

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Letitia H. Verdin, Circuit Court Judge

RECEIVED
Sep 25 2020
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JODY MACK CHILDRESS, JR.

APPELLANT

APPELLATE CASE NO. 2020-000386

ANDERS BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred where it revoked Appellant's probation where Appellant's failure to attend counseling was not willful due to improper actions by the counselor and financial hardship to Appellant, and where Appellant's possession of explicit materials and association with a child were unknowing or incidental?

STATEMENT OF THE CASE

On July 17, 2018, Appellant, Jody Childress, Jr., appeared before the Honorable Robin B. Stilwell in the circuit court of Greenville County and pleaded guilty to second-degree criminal sexual conduct with a minor. Appellant was sentenced to ten years of incarceration suspended upon the service of five hundred and three days and five years of probation. App. 19.

On February 21, 2020, Appellant appeared before the Honorable Letitia H. Verdin for a probation revocation hearing. Appellant was represented by Teal Johnson. The State was represented by Agent Harden. App. 1. The court revoked Appellant's probation, ordered that he serve six years' imprisonment, and terminated his supervision. App. 15, ll. 3-4; App. 20.

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 revoked Appellant's probation where Appellant's failure to attend counseling was not willful due to improper actions by the counselor and financial hardship to Appellant, and where Appellant's possession of explicit materials and association with a child were unknowing or incidental.

Relevant facts

The State alleged that Appellant violated the conditions of his probation because it claimed he: did not attend sex offender counseling; had a child in his home; and accessed social media by sending and receiving explicit, pornographic photographs. App. 2, ll. 10-15. Agent Hardin also provided the court with a statement written by Appellant's counselor.¹ App. 2, ll. 20-23.

Appellant "adamantly dispute[d] these violations [were] willful." App. 4, ll. 2-3. Defense counsel argued that it was "financially hard" for Appellant to attend sex offender counseling because getting there required taking a fifty dollar Uber ride if he was unable to get a ride from a family member, and counsel noted that Appellant did attend twelve counseling sessions. App. 4, l. 16 – 5, l. 21.

Defense counsel also explained that although Appellant tried to be forthcoming in sex offender counseling by disclosing that he himself was abused as a child, the counselor attempted to "use [his] confidential disclosures against [him]." App. 4, l. 20 – App. 5, l. 11. The circuit judge recognized that the counselor's behavior in this regard was improper and asked the probation agent to tell the counselor his statement about Appellant's disclosures was "inappropriate." App. 15, ll. 6-8.

¹ The counselor's statement was not made an exhibit at the revocation hearing.

Defense counsel also explained that the photographs and social media at issue did not involve children and were instead unsolicited photographs from adults and one or two photographs that Appellant sent his fiancée.² App. 5, l. 22 – 6, l. 10. Defense counsel explained that Appellant did not know he was not allowed to send such photographs to another adult, with whom he was in a relationship. App. 7, ll. 7-9.

Finally, Appellant’s aunt explained that the child in the home was her grandchild, and that the child had been brought over in the middle of the night during an emergency. App. 6, l. 18 – 7, l. 11.

However, the court found that Appellant was “in willful violation of his probation,” imposed six years of his suspended sentence, and terminated supervision. App. 14, l. 19 – 15, l. 4.

Discussion

As to the allegation that Appellant had not completed sex offender counseling, the court correctly recognized the counselor’s actions in attempting to use Appellant’s disclosures of his own childhood abuse were improper. Pursuant to S.C. Code Ann. § 19-11-95, subject to certain exceptions, a provider may not knowingly reveal a confidence of his patient and may not knowingly use a confidence of his patient to the patient’s disadvantage.

Moreover, Appellant’s financial difficulty in attending counseling was not willful and should not be the basis of a violation here, absent further inquiry by the circuit court. *See State v. Spare*, 374 S.C. 264, 270, 647 S.E.2d 706, 709 (Ct. App. 2007) (court may not revoke probation

² The State countered by alleging that Appellant had a “hidden phone” and had been using Snapchat, which erased the content of the communications that he sent and received. App. 9, l. 13 – 11, l. 10.

based solely on probationer's failure to pay fines or fees without inquiring into probationer's ability to pay, his reasons for failing to pay, and whether his failure to pay was willful).

As to the allegations regarding social media and explicit photographs, Appellant was unaware he was engaged in any wrongdoing. Similarly, with regard to a child being present in the home, Appellant did not intend for a child to be present in his home. He lived with his aunt, and his aunt explained that the child was her grandchild, who had been brought over due to an emergency. *See State v. Allen*, 370 S.C. 88, 103, 634 S.E.2d 653, 660 (2006) (in upholding the validity of the standard probation condition that a probationer not associate with a person with a criminal record we “hold that the no-association condition implicitly requires a finding that [the probationer] knew the person in question had a criminal record during the period of association, and that the association was not simply an unknowing or incidental encounter.”)

Here, as in *Allen*, this Court should hold that in order for an encounter with a child or possession of contraband to be the basis of a probation revocation, the circuit court must find the encounter or possession was not simply unknowing or incidental. Appellant did not intend to violate his probation with regard to these allegations. Rather, his possession of explicit materials and his association with his aunt's grandchild were unknowing or incidental.

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 25th day of September, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jody Mack Childress, Jr., 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 hearing before Judge Letitia H. Verdin, which was held on February 21, 2020, and, in her opinion, the appeal is without legal merit sufficient to warrant a new hearing.
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 hearing.

WHEREFORE, She asks the Court to relieve her as counsel for Jody Mack Childress.

Respectfully Submitted,

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

This 25th day of September, 2020.

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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 25, 2020.

s/ Joanna K. Delany

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