

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable R. Ferrell Cothran, Circuit Court Judge

RECEIVED

Nov 13 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

FRAZIER SINGLETON,

APPELLANT

APPELLATE CASE NO 2020-000131

ANDERS BRIEF OF APPELLANT

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Division of Appellate Defense
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STATEMENT OF ISSUE ON APPEAL

Whether the lower court erred when it revoked Appellant's probation where the court relied on the complaining witness' affidavit for revocation without holding an evidentiary hearing to afford Appellant with the opportunity to cross-examine the witness?

STATEMENT OF THE CASE

During the January 2016 term, the Sumter County Grand Jury indicted Appellant for stalking or stalking while an injunction or restraining order is in effect prohibiting this conduct.

R. 15 – 16. Appellant was sentenced to ten years' imprisonment and upon the service of five years' imprisonment, three years' probation. R. 17; R. 3, l. 6 – 4, l. 8.

On January 17, 2020, Appellant had a probation revocation hearing the Honorable R. Ferrell Cothran. R. 1. Phillip Little, Jr., represented Appellant. Id.

Appellant was found to have willfully violated his probationary sentence. R.10, ll. 24 – 25. Three years of Appellant's probationary sentence was revoked. Id.

This appeal follows.

STANDARD OF REVIEW

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. 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); S.E.C. v. TheStreet.Com, 273 F.3d 222, 229 n. 6 (2d Cir.2001); See State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655–56 (2006).

ARGUMENT

The lower court erred when it revoked Appellant's probation where the court relied on the complaining witness' affidavit without holding an evidentiary hearing to afford Appellant with the opportunity to cross-examine the witness.

Relevant Facts

Appellant pled guilty to stalking on January 12, 2016. R. 17. Appellant's probationary sentence began due to that charge. R. 3, ll. 6 – 12.

On January 17, 2020, at Appellant's probation revocation hearing the state alleged Appellant violated the terms of his probation when he attempted to contact the complaining witness. R. 4, ll. 2 – 8. The state also alleged Appellant violated the conditions of his probation when he pled guilty to a habitual traffic offender charge and to a driving under the influence charge on June 5, 2019. R. 3, l. 13 – 4, l. 1. Appellant also allegedly failed to pay supervision fees and surcharges as well as failing to "follow up with vocational rehabilitation." R. 3, l. 13 – 4, l. 1.

At Appellant's probation revocation hearing, Appellant denied attempting to contact the complaining witness. R. 6, l. 18 – 7, l. 4. Defense counsel also explained the procedural complexities in this case that caused Appellant to be in violation of his probation for his guilty pleas. R. 5, l. 25 – 7, l. 4. Defense counsel stated that he and the solicitor "tried to workout a negotiation" for a plea agreement on the habitual traffic offender charge. R. 5, l. 25 – 7, l. 4. However, defense counsel forgot Appellant was on probation when he negotiated the plea agreement. Id.

On June 5, 2019, at Appellant's guilty plea hearing for the habitual traffic offender charge and the driving under the influence charge the solicitor recommended probation and the

Honorable Judge William H. Seals, Jr., agreed to follow the recommendation. Id. Defense counsel explained that he mistakenly advised Appellant to plead guilty and that was what “triggered his probation violation” in the instant case. Id.

Appellant was supposed to be brought back to court the next day and “the solicitor agreed to ask the judge to reconsider the sentence.” Id. However, “the jail forgot to bring [Appellant] that day, and Judge Seals had to leave.” Id. Judge Seals stated, “he was comfortable with another circuit judge reconsidering [Appellant’s] sentence,” and Appellant was brought back to court on June 10, 2019 before the Honorable Judge George M. McFaddin, Jr. Id.

Judge McFaddin ordered that an evidentiary hearing be scheduled for September 13, 2019, but Appellant and complaining witness did not appear at the hearing. R. 7, ll. 6 – 11. Appellant and defense counsel gave different reasons why Appellant was not able to appear at the evidentiary hearing. Defense counsel stated that Appellant was not able to appear because he was working in Myrtle Beach. Id. Appellant stated that he was not able to appear at the evidentiary hearing because he was in the hospital that day. R. 11, ll. 18 – 19.

Defense counsel argued that the evidentiary hearing was necessary before Appellant’s probation could be revoked. R. 6, l. 18 – 7, l. 4. However, immediately after reading the complaining witness’ affidavit the probation revocation court determined that Appellant willfully violated his probation without conducting the evidentiary hearing. R. 10, ll. 20 – 25; R. 36 – 37. Appellant had three years of his probationary sentence revoked and the remainder of his probationary sentence was terminated. Id.

