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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Saluda County

Honorable William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARTIN D. PITTMAN,

APPELLANT

APPELLATE CASE NO 2019-001452

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the circuit court erred in revoking Appellant's probation, where the state contended that Appellant was unemployed and had unstable housing, where at the time of the hearing he had living arrangements approved by the probation office and was employed, where the trial court's other basis for revoking probation and placing Appellant on the sex offender registry was four curfew violations, where Appellant arrived home late by nineteen minutes one time and thirty-seven minutes another time, and where the decision to place him on the sex offender registry was an abuse of discretion based on the minor alleged violations?

STATEMENT OF THE CASE

Martin Pittman was charged with criminal sexual conduct with a minor in the third degree, two counts of criminal solicitation of a minor, and five counts of dissemination of obscene material to a person under the age of eighteen. R. 25 and 29. He pled to assault and battery in the second degree and two counts of contributing to the delinquency of a minor. R. 29. Subject to a plea agreement, he received a sentence of three years' incarceration suspended to five years' probation. R. 25. On August 21, 2019, he appeared before the Honorable William P. Keesley for a probation revocation hearing. R. 1. He was represented by Erin Conroy; Pat Griffith, an agent with the South Carolina Department of Probation, Pardon, and Parole Services prosecuted the matter on behalf of the state. At the conclusion of the hearing, over counsel's objection, Judge Keesley revoked Appellant's probation in full and directed that he be placed on the sex offender registry. R. 22, ll. 13 – 23; R. 28.

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 circuit court erred in revoking Appellant's probation, where the state contended that Appellant was unemployed and had unstable housing, where at the time of the hearing he had living arrangements approved by the probation office and was employed, where the trial court's other basis for revoking probation and placing Appellant on the sex offender registry was four curfew violations, where Appellant arrived home late by nineteen minutes one time and thirty-seven minutes another time, and where the decision to place him on the sex offender registry was an abuse of discretion based on the minor alleged violations.

Relevant facts

Martin Pittman was placed on the sex offender registry at the age of twenty-one for minor alleged probation violations, including supposedly missing curfew by less than an hour on two occasions, alleged failure to maintain a stable residence, and alleged temporary unemployment. At the time of the probation revocation hearing, the state admitted that Appellant had secured approved housing and was employed. R. 6, ll. 2 – 10.

Although Pat Griffith, an agent with the South Carolina Department of Probation, Pardon, and Parole Services was the state's representative at the hearing, the primary speaker at the hearing was Vicky Ricker, the mother of the child. Most of Ricker's comments revolved around her disdain for the original plea. R. 8, ll. 17 – 25; R. 9, ll. 13 – 22; R. 10, ll. 14 – 18; R. 13, ll. 18 – 25. She repeatedly referred alleged conduct outside the purview of the original charges and disparaged Appellant via unproved claims. R. 7, l. 21 – R. 8, l. 12; R. 11, l. 22 – R. 12, l. 2.

At the outset of the hearing, Judge Keesley read the alleged probation violations:

> You're before the Court now on an allegation that you violated probation by failing to follow the advice and instruction of the agent, by failing to abide by your electronic monitoring curfew on May 2nd, May 25th, May 28th, and July 8, 2019, by being in arrears on your intensive supervision fees and GPS fee, drug test fee and court costs, failing to maintain employment.
>
> They recommend a partial revocation with supervision and placement in a halfway house, require you to register as a sex offender and not to miss any sex offender counseling meetings.

R. 4, ll. 2 – 12.

Regarding Appellant's alleged "residential instability," Griffith informed the court that after Appellant was sentenced in Aiken County, his father gave him a key to a residence in Saluda County. R. 4, l. 22 – R. 7, l. 6. The original plan was for Appellant to live at that home for the entire duration of his probation. R. 18, ll. 10 – 12. Appellant was unable to pay the high utility fee to get the electricity turned back on because the account was in a different person's name, so he tried to live in the home with the electricity turned off. Id. After several consecutive days of temperatures higher than one hundred degrees, Appellant could no longer live in the house. Id.

He then went to live with his grandparents in Aiken County. R. 4, l. 22 – R. 7, l. 6. Griffith suggested that although Appellant did not get along with his grandfather, Appellant was allowed to use his grandfather's truck.[1] However, Griffith indicated that Appellant was not allowed to live there due to the presence of his nieces and nephews, as part of the plea agreement seemingly prevented such interactions.

