused to order those fees waived, since appellant was revoked for a monetary term that was beyond his financial ability to pay, and it therefore did not constitute a willful violation of probation?

STATEMENT OF THE CASE

Appellant was indicted at the February 2017 term of the Richland County Grand Jury for third offense driving under the influence. R. 53 – 54. Appellant pled guilty to that offense on June 5, 2017, before the Honorable Deandrea G. Benjamin. Judge Benjamin sentenced appellant to three years imprisonment, suspended upon the service of eighteen months and eighteen months' probation. R. 55.

A probation citation was issued on November 20, 2017. R. 56–57. A probation revocation hearing was held on January 5, 2018, before the Honorable Deandrea G. Benjamin. Richard Marsh, III, represented appellant. R. 1.

During the hearing, the judge ruled she was revoking ninety days of appellant's probation, but she also ruled appellant could be released from jail if he paid the fees necessary to have the previously ordered alcohol monitor placed on him, and he was signed up for substance abuse counseling. R. 14, l. 3 – 24, l. 15. Defense counsel asked the judge to waive the fees for the alcohol monitor since appellant was indigent and could not afford to pay the fees. The judge refused, noting that OMS was a private company, and "I'm not waiving their fees." R. 24, l. 16 – 26, l. 8.

A motion to reconsider hearing was held on January 29, 2018, before Judge Benjamin. Richard E. Marsh, III, again represented appellant. Emily Burn, also appeared on behalf of OMS. At the conclusion of the hearing, the judge ruled she would waive the \$193 installation fee for the monitor, but she again refused to waive the \$1,375 arrearage or the \$10.35 a day cost of the alcohol monitor despite repeated assertions of appellant's poverty, and his indigency status. R. 50, l. 7 – 51, l. 16.

This appeal follows.

STANDARD OF REVIEW

“The decision to revoke probation is addressed to the sound discretion of the trial court.” State v. Spare, 374 S.C. 264, 268, 647 S.E.2d 706, 708 (Ct. App. 2007) *citing* State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006). The appellate court’s “authority to review such a decision 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.” Id. (quoting State v. Hamilton, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct. App. 1999)).

Our appellate courts have continued to maintain that “probation may not be revoked solely for failure to make required payments of fines or restitution without the circuit judge first determining on the record that the probationer has failed to make a bona fide effort to pay.” Hamilton, 333 S.C. 642, 649, 511 S.E.2d 94, 97 (Ct. App. 1999) (discussing Bearden v. Georgia, 461 U.S. 660 (1983)); Nichols v. State, 308 S.C. 334, 337, 417 S.E.2d 860, 861 (1992); Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986). “Therefore, in those cases involving the failure to pay fines or restitution, the circuit judge must, in addition to finding sufficient factual evidence of the violation, make an additional finding of willfulness.” Hamilton, 333 S.C. at 649, 511 S.E.2d at 97.

“Willful failure to pay means a voluntary, conscious and intentional failure.” People v. Davis, 216 Ill.App.3d 884, 159 Ill.Dec. 841, 576 N.E.2d 510, 513 (1991); *see* State v. Sowell, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006) (“A willful act is defined as one ‘done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.’ ” (quoting Spartanburg County Dep’t of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988))). “The trial court may infer that the

failure to pay is intentional where a probationer has the ability to pay a fee, but does not do so.” Joseph v. State, 3 S.W.3d 627, 641 (Tex.App.1999) (citations omitted); State v. Spare, 374 S.C. 264, 268–69, 647 S.E.2d 706, 708–09 (Ct. App. 2007)

ARGUMENT

The court erred by ordering a partial revocation of appellant's probation where the court was repeatedly informed appellant could not pay the \$1,375 in arrears and \$10.25 per day fee to wear an alcohol monitoring device, and where the judge refused to order those fees waived, since appellant was revoked for a monetary term that was beyond his financial ability to pay, and it therefore did not constitute a willful violation of probation.

Relevant Facts

Defense counsel Marsh told the judge that before appellant was initially incarcerated he already had an arrearage of \$1,234 on his alcohol monitor. He had to pay that arrearage and the weekly fee to be in the good graces of the private alcohol monitoring corporation, OMS (Offender Management Services). R. 6, l. 3 – 7, l. 13.

The judge focused solely on the alcohol monitoring problem and getting appellant into substance abuse counseling at the revocation hearings. The other allegations were not an issue. Defense counsel repeatedly argued that appellant simply did not have the money to pay for the alcohol monitoring fees, and that he should not be revoked where he did not have the resources to the monitor. R. 11, l. 19 – 12, l. 21; R. 22, ll. 6-20.

The judge told defense counsel she was not waiving the monitoring fees, and that appellant had to pay the private corporation, OMS. "I'm not going to tell OMS that they have to monitor him and he not pay them." R. 25, ll. 5-17.

The discussion of the money necessary for the alcohol monitoring device continued at the second, January 29, 2018 hearing. R. 31, l. 8 – 33, l. 4. Again, defense counsel cited Bearden v. Georgia¹ and other case law for the proposition that appellant's probation could not be revoked

¹ Bearden v. Georgia, 461 U.S. 660, 672 (1983)

for a financial condition where appellant's inability to pay was caused by circumstances beyond his control, and his violation was therefore not willful. Here, the violation occurred because of the very high fees the private corporation, OMS, charged for the alcohol monitoring device, and the judge refused to waive those fees in the manner she would if the government was doing the monitoring.