Discussion

The lower court erred when it found Appellant willfully violated his probation without holding an evidentiary hearing to afford Appellant with the opportunity to cross-examine the

complaining witness. R. 10, ll. 24 – 25. Appellant explained that was not able to appear at the evidentiary hearing on September 13, 2019 because he was in the hospital that day. R. 11, ll. 18 – 19. Moreover, the complaining witness, who alleged that Appellant tried to contact her in violation of the conditions of Appellant's probation, did not appear at the evidentiary hearing either. R. 8, ll. 5 – 11.

The lower court revoked Appellant's probation based on the affidavit written by the complaining witness without giving Appellant the opportunity to cross-examine the witness and without requiring additional proof of guilt. R. 10, ll. 20 – 25; R. 36 – 37. Accordingly, the lower court abused its discretion when it revoked Appellant's probation based solely on the unsubstantiated affidavit because it violated his confrontation and due process rights under Crawford v. Washington, 124 S.Ct. 1354 (2004).

Probation is a matter of judicial grace, and revocation is committed to the sound discretion of the trial court. 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). 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 right to confront adverse witnesses is an essential to due process, the denial of which compels reversal unless it is harmless beyond a reasonable doubt. U.S. Const. Amend. VI; Delaware v. Van Arsdall, 475 U.S. 673 (1986); State v. Graham, 314 S.C. 383, 444 S.E.2d 525 (1994). Additionally, no citizen of South Carolina may be punished for an offense unless he is first "duly and legally convicted thereof." S.C.Code Ann. § 17-25-10.

In Crawford v. Washington, 124 S.Ct. 1354 (2004), the United States Supreme Court held that out-of-court testimonial statements are barred from a criminal trial, under the

confrontation clause, unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. Id. at 1364. The Crawford rule applied to all "testimonial" evidence regardless of whether it bears the traditional indicia of reliability that would have made it admissible in previous cases. Id.

"Testimonial" statements under Crawford include "ex parte in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony... or similar pretrial statements that declarants would reasonably expect to use prosecutorially." Id. at 1364 – 65. Statements taken by a police officer in the course of interrogations qualify as testimonial "under even a narrow standard." Id.; See also State v. Roach, 364 S.C. 422, 613 S.E.2d 791 (Ct. App. 2005) (trial court erred by admitting hearsay statements of unavailable witnesses through investigating officer's testimony).

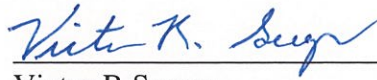
Under Crawford, Appellant had the right to confront the complaining witness who made testimonial statements against him in the affidavit that the lower court relied on to revoke his probation. R. 10, ll. 20 – 25; R. 36 – 37. Thus, the trial court erred when it revoked Appellant's probationary sentence based on the complaining witness' testimonial evidence without holding an evidentiary hearing to give Appellant the opportunity to cross-examine the witness.

That error prejudiced Appellant because it was immediately after the lower court judge read the complaining witness' affidavit that Appellant's probation was revoked.¹ Id. Accordingly, the revocation of Appellant's probation should be vacated, and his case remanded to the Sumter County Court of General Sessions.

¹ Appellant's other alleged probation violations that were a result of his guilty pleas to habitual traffic offender and driving under the influence were not willful violations because defense counsel admitted that he forgot Appellant was on probation when he advised him to plead guilty to those charges. R. 6, l. 4 – 7, l. 4. Accordingly, those violations were attributable to Appellant involuntarily pleading guilty because defense counsel's erroneous sentencing advice left him unaware that pleading guilty would result in a probation violation. Id.

CONCLUSION

Based on the foregoing reasons, Appellant's probation revocation should be vacated, and his case remanded to the Sumter County Court of General Sessions for a new probation revocation hearing.



Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of November, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Frazier Singleton 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 R. Ferrell Cothran, which was held on June 5, 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 Frazier Singleton.

Respectfully Submitted,



Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

This 13th day of November, 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 and sentence sheet:
- (2) Transcript of record dated January 17, 2020; and
- (3) Violation of Probation Packet

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

November 13, 2020



Victor R Seeger
Appellate Defender

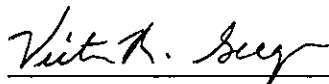
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CERTIFICATE OF COUNSEL

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."

November 13, 2020.



Victor R Seeger
Appellate Defender

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