

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Cherokee County
R. Keith Kelly, Circuit Court Judge

RECEIVED

Dec 07 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JERRY JEROME DAVIS,

APPELLANT

APPELLATE CASE NO. 2020-000608

ANDERS BRIEF OF APPELLANT

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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 court erred where it denied Appellant’s continuance motion, where Appellant moved to continue the probation revocation hearing until an administrative hearing could be held and until he could obtain discovery on his new criminal charges, where no administrative hearing had been held, and where the State alleged Appellant’s new charges were the primary basis for his violation, since Appellant was entitled to due process of law5

Relevant facts5

Discussion.....6

CONCLUSION.....9

PETITION TO BE RELIEVED AS COUNSEL10

TABLE OF AUTHORITIES

Cases

Gagnon v. Scarpelli, 411 U.S. 778 (1973).....7

Morrissey v. Brewer, 408 U.S. 471 (1972).....6, 7

Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007)3

State v. Browder, 277 S.C. 206, 284 S.E.2d 775 (1981).....3

State v. Funderburk, 367 S.C. 236, 625 S.E.2d 248 (Ct. App. 2006).....3, 8

State v. Geer, 391 S.C. 179, 705 S.E.2d 441 (Ct. App. 2010).....3

State v. Irick, 344 S.C. 460, 545 S.E.2d 282 (2001).....3

State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002).....3

State v. Preslar, 364 S.C. 466, 613 S.E.2d 381 (Ct. App. 2005).....3

State v. White, 311 S.C. 289, 428 S.E.2d 740 (Ct. App. 1993)3

State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995)3

State v. Yarborough, 363 S.C. 260, 609 S.E.2d 592 (Ct. App. 2005).....3

Rules

Rule 7(b), SCCrimP4

STATEMENT OF ISSUE ON APPEAL

Whether the court erred where it denied Appellant's continuance motion, where Appellant moved to continue the probation revocation hearing until an administrative hearing could be held and until he could obtain discovery on his new criminal charges, where no administrative hearing had been held, and where the State alleged Appellant's new charges were the primary basis for his violation, since Appellant was entitled to due process of law?

STATEMENT OF THE CASE

On March 21, 2019, a Cherokee County Grand Jury indicted Appellant for domestic violence in the first degree. R. 13 – 14. On June 17, 2019, Appellant appeared before the Honorable Grace Gilchrist Knie for a guilty plea hearing. Appellant was represented by Matthew Craft and the State was represented by Toria Smith. The court sentenced Appellant to ten years of imprisonment suspended upon the service of one hundred and fifty-six days' time served and three years of probation. R. 15.

On March 26, 2020, Appellant appeared before the Honorable R. Keith Kelly for a probation violation hearing. Clay Allen and Andrea Price represented Appellant. An unnamed probation agent represented the State. R. 1; App. 4, 1. 23. The court revoked Appellant's probation in full. R. 11, 1. 1; R. 16.

This appeal follows.

STANDARD OF REVIEW

A motion for continuance is addressed to the sound discretion of the trial court and its ruling on such motion will not be reversed without a clear showing of abuse of discretion. *State v. Browder*, 277 S.C. 206, 284 S.E.2d 775 (1981). In South Carolina, “[t]he grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record.” *Plyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007). *Accord State v. Geer*, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010); *State v. Yarborough*, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005).

“An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” *Geer*, 391 S.C. at 189, 705 S.E.2d at 447 (quoting *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001)); *see also State v. Funderburk*, 367 S.C. 236, 239, 625 S.E.2d 248, 249–50 (Ct. App. 2006) (“An abuse of discretion occurs when the trial court’s ruling is based on an error of law”). Even if there was no evidentiary support, “[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant.” *Geer*, 391 S.C. at 190, 705 S.E.2d at 447 (quoting *State v. Preslar*, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005)); *see also State v. Wyatt*, 317 S.C. 370, 372–73, 453 S.E.2d 890, 891–92 (1995).

The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion. *State v. White*, 311 S.C. 289, 293, 428 S.E.2d 740, 742 (Ct. App. 1993). Reversals of refusals of continuances “are about as rare as the proverbial hens teeth.” *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (citation omitted). The party asking for the continuance must show due diligence was used in trying to procure the testimony of an absent witness as well as set forth what the party believes the absent witness will testify to and the grounds for that belief. *See White*, 311 S.C. at

293, 428 S.E.2d at 742-43; *see also* Rule 7(b), SCCrimP (explaining that a motion for continuance to procure the testimony of a witness will not be granted unless the party seeking the testimony made use of due diligence to procure the testimony).

