

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Florence County

Honorable Thomas A. Russo, Circuit Court Judge

RECEIVED

JAN 02 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

NIKKI GIOVANNI ECHOLS,

APPELLANT

APPELLATE CASE NO 2019-000561

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

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT

The probation revocation court abused its discretion when it
revoked Appellant’s probation in full where Appellant’s failure to
pay restitution was not willful because she and the complaining
witness agreed to waive Appellant’s restitution and Appellant
believed that agreement concluded her obligation to pay
restitution.4

Relevant Facts.....4

Discussion.....4

CONCLUSION.....8

PETITION TO BE RELIEVED AS COUNSEL9

TABLE OF AUTHORITIES

Cases

Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987) 3

People v. Davis, 216 Ill.App.3d 884, 159 Ill.Dec. 841, 576 N.E.2d 510 (1991).....5

S.E.C. v. TheStreet.Com, 273 F.3d 222, 229 n. 6 (2d Cir.2001)..... 3

State v. Allen, 370 S.C. 88, 96, 634 S.E.2d 653, 656 – 57 (2006)..... 3, 5

State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (Ct.App.1999)..... 3

State v. King, 221 S.C. 68, 73, 69 S.E.2d 123, 125 (1952) 3

State v. Miller, 122 S.C. 468, 115 S.E. 742 (1923) 3

State v. Proctor, 345 S.C. 299, 546 S.E.2d 673 (Ct.App.2001)..... 3

State v. Sowell, 370 S.C. 330, 635 S.E.2d 81 (2006)..... 5, 7

State v. Spare, 374 S.C. 264, 647 S.E.2d 706 (Ct. App. 2007)5, 6

State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950)..... 3

State v. Williamson, 356 S.C. 507, 510, 589 S.E.2d 787, 788 (Ct. App. 2003)..... 5

Statutes

S.C. Code Ann. § 24-21-430 (1976)..... 5

S.C.Code Ann. § 24-21-460 (1989)..... 3

STATEMENT OF ISSUE ON APPEAL

Whether the probation revocation court abused its discretion when it revoked Appellant's probation in full where Appellant's failure to pay restitution was not willful because she and the complaining witness agreed to waive Appellant's restitution and Appellant believed that agreement concluded her obligation to pay restitution?

STATEMENT OF THE CASE

During the July 2013 term the Florence County Grand Jury indicted Appellant for financial transaction card theft and five counts financial transaction card fraud. R. 23 – 25.

On September 9, 2014, Appellant pled guilty as indicted before the Honorable Deadra Jefferson. R. 4, ll. 5 – 20. Appellant was sentenced to one-year imprisonment, suspended on time served and five years' probation. Id. Appellant was also ordered to pay restitution of \$2,705. R. 10, ll. 9 – 18.

On March 20, 2015, Appellant's probation revocation hearing proceeded before the Honorable D. Craig Brown. R. 1. William Grove represented Appellant. Id. Judge Brown revoked sixty days of Appellant's probationary sentence but continued her on probation. R. 10, ll. 19 – 22.

A second probation revocation hearing was held on March 22, 2019 before the Honorable Thomas A. Russo. R. 13. Daniel Jordan represented Appellant. Id. Judge Russo revoked Appellant's probation in full for failure to pay restitution even though Appellant and the complaining witness agreeing to waive Appellant's obligation to pay restitution, and Appellant did not willfully fail to pay. R. 16, l. 17 – 18, l. 25; R. 20, ll. 11 – 23.

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. 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 probation revocation court abused its discretion when it revoked Appellant's probation in full where Appellant's failure to pay restitution was not willful because she and the complaining witness agreed to waive Appellant's restitution and Appellant believed that agreement concluded her obligation to pay restitution.

Relevant Facts

Between August 17 and 31 2012, Appellant allegedly obtained and used the "financial transaction card" of Dorothea Dockery, the complaining witness. R. 23 – 25. Appellant was sentenced to one-year imprisonment, suspended on time served and five years' probation. R. 10, ll. 9 – 18. Appellant was also ordered to pay restitution of \$2,705. Id.

In the following months, Appellant allegedly failed to pay restitution and failed to report to her probation officer. R. 5, ll. 11 – 14. Judge Brown revoked sixty days of her probation, but ordered that she continue to serve her probationary sentence when her sixty day term of imprisonment concluded. R. 10, ll. 19 – 22.

During the next two years, Appellant and Dockery came to an agreement that Appellant did not need to pay restitution. R. 16, ll. 17 – 18, l. 25. Dockery told Appellant that she "wasn't coming to court anymore." Id. As a result of that agreement and of Dockery's unwillingness to be involved with the court, Appellant was under the impression her obligation to pay restitution was extinguished and that "everything was over." Id. Appellant did not know that her agreement with Dockery did not end her duty to pay the restitution ordered.

Discussion

The trial court abused its discretion by revoking Appellant's probation in full because Appellant did not *willfully* fail to pay restitution to Dockery. R. 20, ll. 15 – 23. Appellant and

Dockery agreed that Appellant did not have to pay Dockery restitution. R. 16, ll. 17 – 18, l. 25. Appellant believed that this agreement was sufficient to end her obligation to repay Dockery. Id. Dockery expressed to Appellant that she did not want to go to court to inform the court of their agreement. Id. At that point Appellant simply thought the matter was concluded. Id. Had Appellant known that she was still obligated to pay restitution, she would have continued to do so and would not have violated her probationary sentence. Id.

