

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Jul 28 2020

SC Court of Appeals

Appeal from York County

Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARK JEFFREY DORKO,

APPELLANT

APPELLATE CASE NO. 2020-000239

ANDERS BRIEF OF APPELLANT

JOANNA K. DELANY
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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 circuit court erred where it revoked Appellant’s probation since there was an insufficient factual basis to support the court’s decision that Appellant violated the conditions of his probation.....4

Relevant facts4

Discussion.....5

CONCLUSION.....8

PETITION TO BE RELIEVED AS COUNSEL9

TABLE OF AUTHORITIES

Cases

Gagnon v. Scarpelli, 411 U.S. 778 (1973).....5, 6

Morrissey v. Brewer, 408 U.S. 471 (1972).....5, 6

State v. Allen, 370 S.C. 88, 634 S.E.2d 653 (2006)5

State v. Barlow, 372 S.C. 534, 643 S.E.2d 682 (2007).....2

State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999).....3, 5

State v. Hill, 368 S.C. 649, 630 S.E.2d 274 (2006)6, 7

State v. King, 221 S.C. 68, 69 S.E.2d 123 (1952).....5

State v. Pauling, 371 S.C. 435, 639 S.E.2d 680 (Ct. App. 2006)6, 7

State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950)5

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

United States v. Cates, 402 F.2d 473 (4th Cir. 1968).....6

Rules

Rule 603, SCRE.....7

Constitution

U.S. CONST. amend. XIV5

STATEMENT OF ISSUE ON APPEAL

Whether the circuit court erred where it revoked Appellant's probation since there was an insufficient factual basis to support the court's decision that Appellant violated the conditions of his probation?

STATEMENT OF THE CASE

On October 4, 2016, Appellant appeared before the Honorable Daniel D. Hall and entered a plea of guilty to possession of heroin, second offense. R. 10. Appellant waived presentment of the charge to the grand jury. R. 8 – 9. Appellant was represented by Walter Dusky and the State was represented by Christopher Epting. R. 10. The court sentenced Appellant to two years of imprisonment suspended upon the service of ninety days' imprisonment and twenty-four months of probation. R. 10.

On February 10, 2020, Appellant appeared before the Honorable Brian Gibbons for a probation violation hearing. R. 1. Appellant was represented by Christopher Bonds. R. 1. Christian Mitchell, a probation agent, represented the State instead of a prosecutor.¹ R. 1. The court found Appellant had violated the conditions of his probation and ordered that Appellant's suspended sentence be partially revoked and Appellant was required to serve fourteen months in prison. R. 11; R. 6, ll. 11-14. The order also terminated Appellant's probation and converted his fees to a civil judgment. R. 11; R. 6, ll. 15-16.

This appeal follows.

¹ See *State v. Barlow*, 372 S.C. 534, 539, 643 S.E.2d 682, 685 (2007) (holding that a probation agent may present a revocation case without his actions amounting to the unauthorized practice of law).

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 where it revoked Appellant's probation since there was an insufficient factual basis to support the court's decision that Appellant violated the conditions of his probation.

The court's decision to revoke Appellant's probation was error since no evidence was offered at the probation violation hearing that Appellant had violated his probation. Although defense counsel conceded that Appellant had left the state and gone to Illinois, Appellant did not make any admission that he had violated his probation. No witnesses were sworn, no testimony was taken, and no affidavits were offered into evidence or made exhibits. Therefore, the court abused its discretion since it lacked a factual basis upon which to find that Appellant violated the conditions of his probation.

Relevant facts

Appellant's probation violation hearing was held on February 10, 2020. R. 1. No witnesses were sworn and no testimony was taken. R. 2 – 3. Although Probation Agent Mitchell referenced a "packet" possessed by the circuit judge, the packet was not offered into evidence or incorporated into the record as an exhibit. R. 4, l. 7. However, Probation Agent Mitchell alleged that Appellant violated probation when he left South Carolina without permission. R. 4, ll. 8-9. Mitchell further claimed Appellant "pick[ed] up additional charges" in Illinois and claimed Appellant had not reported in the past year. R. 4, ll. 9-13. The record is devoid of any indication Mitchell was sworn as a witness.