ARGUMENT

The court erred where it denied Appellant’s continuance motion, where Appellant moved to continue the probation revocation hearing until an administrative hearing could be held and until he could obtain discovery on his new criminal charges, where no administrative hearing had been held, and where the State alleged Appellant’s new charges were the primary basis for his violation, since Appellant was entitled to due process of law.

The court’s refusal to grant a continuance improperly denied Appellant due process because he was denied a preliminary administrative hearing and he was effectively denied the ability to contest the allegations against him at the revocation hearing.

Relevant facts

Appellant was alleged to have violated the conditions of his probation by being arrested for domestic violence and grand larceny, and by failing to enroll in “batterers treatment” [sic]. R. 4, ll. 3-9; R. 8, l. 16 – 9, l. 5. The probation agent present at the revocation hearing claimed that as to Appellant’s new domestic violence charge, “I’ve shown the defense all the photos [complainant’s bruise] and the text messages where he even admits to hitting her with a belt.” R. 8, ll. 18-22. The agent also alleged that Appellant “hasn’t done anything really on probation.” R. 9, l. 6. In response to questioning by the judge, Appellant admitted that he violated his probationary requirements. R. 3, ll. 22-23.

However, defense counsel moved for a continuance, so that Appellant could “both have an admin[istrative] hearing, and I can get some discovery . . .” R. 4, ll. 15-20. A bench conference was held off the record, and when the parties went back on the record, the court recognized that probation-related administrative hearings had been cancelled due to the coronavirus emergency. Nevertheless, the court denied the continuance motion and ruled,

“whereas here you have admitted the violations with able counsel, and also [defense counsel] himself [is] standing there next to you. I don’t see any violation of due process.” R. 5, ll. 1-14. “I don’t know of any statute that guarantees you a . . . preliminary hearing or an administrative hearing.” R. 5, ll. 6-9. Appellant then stated that he wished to go forward with the revocation hearing. R. 10, ll. 20-25.

The court revoked Appellant’s probation in full. R. 11, l. 1.

Discussion

In *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972), the United States Supreme Court explained that because a parole revocation deprives an individual of conditional liberty, due process requires a hearing “structured to assure that the finding of a parole 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.” The Supreme Court found that a parolee’s entitlement to a hearing in that regard is twofold: he is entitled to both a preliminary hearing and a revocation hearing. *Id.* at 485 – 489.

First, due process requires “that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available.” *Id.* at 485. “Such an inquiry should be seen as in the nature of a ‘preliminary hearing’ to determine whether there is probable cause or reasonable ground to believe the arrested parolee has committed acts that would constitute a violation of parole conditions.” *Id.*

Second, due process requires a hearing that leads to “a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation.” *Id.* at 488. “The parolee must have an opportunity to be heard and to show, if he can, that he did not

violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.” *Id.*

In *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n. 3 (1973), the United States Supreme Court explained that a probation revocation and a parole revocation are “constitutionally indistinguishable.” “Petitioner does not contend that there is any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one.” *Id.* at 782. Therefore, the Supreme Court “h[e]ld that a probationer, like a parolee, is entitled to a preliminary and final revocation hearing, under the conditions specified in *Morrissey v. Brewer*, *supra.*” *Id.*

Here, the court erred in denying Appellant’s continuance motion because it appears Appellant did not receive a preliminary hearing: it was undisputed that an administrative hearing had not been held due to the pandemic. Although the court stated that no statute required an administrative hearing, it overlooked *Gagnon v. Scarpelli*, 411 U.S. at 782, which held that a probationer is constitutionally entitled to a preliminary hearing.

The court also erred in denying Appellant’s continuance motion because although Appellant received a revocation hearing in form, he was denied a revocation hearing in function since he did not have the opportunity to receive full discovery on his new domestic violence charge and therefore he could not meaningfully contest that allegation; an allegation which was a primary reason the State sought to revoke probation.

Appellant was improperly denied due process of law: his “opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.” *Morrissey v. Brewer*, 408 U.S. at 488. The court’s refusal to allow Appellant a continuance was an abuse of discretion since it

was premised on an error of law—denying Appellant the opportunity to have a preliminary hearing and denying him the opportunity to meaningfully contest the allegations. *See State v. Funderburk*, 367 S.C. at 239, 625 S.E.2d at 249–50.

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 7th day of December, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jerry Jerome Davis 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 R. Keith Kelly, which was held on March 26, 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 Jerry Jerome Davis.

Respectfully Submitted,

s/ Joanna K. Delany

Joanna K. Delany

Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of December, 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.”

December 7, 2020.

s/ Joanna K. Delany

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