Griffith, through local church officials, found a place with air-conditioning for Appellant to stay. Id. However, the living situation closely resembled indentured servitude. A farmer with

[1] Appellant explained that his grandfather suffers from dementia. R. 17, ll. 20

a trailer was "gracious enough" to let Appellant stay there for "a couple of days" as long as he "help[ed] the farmer out on the farm and clean[ed] this place up and do all that." R. 20, ll. 18 – 23. The farmer's grace was short-lived, however, and ended when Appellant did not provide free labor on the farm. R. 21, ll. 4 – 6. The farmer "kind of got tired of [Appellant] and told him he needed to get out." Id. At the time of the hearing, Appellant lived in an approved residence. R. 6, ll. 6 – 10.

Seemingly ignoring the work Appellant did cutting grass, and failing to recognize Appellant's successful attempt to obtain a fast food job, Griffith suggested "[i]t's convenient that he just got a job at McDonald's just before this court hearing when he wouldn't work any time up to this." R. 21, ll. 7 – 17. It is unclear why Griffith refused to acknowledge Appellant's grass-cutting efforts as work, when Appellant would cut grass and get paid for it.

After Griffith's presentation and Ricker's remarks, counsel for Appellant clarified some inaccuracies and offered background information in Appellant's case. Appellant's father, soon after being released from prison, provided a key to the residence that had neither electricity nor running water. R. 14, l. 22 – Tr. 17, l. 7. Appellant was unable to provide his father's contact information to the probation office, because he did not know where his father lived. R. 18, ll. 23 – 25. Appellant did not have his father's telephone number, either. R. 18, l. 25 – R. 19, l. 1.

As mentioned briefly by Griffith, Appellant was living with a friend at the time of the hearing. R. 5, l. 12 – R. 7, l. 6. Regarding the truck usage, Appellant would drive around trying to find people's yards he could cut in order to make money. Id. Unfortunately, he would occasionally run out of gas some days while driving around so much. Id. When that happened, Appellant would call his cousin and ask for five or ten dollars for gas. R. 19, l. 15 – R. 20, l. 10.

Two days before the revocation hearing, when counsel met with Appellant, he informed her that he had not eaten in a few days because he was so destitute. R. 15, ll. 9 – 12. However, he had acquired employment at McDonalds and was prepared to go to work after the conclusion of the hearing. R. 15, ll. 12 – 16. He previously had to decline a night shift employment opportunity because it would have interfered with his curfew. R. 15, ll. 16 – 24.

Regarding the alleged curfew violations, counsel discussed three of them:

> I'm aware of four instances that he didn't make it home in time and I believe, you know, one time he was nineteen minutes late, another time he was thirty-seven minutes, and then an hour, so it's not egregious. Yes, he didn't get home in time, we're not disputing that, Your Honor, but it's not like he was out partying until all hours of the night gallivanting. He tells me that, you know, **one of those times he ran out of gas** as we indicated earlier and didn't make it home in time. Another time was because … he has an … eight-month-old son. Excuse me. **He was waiting on … the child's mother to bring the baby to him**. So not to make excuses, Your Honor, but I just don't want you to think that he's out riding around town, you know, getting into trouble.

R. 16, ll. 1 – 15 (emphasis added). Counsel also distinguished Appellant's minor alleged infractions from serious offenses:

> [W]ith regard to his original charges… in relation to these violations it's not as though he's out committing sex crimes, Your Honor. I mean, he - - he's violated again because of the failure to maintain a stable residence and unemployment and the fees. It's not like he's out there committing sexual deviant crimes, Your Honor. There's been no more reports of that.

R. 16, ll. 16 – 22.

Appellant informed the court that he was in the process of obtaining either his high school diploma or a GED. R. 17, ll. 9 – 10. After counsel spoke about how Appellant does not have much family support, Appellant explained the hardships of living with a family member who suffers from dementia:

> My grandfather has dementia and with his dementia it - - it's hard for me to relate with him or have him understand something that I'm saying, so a lot of times he'll forget who I am or he won't - - he'll be angry at me for something that I didn't do

> or haven't said anything about or when I'm speaking to my grandmother, he'll cut me off and be angry with what I'm saying to her, and it's - - it's more of an up and down relationship between me and him.

R. 17, l. 20 – R. 18, l. 3. When the revocation judge began asking Appellant questions, Griffith interrupted and used the opportunity to repeat points he had already made. R. 18, ll. 4 – 18.

Counsel for Appellant correctly noted that the minor violations did not "rise to the level of having to be on the sex offender registry, which would affect him … permanently." R. 21, l. 23 – R. 22, l. 4. After the revocation judge found that Appellant willfully violated the terms and conditions of probation, revoked him in full, and placed him on the sex offender registry, counsel for Appellant objected again. R. 22, l. 13 – R. 23, l. 11. The revocation judge remarked that this was an "unusual situation" but overruled the objection and ordered that Appellant be placed on the registry. Id.