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)).

“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– 709 (Ct. App. 2007); quoting 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.’”) Moreover, “A proper analysis should include an inquiry into the reasons surrounding the probationer's failure to pay, followed by a determination of whether the probationer made a willful choice not to pay.” Id. at 269 – 270, 647 S.E.2d at 709. (internal citations omitted) Then, “if the court finds the probationer ‘could not pay despite sufficient bona

fide efforts to acquire the resources to do so,' the court should then consider alternatives to incarceration in accordance with Bearden.” Id. (internal citations omitted)

In State v. Spare, 374 S.C. 264, 647 S.E.2d 706 (Ct. App. 2007) this Court held that the revocation of Spare’s probation was wrongful because Spare made a bona fide effort to pay the court-ordered restitution. Spare, at 266; 647 S.E.2d at 707. Spare pled guilty to breach of trust greater than \$5,000. Id. He was sentenced to ten-years’ imprisonment, suspended upon five years’ probation and restitution “to be calculated at a later date.” Id. The restitution amount was \$41,370. Id. at 266 – 267; 647 S.E.2d at 707.

On May 12, 2004, Spare was served a financial probation citation because he was in arrears for his restitution. Id. at 267; 647 S.E.2d at 707. On September 12, 2005, Spare was again served with a financial probation citation for being \$4,921 in arrears. Id.

A probation revocation hearing was held for Spare on September 15, 2005. Id. Spare showed that he was employed at Cracker Barrel, however his check was being garnished by the Internal Revenue Service for back taxes and was being used to make payments to probation. Id. Spears explained that due to those expenses Spears did not earn enough money to pat the restitution. Id. At the conclusion of the hearing, the judge found that Spare had willfully violated his probation and revoked one year of Spare’s probationary sentence. Id. at 267, 647 S.E.2d at 708. Spare was also ordered to remain on probation and begin paying restitution when he was release from prison. Id.

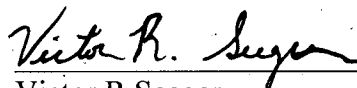
This Court first distinguished between cases where probation was revoked “solely for failure to make required payments of fines or restitution,” and probation revocation for violations on other terms of probationary sentences, such as breaching a no-contact order. Id. at 269, 647 S.E.2d at 708. This Court determined that if revocation of a defendant’s probation is based solely

on their failure to pay fines or restitution, the lower court must find that the failure to pay was willful. Id. at 268 – 269, 647 S.E.2d at 708.

Here, the trial court abused its discretion by revoking Appellant's probation in full for willfully failing to pay restitution. R. 20, ll. 15 – 20. Although Appellant failed to pay restitution, she did not do so willfully. R. 16, l. 17 – 18, l. 25. Appellant was under the impression that she was no longer required to pay restitution because Dockery and Appellant agreed to discharge Appellant from her obligation to pay restitution. Id.; State v. Sowell, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006) (quoting Black's Law Dictionary in defining "willful." as "[p]roceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary." Black's Law Dictionary 1434 (5th ed.1979)). Had Appellant known that her agreement with Dockery did not end her obligation to pay restitution, she would have repaid Dockery and not violated her probation. Id. Therefore, the lower court abused its discretion when it revoked Appellant's probation because her violation was not "a voluntary, conscious and intentional failure." Spare, at 269, 647 S.E.2d at 708 – 709. Accordingly, Appellant should be granted a new probation revocation hearing.

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests that this Court vacate the revocation of Appellant's probation and remand her case to the Florence County Court of General Sessions for a new probation revocation hearing.



Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of January, 2020.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JAN 02 2020
SC Court of Appeals

Appeal from Florence County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NIKKI GIOVANNI ECHOLS,

APPELLANT

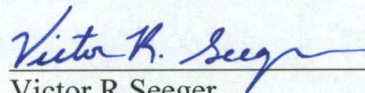
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Nikki Giovanni Echols 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 Thomas A. Russo, which was held on March 22, 2019, 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 Nikki Giovanni Echols.

Respectfully Submitted,



Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

This 2nd day of January, 2020.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NIKKI GIOVANNI ECHOLS,

APPELLANT

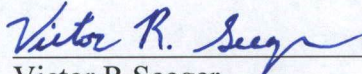
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) Hearing Transcript Dated March 20, 2015
- (2) Hearing Transcript Dated March 22, 2019
- (3) True-billed indictment(s):

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

January 2, 2020



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

RECEIVED
JAN 02 2020
SC Court of Appeals

RECEIVED

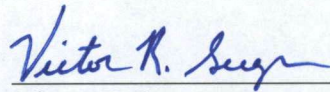
JAN 02 2020

SC Court of Appeals

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."

January 2, 2020.



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

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JAN 02 2020
SC Court of Appeals

Appeal from Florence County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

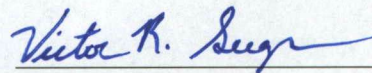
V.

NIKKI GIOVANNI ECHOLS,

APPELLANT

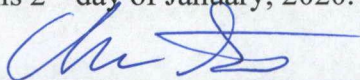
CERTIFICATE OF SERVICE

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 S. C. Department of Probation, Parole and Pardon Services, 1221 Gregg Street, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Nikki Giovanni Echols at 2121 W. Cambridge Drive, Florence, SC 29501, this 2nd day of January, 2020.



Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of January, 2020.



(L.S)

Notary Public for South Carolina
My Commission Expires: September 30, 2029