

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Jul 10 2020

Appeal from Spartanburg County

SC Court of Appeals

Grace Gilchrist Knie, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS RAYNES MARETT,

APPELLANT

APPELLATE CASE NO. 2019-001385

ANDERS BRIEF OF APPELLANT

JOANNA K. DELANY
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STATEMENT OF ISSUE ON APPEAL

Whether the court erred where it terminated Appellant's probation and converted his restitution to a civil judgment, since the court did not find that Appellant's failure to pay restitution was willful?

STATEMENT OF THE CASE

On February 22, 2013, a Spartanburg County Grand Jury indicted Appellant for the offense of obtaining property under false pretenses. R. 11 – 12. Appellant was tried before the Honorable R. Keith Kelly on or about September 11, 2013. R. 13; R. 5, ll. 4-5. Appellant was represented by Mary Shealy and the State was represented by Brittany Scott. R. 13; R. 5, ll. 5-6.

Appellant was sentenced to five years of imprisonment, suspended upon the service of six months, the balance suspended with probation for five years. R. 13. No restitution hearing was held, but the court ordered that Appellant pay restitution in the amount of two thousand three hundred and twenty-one dollars and forty cents (\$2,321.40). R. 13; R. 5, ll. 10-13.

On July 23, 2019, Appellant appeared before the Honorable Grace Knie for a probation violation hearing. R. 1. Appellant was represented by Charles Snyder, III. R. 1. The court ordered that Appellant's probation was reduced to time served under supervision and discharged Appellant from supervision. R. 10. The order satisfied Appellant's fines and fees and converted the restitution owed to a civil judgement. R. 10.

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)).

ARGUMENT

The court erred where it terminated Appellant's probation and converted his restitution to a civil judgment, since the court did not find that Appellant's failure to pay restitution was willful.

Because Appellant mistakenly believed that his restitution was not due, his failure to pay restitution was not willful. Therefore, the court erred when it ruled against Appellant and converted the restitution to a civil judgement.

Relevant facts

Appellant's probation and restitution were ordered as part of his 2013 sentence on the underlying offense of obtaining property under false pretenses. R. 13. Appellant came before the circuit court for a probation revocation hearing in 2015 and "he was ordered to comply with the restitution order." R. 5, ll. 1-3.

When Appellant, aged seventy-six, subsequently appeared at the July 23, 2019 probation revocation hearing before Judge Knie, it was undisputed that he failed to pay restitution. R. 4, ll. 17-21; R. 7, l. 3. Defense counsel explained that this was because Appellant mistakenly believed he was not required to pay restitution while an appeal or post-conviction relief action was underway. R. 5, ll. 14-20. The court ordered that Appellant's probation was reduced to time served under supervision and discharged Appellant from supervision. R. 10. The order satisfied Appellant's fines and fees and converted the restitution owed to a civil judgement. R. 10. *See* S.C. Code Ann. § 17-25-323(B):

When a defendant is placed on probation . . . and ordered to make restitution, and the defendant is in default in the payment . . . the court, before the defendant completes his period of probation or parole . . . must hold a hearing to require the defendant to show cause why his default should not be treated as a civil judgment and a judgment lien attached. The court must enter: (1) judgment in

favor of the State for the unpaid balance, if any, of any fines, costs, fees, surcharges, or assessments imposed; and (2) judgment in favor of each person entitled to restitution for the unpaid balance if any restitution is ordered plus reasonable attorney's fees and cost ordered by the court.

Discussion

“[B]efore revoking probation, the circuit judge must determine if there is sufficient evidence to establish that the probationer has violated his probation conditions.” *State v. Hamilton*, 333 S.C. 642, 648–49, 511 S.E.2d 94, 97 (Ct. App. 1999). When probation is revoked solely for failure to pay fines or restitution, a finding of willfulness is mandatory. *Id.* at 649, 511 S.E.2d at 97.

“[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay.” *Bearden v. Georgia*, 461 U.S. 660, 672 (1983). “If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority.” *Id.* “If the court finds the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court may not imprison the probationer unless it also finds that alternate measures are not adequate to meet the State’s interests in punishment and deterrence.” *State v. Coker*, 397 S.C. 244, 245–46, 723 S.E.2d 619, 620 (Ct. App. 2012) (internal quotations and alterations omitted).

“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.” *State v. Spare*, 374 S.C. 264, 268, 647 S.E.2d 706, 708 (Ct. App. 2007) (internal

quotations omitted) (emphasis in original). “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.” *Id.* at 269, 647 S.E.2d at 708 (quoting *Hamilton*, 333 S.C. at 649, 511 S.E.2d at 97).

“Our appellate courts have defined ‘willful’ in a variety of contexts. In each instance, the court has required a showing of a consciousness of wrongdoing in order to prove willfulness.” *State v. Garrard*, 390 S.C. 146, 149, 700 S.E.2d 269, 271 (Ct. App. 2010). In the context of an alleged probation violation based solely on the failure to pay money, a willful failure to pay means a voluntary, conscious, and intentional failure. *Spare*, 374 S.C. at 269, 647 S.E.2d at 708. The circuit judge should inquire into the reasons surrounding the probationer’s failure to pay and make a determination of whether the probationer made a willful choice not to pay. *Id.* at 269, 647 S.E.2d at 709.

Although the judge did not revoke Appellant’s probation here, Appellant submits that the circuit court should have considered willfulness not just where it intends to revoke probation but also before converting restitution to a civil judgement.

Although defense counsel did not explicitly raise the issue of willfulness, the essence of his argument was that the probation violation was not willful because Appellant was unaware that he had to pay restitution while his direct appeal and post-conviction relief proceedings were pending. Therefore, Appellant asserts the issue was properly preserved. *See State v. Hamilton*, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999). In *Hamilton*, this Court found that although defense counsel did not specifically raise the issue of willfulness at the probation revocation hearing, “it was clear that the essence of defense counsel’s argument at the revocation hearing was that the violation was not willful because Hamilton believed his probationary period had

terminated.” *Id.* at 648, 511 S.E.2d 96-97. “The circuit judge ruled that the violation was ‘intentional.’ Thus, we find the issue is properly preserved even though counsel did not expressly argue lack of willfulness at the revocation hearing.” *Id.* at 648, 511 S.E.2d at 97.

The court erred here, since it failed to inquire whether Appellant’s failure to pay was willful. *See Spare*, 374 S.C. at 270, 647 S.E.2d at 709 (“without a specific accounting of Spare’s total earnings, living expenses, other sources of income, and potential earning capacity, it is difficult to conclude that he had the ability to pay more toward his restitution but made a voluntary, conscious, and intentional decision not to pay”).

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse the decision of the circuit court and remand for a new hearing.

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of July, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Thomas R. Marett states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Grace Gilchrist Knie, which was held on July 23, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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, She asks the Court to relieve her as counsel for Thomas R. Marett.

Respectfully Submitted,

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

This 10th day of July, 2020.

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.”

July 10, 2020.

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender

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