

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Richland County

Honorable Frank R. Addy, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**  
**Sep 16 2020**  
**SC Court of Appeals**

THE STATE,

RESPONDENT,

V.

ANDRE DESHAWN POSEY,

APPELLANT

APPELLATE CASE NO 2019-001997  
\_\_\_\_\_

ANDERS BRIEF OF APPELLANT  
\_\_\_\_\_

VICTOR R SEEGER  
Appellate Defender

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

**TABLE OF CONTENTS**

TABLE OF CONTENTS .....i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUE ON APPEAL .....1

STATEMENT OF THE CASE .....2

STANDARD OF REVIEW .....3

ARGUMENT

The probation revocation court improperly revoked Appellant’s  
probationary sentence on an impermissible basis where the  
probation agent said the violation was “financial” and where  
Appellant explained he did not willfully fail to pay his restitution .....4

Relevant Facts.....4

Discussion.....5

CONCLUSION.....7

PETITION TO BE RELIEVED AS COUNSEL.....8

**TABLE OF AUTHORITIES**

Cases

Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986) .....5, 6

Bearden v. Georgia, 461 U.S. 660 (1983) .....5

Nichols v. State, 308 S.C 334, 417 S.E.2d 860 (1992) .....5, 6

State v. Allen, 370 S.C. 88, 634 S.E.2d 653 (2006) .....3

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

State v. Lee, 350 S.C. 125, 564 S.E.2d 372 (Ct. App. 2002) .....5

State v. Spare, 374 S.C. 264, 647 S.E.2d 706 (Ct. App. 2007) .....3, 5

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

Statutes

S.C. Code §§ 24-21-450 .....5

**STATEMENT OF ISSUE ON APPEAL**

Whether the probation revocation court improperly revoked Appellant's probationary sentence on an impermissible basis where the probation agent said the violation was "financial" and where Appellant explained he did not willfully fail to pay his restitution?

## STATEMENT OF THE CASE

During its July 2015 term, the Richland County Grand Jury indicted Appellant for assault and battery by mob and burglary in the first degree. R. 11. Appellant pled to assault and battery by mob, third degree, and the lesser included offense of burglary in the third degree. R. 9. Judge Hood sentenced Appellant to five years' imprisonment suspended on three years' probation pursuant to the Youthful Offender Act (YOA). R. 3, ll. 6 – 11; R. 13.

On November 22, 2019, Appellant had a probation revocation hearing held before the Honorable Frank R. Addy. R. 1. Agent Price represented Probation, Parole, and Pardon Services. Id. Jean Popowski represented Appellant. Id. Appellant allegedly violated the conditions of his probation by failing to pay restitution and admitting to marijuana use. R. 3, l. 17 – 4, l. 6. Appellant's probation was revoked, and he was screened for the "Shock incarceration program." R. 5, l. 16 – 6, l. 8.

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 probation revocation court improperly revoked Appellant's probationary sentence on an impermissible basis where the probation agent said the violation was "financial" and where Appellant explained he did not willfully fail to pay his restitution.

### **Relevant Facts**

During Appellant's probation revocation hearing probation agent Price informed the court that Appellant's "current violation is financial." R. 3, ll. 17 – 24. Although Appellant paid \$836 in restitution, Price said "it just seems as though he's not making an effort to pay his restitution off." R. 3, l. 25 – 4, l. 6.

Price stated that he would normally not recommend revocation but Appellant "tested positive for marijuana multiple times over the course of his probation." Id. Price opined that if "[Appellant] has money to buy weed" he has money to pay restitution. Id.

Appellant explained his money problems to the court that made his failure to pay restitution not willful. R. 4, l. 9 – 5, l. 11. Appellant was the sole supporter of his mother and his two children. Id. Appellant also explained that he did not pay for any of the marijuana that he used; his friends gave him some for free. Id. Moreover, Appellant always admitted to his marijuana use, so the state would not have to waste time and money testing him. Id.