Discussion

Appellant was punished for being impoverished. His dad was incarcerated, and he was unable to live with his grandparents; Appellant was on his own at age twenty-one without a high school diploma. He tried to survive by cutting the grass and earning money via manual labor. Although this appeared to be insufficient to Griffith, Appellant was not committing crimes or getting into trouble. None of the alleged probation violations entailed even the suggestion that Appellant had broken the law, much less the hint of a crime of sexual nature.

Because he was not making a lot of money, he was unable to locate consistent housing. Like many indigent individuals across the state, he relied on family support as much as possible. When he was unable to live at the house offered by his father or his grandparents' home, he secured approved housing with a friend. Regarding employment, Appellant drove around with a lawnmower in the back of his grandfather's pick-up truck and cut grass for money. Contrary to

the state's assertion that he was unemployed, Appellant was receiving payment for providing a lawful service. At the time of the hearing, Appellant had secured a fast food job and was prepared to begin immediately. The probation revocation judge found that Appellant "willfully violated the terms and conditions of his probation by failing to maintain his curfew and to work diligently at a lawful occupation, [and] failing to follow the advice and instruction of the agent." R. 22, ll. 13 – 17. The alleged failure to work diligently at a lawful occupation was untrue prior to the hearing, based on Appellant's grass-cutting efforts, and it was untrue at the time of the hearing, based on Appellant successfully navigating the hiring process at McDonalds.

Probation is a matter of judicial grace, and revocation is committed to the sound discretion of the trial court. S.C. Code §§ 24-21-450, et. seq.; State v. Lee, 350 S.C. 125, 564 S.E.2d 372 (Ct. App. 2002); State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950). Nevertheless, a circuit court should not order revocation unless "predicated upon an evidentiary showing of fact tending to establish violations of conditions." Id; State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999).

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. "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." Hamilton, 333 S.C. at 647, 511 S.E.2d at 96.

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).

The circuit court judge in this case failed to exercise discretion, and as a result, the decision to revoke probation and place Appellant on the sex offender registry was arbitrary and capricious. The evidentiary basis relied on by the circuit court was that Appellant "**willfully violated** the terms and conditions of probation by failing to maintain his curfew and to work diligently at a lawful occupation, [and] failing to follow the advice and instruction of the agent." R. 22, ll. 13 – 17 (emphasis added). As noted, Appellant did not willfully violate his curfew; in one instance, his truck broke down, and in another, he was taking care of parental responsibilities and was delayed by the child's mother. The circuit court failed to exercise discretion, in a case where the alleged violations were minimal. The revocation of probation and subsequent placement on the registry were disproportionate to the alleged violations.

The state's representative, Griffith, vilified Appellant for trying to make a living. Seemingly oblivious to the plights of a young man largely on his own, Griffith questioned every action taken by Appellant and failed to recognize the hardships he was facing.

Griffith also struggled to comprehend how gasoline costs less than housing:

> And now he's living in Winnsboro in a camper with another family that … [has] been approved by our probation office in Fairfield County and he's currently living there and he just recently got a job at McDonald's yesterday.
>
> So his living arrangements are - - have not been very stable. I just wanted to inform you of that. He does - - he wears a GPS monitor due to his original sentence. He would - - although he didn't go to work at that job that we got for him, he gets his grandfather's truck and it's not unusual for him to go a hundred miles a day in that vehicle and I've never understood how he could travel so much and get gas money to travel around, but yet he can't get his own place to stay. It's an odd situation. But, anyway, that's all I've got, Your Honor, to add.

R. 6, ll. 2 – 20.

In 2019, gas prices were fairly low.[2] Assuming, *arguendo*, that gas cost two dollars per gallon while Appellant was on probation, that the truck he drove got fifteen miles per gallon, and he drove one hundred miles each day, five days out of the week, he would have spent approximately sixty-five dollars in gasoline costs each week in order to make money cutting lawns. Over the course of a month, his fuel cost at most was between two hundred and three hundred dollars, assuming he drove five hundred miles while trying to earn a living each week.

Contrary to Griffith's supposition that Appellant was somehow squandering money by driving around and therefore unable to make enough money to find somewhere to live, in 2019 the cost of living in South Carolina exceeded three hundred dollars per month, according to a

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[2] Briana Saunders, *Gas prices are lowest SC has seen in years. What happened, how long will it last?* https://www.islandpacket.com/news/state/south-carolina/article223914915.html (last visited May 27, 2020)

housing needs assessment.[3] An account of a working young adult in the South Carolina Housing report closely mirrored Appellant's situation, even down to the need to ask a cousin for money occasionally. Id. at 18. Appellant was unable to afford housing, utilities, and the probation fees. As such, his alleged violations could not be deemed willful.

