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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN JOSEPH HART,

APPELLANT

APPELLATE CASE NO 2018-000827

ANDERS BRIEF OF APPELLANT

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the probation revocation judge abused his discretion in revoking probation in full, where the decision was based on pending charges which had not been adjudicated, where Appellant maintained his innocence, and where the State brought no witnesses to the revocation hearing?

STATEMENT OF THE CASE

Appellant was sentenced to three years' incarceration, suspended to three years' probation, on the charge of domestic violence in the second degree on December 7, 2016. R. 13. On April 20, 2018, Appellant appeared before the Honorable R. Lawton McIntosh in Anderson County on a probation revocation hearing. R. 1. Heather Scalzo represented Appellant, and Joshua Nesbitt, a probation agent, appeared on behalf of the State. Appellant had previously been served with a probation citation that alleged various violations of the conditions of his probation, including that he made violent contact with his spouse, allegedly in violation of a no contact order. R. 3, ll. 13 – 16.

Appellant contested the alleged violations. R. 2, ll. 12 – 15. Finding that Appellant violated a no contact order and failed to go to substance abuse or mental health counseling, Judge McIntosh revoked Appellant in full. R. 10, ll. 15 – 21. He received credit for forty-two days pre-hearing time served. R. 12.

This appeal follows.

STANDARD OF REVIEW

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).

ARGUMENT

The probation revocation judge abused his discretion in revoking probation in full, where the decision was based on pending charges which had not been adjudicated, where Appellant maintained his innocence, and where the State brought no witnesses to the revocation hearing.

The State alleged that Appellant was living in the home with his spouse, supposedly a violation of a no-contact order. R. 4, l. 10 – R. 5, l. 6. Additionally, the probation agent testified that although Appellant was referred to mental health and substance abuse counseling, he did not attend. R. 5, ll. 9 – 20. Counsel for Appellant correctly noted that both of these violations stemmed from Appellant’s new pending charge. R. 6, ll. 7 – 9. Appellant described the allegations as “fabricated lies” and vehemently denied living with his spouse. R. 7, l. 19 – R. 10, l. 5.

Although the judge indicated that he was not going to consider the new charge, he pointed out Appellant’s pending criminal domestic violence charge and suggested that Appellant was a danger to his spouse. R. 6, l. 10 – R. 7, l. 8. Judge McIntosh found that Appellant willfully violated the terms of his probation by living with the complainant from his underlying criminal domestic violence charge. R. 10, ll. 15 – 20.

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 (Ct. App. 2003 (citing State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999)).

“Before revoking probation, a circuit court judge must determine if there is sufficient evidence to establish that the probationer has violated his probation conditions.” Williamson, 356 S.C. at 510, 589 S.E.2d at 788; see State v. White, 218 S.C. 130, 61 S.E.2d 754 (“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.”).

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). 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; State v. Allen, 370 S.C. 88, 96, 634 S.E.2d 653, 657 (2006) (“[A] probationer or parolee has a constitutionally protected liberty interest and cannot be denied due process simply because probation has been described as an act of grace.”).

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

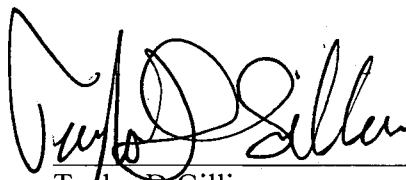
ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.” Allen, 370 S.C. at 94, 634 S.E.2d at 656.

This matter can be distinguished from State v. Williamson, 356 S.C. 507, 589 S.E.2d 787 (2003) wherein the State offered an affidavit and voluntary statement of the complaining witness, Williamson’s mother, as well as photographs of her alleged injuries. She indicated that Williamson had cut her on the arm with a knife. Id. at 510, 589 S.E.2d at 788. Much like Appellant, Williamson proclaimed his innocence. Id. at 511, 589 S.E.2d at 789. However, this Court relied on State v. Gleaton, 172 S.C. 300, 174 S.E. 12, 14 (1934) which held that “[i]f [the defendant’s breach of the conditions do] not appear to be determined upon an investigation of the facts, the circuit judge would have the right to take testimony and determine the question himself, or frame an issue to be decided by a jury, or hold the matter in abeyance until the defendant shall have been tried upon the charge.”

The court in Appellant’s case should have taken testimony from Appellant’s spouse, the complaining witness, or held the matter in abeyance until Appellant was tried upon the charge, relief the Gleaton court suggested.

CONCLUSION

Based on the foregoing, Appellant requests that this Court reverse the revocation of probation and remand for a new revocation hearing, or grant such other relief as justice may require.

A handwritten signature in black ink, appearing to read 'Taylor D. Gilliam', written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of December, 2018.

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Honorable R. Lawton McIntosh, Circuit Court Judge

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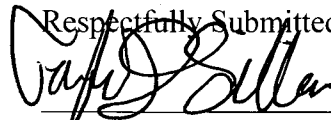
PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Joseph Hart 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 R. Lawton McIntosh, which was held on April 20, 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 John Joseph Hart.

Respectfully Submitted,



Taylor D Gilliam

Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of December, 2018.

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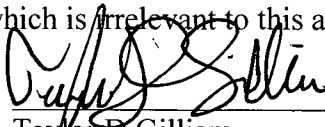
APPELLANT

**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) Entire probation revocation hearing transcript;
- (3) Revocation order; and
- (4) Sentence sheet.

I certify that this designation contains no matter which is irrelevant to this appeal.
December 17, 2018


Taylor D. Gilliam
Appellate Defender

South Carolina Commission on Indigent
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Division of Appellate Defense
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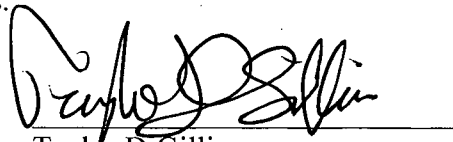
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CERTIFICATE OF COUNSEL

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 17, 2018.



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Appellate Defender

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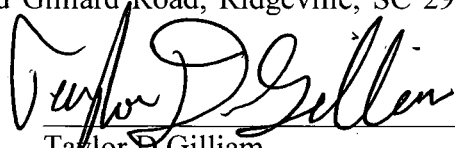
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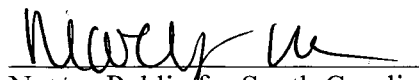
CERTIFICATE OF SERVICE

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 Buchanan, Esquire, at SCDPPPS, P.O. Box 50666, Columbia, SC 29250; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on John Joseph Hart, 376073, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 17th day of December, 2018.



Taylor D. Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of December, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2027