Defense counsel made clear that the defense did not object to the requirement that appellant wear an alcohol monitoring device. However, the defense did object to the judge's refusal to order those fees waived if it was going to result in appellant's probation being revoked, and him being incarcerated simply because he could not afford the exorbitant fees OMS charged. R. 32, l. 10 – 41, l. 9.

Emily Burn, of OMS, told the judge appellant owed \$1,037.75 in back fees, and that there was the monthly fee he also had to pay. The judge repeated that she was not waiving the fees to OMS despite defense counsel's repeated assertions that appellant was living in poverty, and unable to afford those fees. R. 41, l. 14 – 51, l. 16.

Discussion

Defense counsel correctly cited Bearden v. Georgia, 461 U.S. 660, 672 (1983) for the principle that a probationer should not be incarcerated where he was attempting to make a bona fide effort to pay but he did not have the resources to do so. Most respectfully, here, the interests of a private corporation, OMS, with a government contract should not have taken precedence over the constitutional principle announced by the United States Supreme Court in Bearden v. Georgia. See, also, Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986).

In State v. Spare, 374 S.C. 264, 674 S.E.2d 706 (Ct. App. 2007), this Court vacated the revocation of Spare's probation where he was \$4,921 in arrears on his restitution, and he simply

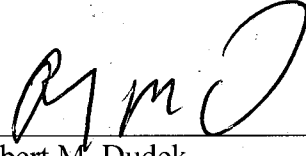
could not afford the \$753-a-month installments he had been ordered to pay. Spare worked for the Cracker Barrel, forty-four hours each week. His paychecks were being garnished by the IRS for back taxes, and he also had to make payments to PPP.

The Supreme Court reiterated that a “willful failure to pay means a voluntary, conscious and intentional failure.” State v. Spare, 374 S.C. 264, 269, 647 S.E.2d 706, 708-09 (2007) *citing* People v. Davis, 216 Ill. App. 3d 884, 576 N.E.2d 510, 513 (1991); State v. Sowell, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006). Here, if PPP did the alcohol monitoring itself the court’s words lead to the conclusion that the fees would have been waived. However, because OMS was a private company the fees were not similarly waived.

As in State v. Spare, this Court should vacate the partial revocation of appellant’s probation and remand this case for a new probation revocation hearing where the court properly considers appellant’s ability to pay OMS for his alcohol monitoring. If the court determines appellant cannot pay the OMS arrearages, and future monthly fees, the lower court should consider all available alternatives to incarceration before revoking appellant’s probation. See Bearden v. Georgia, 461 U.S. 660, 672 (1983).

CONCLUSION

By reason of the foregoing argument, the revocation of appellant's probation should be vacated, and this matter remanded to the Richland County Court of General Sessions for a new probation revocation hearing.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of December, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMMIE DWAYNE WILSON,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jammie Dwayne Wilson states:

1. He is Chief 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 probation revocation hearings before Judge DeAndrea G. Benjamin, which were heard on January 5, 2018, and January 29, 2018; and, in his opinion, the appeal is without legal merit sufficient to warrant a new revocation hearing.
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.

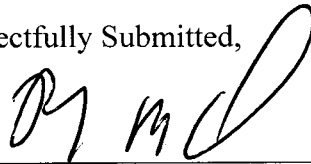
WHEREFORE, He asks the Court to relieve him as counsel for Jammie Dwayne Wilson.

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Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 7th day of December, 2018.

STATE OF SOUTH CAROLINA
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Honorable DeAndrea G. Benjamin, Circuit Court Judge

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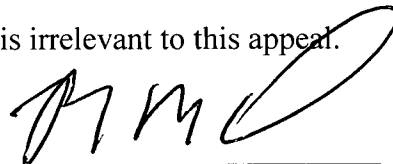
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment;
- (2) Sentencing Sheet;
- (3) Probation Citation;
- (4) Probation Revocation Hearing (January 5, 2018);
- (5) Probation Revocation Hearing (January 29, 2018).

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

December 7, 2018



Robert M. Dudek
Chief Appellate Defender

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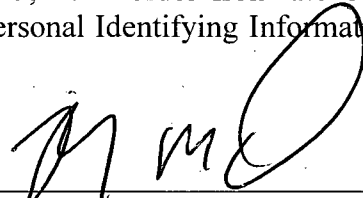
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CERTIFICATE OF COUNSEL

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."

December 7, 2018.



Robert M. Dudek
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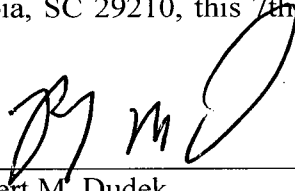
V.

JAMMIE DWAYNE WILSON,

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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 Buchanan, Esquire, at SCPPPS, P.O. Box 50666, Columbia, SC 29250, by placing a copy in U.S. Mail; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Jammie Dwayne Wilson, at 240 Jamil Road, Apt. 13, Columbia, SC 29210, this 7th day of December, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of December, 2018.

Carthene Powers (L.S)

Notary Public for South Carolina
My Commission Expires: May 2, 2027.

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