In State v. Spare, 374 S.C. 264, 270, 647 S.E.2d 706, 709 (Ct. App. 2007), this Court held that the circuit court abused its discretion in concluding that Spare's failure to pay restitution was willful. "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, 647 S.E.2d at 709 (citing Commonwealth v. Eggers, 742 A.2d 174, 176 (Pa. Super. Ct. 1999)). In Spare, as in the matter *sub judice*, the circuit court failed to make the requisite inquiry into the defendant's ability to pay, his reasons for failing to pay, and whether his failure to pay was willful. Appellant had obtained a job and was undoubtedly going to make payments towards his fines. Similar to Spare, Appellant experienced some situations outside of his control that did not allow him to make the payments. This Court vacated the revocation of Spare's probation and remanded for a new probation revocation hearing:

> Therefore, 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. Although we understand the court's frustration with Spare's limited progress in making payments, we find the evidence does not support the court's finding of willfulness.

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[3] South Carolina Housing Needs Assessment https://issuu.com/schousing/docs/sc_needs_assessment_report_finalweb (last visited May 27, 2020)

Spare at 270, 647 S.E.2d at 709. A similar reasoning can be applied to the failure to maintain stable housing as well as employment. Although the state suggested Appellant was unable to find consistent housing, the reasons he moved around were not voluntary, conscious, and intentional. Appellant did not sabotage the house for which he was given a key. He was unable to live with his grandparents. At the time of the hearing, he had located and was living in housing arrangements approved by the probation office. Additionally, Appellant was self-employed throughout his probation and was employed by a fast food restaurant at the time of the hearing.

"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).

Appellant's unemployment and inconsistent housing were not the result of willful actions. Further, he remedied both of those situations and was set up for success at the time of the probation revocation hearing. Rather than exercising discretion and allowing him a chance to make money in order to pay his fees, the circuit court judge revoked his probation following four alleged minor curfew violations.

A person required to register on the sex offender registry "is required to register biannually for life." S.C. Code Ann. § 23-3-460(A). "The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended within the above limit." S.C. Code Ann. § 24-21-440. In State v. Davis, this Court held that a probation revocation judge was not authorized to order placement on the sex offender registry as a condition of probation. 375 S.C. 12, 649 S.E.2d 178. Davis was indicted for criminal sexual conduct with a minor and pled no contest to assault and battery of a high and aggravated nature. Id. at 13-14, 649 S.E.2d at 178-9. He was sentenced to six years imprisonment suspended upon the service of two years probation. Id. Additional conditions included sex offender counseling and "not be required to register as a sex offender." Id.

After the counselor contended that Davis was not meaningfully participating in the sessions, Davis was brought before the circuit court for a probation revocation hearing. Id. at 14, 649 S.E.2d at 179. His probation was revoked and placement in the sex offender registry was mandared. Id. at 15, 649 S.E.2d at 179. Davis successfully argued that under S.C. Code Ann. § 23-4-430(D), placement in the registry as a condition of sentencing is only allowed when the solicitor has shown good cause. Id.

Much like in Davis, no good cause was shown at the probation revocation hearing in Appellant's case. Although the plea agreement contained a provision that failure to comply with probation conditions will trigger a revocation hearing and possible placement on the registry, there was no good cause shown. R. 25. The plea judge specifically ordered that Appellant not be required to register as a sex offender. In requiring that Appellant register as a sex offender, the probation judge abused his discretion. Good cause was not shown in this instance. Unlike in

State v. Hicks, where good cause existed in the form of confrontational gestures towards the victim's father, living arrangements within a half-mile of many girls of similar age to the victim, and sex with the fourteen-year-old victim, Appellant allegedly arrived late at home four times. 377 S.C. 322, 659 S.E.2d 499 (Ct. App. 2008). The state never contended that he violated the no-contact provision in his sentence sheets.

> The purpose of the sex offender registry has nothing to do with retribution, and any deterrent effect of registration derives from the availability of information, not from punishment. Instead, the purpose of the registry and the electronic monitoring requirement is to protect the public and aid law enforcement.

In Interest of Justin B., 419 S.C. 575, 583, 799 S.E.2d 675, 679 (2017)

If the purpose of the sex offender registry is meant to protect the public from a sex offender, then the intent of the Legislature is not being served when placement on the registry is being imposed when a person violates a non-sexual related condition of probation. Appellant's underlying charges were not so severe as to warrant placement on the registry initially. If the public did not need protection in the form of placement on the registry after the initial charges, then it is highly unlikely that the public needed protection after Appellant missed curfew four times. The registry, in this instance, is not punitive but is being used as a punitive tool.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that the probation revocation decision be reversed.

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

ATTORNEY FOR APPELLANT

This 22nd day of July, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

July 22, 2020

s/Taylor D. Gilliam
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APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Final Brief of Appellant has been served upon opposing counsel this 22nd day of July, 2020 by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS).

s/Taylor D. Gilliam
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Appellate Defender
ATTORNEY FOR APPELLANT