Appellant did not admit that he intentionally violated the condition of his probation that he remain in South Carolina. Instead, defense counsel explained that Appellant's prior probation agent "had told him that he was finished with probation . . ." R. 4, l. 23 – 5, l. 2. "Defense

counsel continued, “That’s why he tells me he was in Illinois. Illinois is where his child’s mother and child live.” R. 5, ll. 3-5.

The court asked Appellant, “[A]nything you want to tell me?” and Appellant replied, “No, sir.” R. 6, ll. 8-9. The court then ruled, “All right, based upon my review of the record, I do find that you willfully failed to comply with the terms and conditions of your probation.” R. 6, ll. 11-13. “I’m going to partially revoke 14 months, give you credit for time served; I’m going to terminate the probation, civil judgement for all monies due.” R. 6, ll. 14-16.

Discussion

The court’s decision was error since it had no factual basis in evidence.² “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. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006) (citing *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)). The judge must make a finding of “sufficient factual evidence of the violation” to support a probation revocation. *State v. Williamson*, 356 S.C. 507, 510, 589 S.E.2d 787, 788 (Ct. App. 2003).

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.” *Allen*, 370 S.C. at 96–97, 634 S.E.2d at 657 (citing *Morrissey v. Brewer*, 408 U.S. 471, 480–90 (1972)). The United States Supreme Court has held that a parole revocation requires “an informal hearing

² Although this issue was not raised before the circuit court, Appellant submits that fundamental fairness weighs in favor of this Court addressing his position since the State’s failure to present evidence resulted in a hearing of such informality that it did not protect Appellant’s due process rights. U.S. CONST. amend. XIV; *see also Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) (loss of liberty entailed in a probation revocation is a serious deprivation requiring that the probationer be accorded due process).

structured to assure that the finding of a parole³ violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." *Morrissey v. Brewer*, 408 U.S. at 484.

Only if the court finds sufficient evidence to establish a probationer has violated his probation conditions may the court revoke probation and impose all or part of the suspended sentence. "In contrast [to criminal trials], probation revocation proceedings have a much lower evidentiary threshold. Instead of requiring proof beyond a reasonable doubt, probation is properly revoked upon an evidentiary showing of facts tending to establish a violation." *State v. Hill*, 368 S.C. 649, 658, 630 S.E.2d 274, 279 (2006) (alterations omitted). Here, there was no evidentiary show of facts.

A probation revocation is a serious deprivation of liberty requiring the probationer be afforded due process. *Gagnon v. Scarpelli*, 411 U.S. at 781-82. A probation revocation hearing may consist of live testimony, or "conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence." *Id.* at 789. Revocation requires the judge "be reasonably satisfied that a probationer has violated the terms of his release." *United States v. Cates*, 402 F.2d 473, 474 (4th Cir. 1968). In *State v. Pauling*, 371 S.C. 435, 438, 639 S.E.2d 680, 682 (Ct. App. 2006), this Court observed that in probation revocation proceedings, "the evidence is often limited to the testimony of a probation officer or . . . affidavits of victims or police officers."

Here, however, as seen, no affidavits were entered into evidence or made exhibits and there was no testimony given. The unsworn remarks of Agent Mitchell were not testimony since

³ The United States Supreme Court confirmed there is no difference between a parole revocation and a probation revocation relevant to due process analysis where the sentence has been previously imposed. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

Rule 603, SCRE provides: “Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so.”

The circuit court lacked a sufficient factual basis to find Appellant violated his probationary conditions. *Pauling*, 371 S.C. at 438, 639 S.E.2d at 682; *Hill*, 368 S.C. at 658, 630 S.E.2d at 279. This Court should reverse.

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 28th day of July, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mark Jeffrey Dorko 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 Brian M. Gibbons, which was held on February 10, 2020, 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 Mark Jeffrey Dorko.

Respectfully Submitted,

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

This 28th 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 28, 2020.

s/ Joanna K. Delany

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