The probation revocation court revoked Appellant's probationary sentence and stated that the revocation had "nothing to do with money at this point." R. 5, l. 16 – 6, l. 8. According to the court, the reason for Appellant's sentence being revoked was because he had "discipline issues." Id. Appellant tried to tell the court that he does not have "discipline issues" and he had not broken the law since being on probation. R. 6, l. 14 – 7, l. 13.

The probation revocation court disregarded Appellant's explanation during the revocation hearing, revoked Appellant's probationary sentences, and had Appellant screened for the "Shock incarceration program." R. 5, l. 16 – 6, l. 8.

### **Discussion**

Appellant's probationary sentence was improperly revoked where the "current violation [was] financial" according to probation agent Price and Appellant explained he did not willfully fail to pay his restitution, he simply did not have the money. R. 4, l. 9 – 5, l. 11.

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 state may not subject indigent parolees, as a class, to confinement solely because they lack means to pay court-ordered fines. Bearden v. Georgia, 461 U.S. 660, 664 (1983). In cases involving the failure to pay fines or restitution, the circuit court must make a finding of sufficient factual evidence of the violation and make an additional finding of willful failure to pay. *See State v. Spare*, 374 S.C. 264, 269, 647 S.E.2d 706, 709 (Ct. App. 2007). While a defendant's poverty does not immunize her from punishment, the state may not confine her for poverty alone. Georgia, at 664. It may do so only after finding that her failure to pay was willful. *Id.*; Nichols v. State, 308 S.C. 334, 337, 417 S.E.2d 860, 862 (1992); Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986).

At the revocation hearing Agent Price informed the court that Appellant's violation was "financial." R. 3, ll. 17 – 24. He also explained that Appellant admitted to marijuana use while

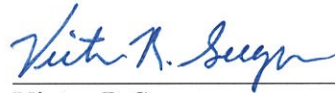
on probation and opined that if Appellant “has money to buy weed” so he should have money to pay restitution. Id. While Appellant had paid \$836 towards restitution, Agent Price still maintained that Appellant was not making an effort to pay the court ordered restitution. R. 3, l. 25 – 4, l. 6.

Appellant explained that Agent Price’s assumption that Appellant was spending money on marijuana rather than paying his restitution was incorrect. R. 4, l. 9 – 5, l. 11. Appellant never spent money on marijuana because friends gave him it for free. Id. Moreover Appellant clarified the reason he has only been able to pay \$836 of his restitution because he is the sole supporter of his two kids and mother. Id.

Accordingly, the probation revocation court erred when it revoked Appellant’s probation because Agent Price categorized the violation as a “financial” one and Appellant did not willfully fail to pay the restitution pursuant to his probationary sentence. R. 5, l. 16 – 6, l. 8. See Nichols v. State, 308 S.C 334, 337, 417 S.E.2d 860, 862 (1992); see also Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986).

**CONCLUSION**

By reason of the foregoing arguments, Appellant respectfully requests that this Court remand his case to the Richland County Court of General Sessions for a new probation revocation hearing.



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Victor R Seeger  
Appellate Defender

ATTORNEY FOR APPELLANT

This 16<sup>th</sup> day of September, 2020.

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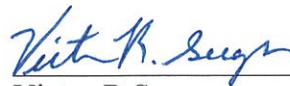
\_\_\_\_\_  
PETITION TO BE RELIEVED AS COUNSEL  
\_\_\_\_\_

Counsel for Andre Deshawn Posey 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 Frank R. Addy, which was held on November 22, 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 Andre Deshawn Posey.

Respectfully Submitted,



\_\_\_\_\_  
Victor R Seeger  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 16<sup>th</sup> day of September, 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) and Sentence Sheet(s);
- (2) Probation Violation Hearing Transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

September 16, 2020



Victor R Seeger  
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."

September 16, 2020.



Victor R Seeger  
Appellate Defender

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