

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Jun 25 2020
SC Court of Appeals

Appeal from Sumter County

Honorable Thomas L. Hughston, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RISHEEN G. RICH,

APPELLANT

APPELLATE CASE NO 2019-001785

ANDERS BRIEF OF APPELLANT

TAYLOR D. GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the circuit court erred in revoking Appellant's probation, where one of the grounds for revocation was Appellant's alleged possession of a weapon, where the charge was still pending?

STATEMENT OF THE CASE

In January 2018, Appellant was convicted for failure to stop for a blue light. R. 3, ll. 14 – 20. He received a sentence of three years, suspended, with thirty months of probation. Id. The South Carolina Department of Probation, Parole, and Pardon Services contended that Appellant absconded and stopped reporting after July 2018. Id. A probation revocation hearing was held before the Honorable Thomas L. Hughston on October 11, 2019. R. 1. Phillip Little, Jr. represented Appellant; an agent with SC PPS appeared on behalf of the state.

Following a finding that Appellant failed to report and that he was in possession of a weapon, Appellant's probation was revoked in full. R. 20, ll. 23 – 26.

This appeal follows.

STANDARD OF REVIEW

The decision to revoke probation is addressed to the discretion of the circuit judge. State v. White, 218 S.C. 130, 135–6, 61 S.E.2d 754, 756 (1950); Sanders v. MacDougall, 244 S.C. 160, 164, 135 S.E.2d 836, 837 (1964); State v. Miller, 122 S.C. 468, 475, 115 S.E. 742, 745 (1923). This 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. White at 135–6, 61 S.E.2d at 756; State v. Archie, 322 S.C. 135, 137–8, 470 S.E.2d 380, 381 (Ct.App.1996).

ARGUMENT

The circuit court erred in revoking Appellant’s probation, where one of the grounds for revocation was Appellant’s alleged possession of a weapon, where the charge was still pending.

Relevant facts

A violation report was issued by SC PPS alleging that Appellant absconded supervision, that probable cause existed to believe he was in possession of a weapon, that Appellant failed to refrain from “association with people with criminal records as he has been seen in several rap videos with known criminals,” and failure to pay fees. R. __ (Violation Report). An agent with the Department recommend revocation because Appellant “has shown he is unwilling to change his criminal behavior after this agency has made numerous attempts to assist him.” *Id.* The Order revoking probation found that Appellant violated each of those conditions. R. __ (Order).

At the time of the hearing, Appellant’s weapon charges were still pending; he had not been convicted. R. 3, l. 22 – R. 4, l. 5. On his behalf, counsel asserted Appellant’s Fifth Amendment rights. R. 4, ll. 1 – 5. The state alleged that on September 8, 2019, Appellant was seen on surveillance footage carrying “an AR type pistol.” R. 6, ll. 5 – 10. According to the state, Appellant gave a statement that he purchased the gun but only used it for filming a video. R. 6, ll. 16 – 20. Counsel for Appellant noted that he represented Appellant on the weapon charge and had not yet received discovery. R. 7, ll. 3 – 9.

Additionally, Appellant believed he was off probation. R. 7, ll. 10 – 13. In a prior case, his probation ended early, and he was under the impression that had occurred again. *Id.* He was working for a refrigerator company in Camden and caring for his five children. R. 7, ll. 14 – 21.

Appellant's fiancée, Tamara Bennett, testified at the revocation hearing. R. 8, ll. 5 – 22. She confirmed counsel's suggestion that Appellant was unaware that he was still on probation. Id. Counsel requested that the judge continue his probation. R. 9, ll. 17 – 19.

Appellant was the third person to indicate that he believed he was no longer on probation. R. 9, l. 22 – R. 10, l. 6. He stated that his prior probation agent was no longer at the office, so he believed he was done with his probation. Id. He noted that nobody ever called him. Id. He cooperated and turned himself in. Id.

The judge nonetheless revoked Appellant's probation in full, partially relying on the weapon charge:

All right. Well, I appreciate that, but I'm gonna revoke your probation in full. I find that you did fail to report as you were instructed to, and also that you did have in your possession a weapon when you're - - when that was not allowed under probation.

R. 10, ll. 12 – 16.

Discussion

Probation is a matter of grace; revocation is the means to enforce the conditions of probation. State v. McCray, 222 S.C. 391, 396, 73 S.E.2d 1, 3 (1952); State v. White, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950). However, the authority of the revoking court should always be predicated upon an evidentiary showing of fact tending to establish a violation of the conditions. White, at 135, 61 S.E.2d at 756; State v. Miller, 122 S.C. 468, 475, 115 S.E. 742, 745 (1923). Thus, before revoking probation, the circuit judge must determine if there is sufficient evidence to establish that the probationer has violated his probation conditions.

The revocation of probation or parole is not a stage of criminal prosecution. However, 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. Morrissey v.

Brewer, 408 U.S. 471, 480–90, 92 S.Ct. 2593, 2600–05, 33 L.Ed.2d 484 (1972) (holding that minimum requirements of due process in parole revocation proceeding 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”); Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S.Ct. 1756, 1760, 36 L.Ed.2d 656 (1973) (holding that “a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in Morrissey”); State v. Riddle, 277 S.C. 110, 282 S.E.2d 863 (1981) (reversing probation revocation and remanding for hearing consistent with guidelines set forth in Morrissey and Gagnon). “It is an essential component of due process that individuals be given fair warning of those acts which may lead to a loss of liberty. This is no less true whether the loss of liberty arises from a criminal conviction or the revocation of probation.... [W]here the proscribed acts are not criminal, due process mandates that [a probationer or parolee] cannot be subjected to forfeiture of his liberty for those acts unless he is given prior fair warning.” U.S. v. Dane, 570 F.2d 840, 843–44 (9th Cir.1977) (citing Tiitsman v. Black, 536 F.2d 678 (6th Cir.1976)).

Although Appellant admitted that he had not reported, he explained that he believed his probation was over. He did not intentionally and willfully fail to report, nor did the state present evidence supporting such a claim. No evidence was presented on many of the allegations in the Violation Report, including failure to pay fines and fees as well as the prohibition against

associating with people with criminal records. The probation revocation judge should not have revoked in full. Appellant was working and caring for his children. His fiancée worked during the day, and he took care of his children. R. 7, ll. 10 – 21. After receiving a bond on acts giving rise to the probation revocation, Appellant did resume reporting. Id. The decision to revoke his probation in full was an error.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse the probation revocation decision and remand his case for a new revocation hearing.

s/Taylor D. Gilliam _____
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of June, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Risheen G. Rich 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 L. Hughston, which was held on October 11, 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 Risheen G. Rich.

Respectfully Submitted,

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

This 25th day of June, 2020.

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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) Entire revocation hearing transcript held October 11, 2019;
- (3) Violation report; and
- (4) Order revoking probation.

I certify that this designation contains no matter which is irrelevant to this appeal.
June 25, 2020

s/Taylor D. Gilliam
Taylor D Gilliam
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.”

June 25, 2020.

s/Taylor D. Gilliam
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