

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Daniel D. Hall, Circuit Court Judge

RECEIVED

Jan 08 2021

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ANTHONY TERMAINE AVERA,

APPELLANT

APPELLATE CASE NO. 2020-000812

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred where it partially revoked Appellant's probation, where the State alleged Appellant violated his probation because he was charged with domestic violence offenses and was in arrears, since there was no finding the monetary violations were willful, and since the victim of the alleged domestic violence recanted?

STATEMENT OF THE CASE

During the September term of 2018, a York County Grand Jury indicted Appellant for attempted murder. R. 21 – 22. On January 31, 2019, Appellant appeared before the Honorable William A. McKinnon and pleaded guilty to the lesser-included offense of assault and battery of a high and aggravated nature. Appellant was sentenced to ten years' imprisonment suspended upon the service of three hundred and ninety days' incarceration and five years of probation. R. 25.

During the March term of 2020, a York County Grand Jury indicted Appellant for domestic violence in the second degree. R. 19 – 20. During the June term of 2020, a York County Grand Jury indicted Appellant for domestic violence in the first degree. R. 17 – 18. On May 7, 2020, Appellant appeared before the Honorable Daniel D. Hall for a guilty plea hearing and probation revocation proceeding. Appellant was represented by Jeffrey Zuschke. The State was represented by Sharon Ohayon. R. 1.

Appellant pleaded guilty to domestic violence in the first and second degrees. R. 2, ll. 4-7. The court sentenced Appellant to time served on both domestic violence charges. The court also revoked Appellant's probation for three years and continued Appellant on probation for the balance. R. 14, l. 13 – 15, l. 13; R. 23 – 24; R. 26.

This appeal follows.

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 court erred where it partially revoked Appellant’s probation, where the State alleged Appellant violated his probation because he was charged with domestic violence offenses and was in arrears, since there was no finding the monetary violations were willful, and since the victim of the alleged domestic violence recanted.

Relevant facts

On May 7, 2020, Appellant appeared before the court and pleaded guilty to first-degree and second-degree domestic violence. R. 2, ll. 3-7; R. 5, ll. 12-23. At the same hearing, the parties went forward with Appellant’s pending probation violation matter. R. 10, ll. 18-24. The State alleged that Appellant violated the terms of his probation because he was charged with the above domestic violence offenses and because his financial obligations were in arrears. R. 10, l. 18 – 11, l. 4.

As to the allegation that Appellant was in arrears, no details were given regarding Appellant’s alleged financial arrears, and his ability to pay was not addressed. However, his counsel explained that Appellant worked two fast food jobs and paid child support for his two children. R. 13, ll. 11-17.

As to the allegation that Appellant committed domestic violence, although Appellant did plead guilty to those charges, it seemed the State and defense agreed that the alleged victim of the charges had recanted her accusations. R. 10, ll. 3-5; R. 11, l. 16 – 12, l. 5. Defense counsel told the court that the alleged victim “has indicated that she lied to the police; that [Appellant] did not assault her . . . He’s not guilty of anything.” R. 11, ll. 17-21.

Nevertheless, the court found there was “a willful, substantial violation to [Appellant’s] probation,” revoked three years, and continued Appellant on probation. R. 14, ll. 20-22; R. 26.

Discussion

First, the mere allegation that Appellant was “in arrears” was insufficient to support revocation, since there was no inquiry by the court into the circumstances surrounding the arrearage. “[W]hen probation is revoked *solely* for failure to pay fines or restitution [] a finding of willfulness is mandatory.” *State v. Hamilton*, 333 S.C. 642, 649, 511 S.E.2d 94, 97 (Ct. App. 1999) (emphasis in original) (citing *Bearden v. Georgia*, 461 U.S. 660 (1983)). “[A] probationer whose sole violation consists of nonpayment of fines or restitution, and who is willing but unable to pay, should not be penalized for being poor.” *Id.*

“[I]n those cases involving the failure to pay fines or restitution, the circuit judge must, in addition to finding sufficient factual evidence of the violation, make an additional finding of willfulness.” *Id.* See *State v. Spare*, 374 S.C. 264, 270, 647 S.E.2d 706, 709 (Ct. App. 2007) (judge abused his discretion in concluding probationer’s failure to pay restitution was willful where judge failed to inquire into probationer’s “ability to pay, his reasons for failing to pay, and whether his failure to pay was willful”). Here, the court made no inquiry into Appellant’s ability to pay, reasons for failing to pay, and whether the failure was willful. This was error. To the extent the record speaks at all to Appellant’s ability to pay it indicates that he was likely unable to pay despite his best efforts—he worked two fast food jobs and paid child support for two children.

Second, Appellant’s probation should not have been revoked on the basis of his domestic violence arrests, since the alleged victim admitted she “lied to the police” and said Appellant was not guilty. R. 11, ll. 17-21. The authority of the court to revoke probation “may not be capriciously or arbitrarily exercised, but should always be predicted upon an evidentiary showing of fact tending to establish violation of the conditions.” *State v. White*, 218 S.C. 130, 135, 61

S.E.2d 754, 756 (1950). “Before revoking probation, the circuit judge must determine if there is sufficient evidence to establish that the probationer has violated his probation conditions.” *State v. Williamson*, 356 S.C. 507, 510, 589 S.E.2d 787, 788 (Ct. App. 2003) (quoting *Hamilton*, 333 S.C. at 648–49, 511 S.E.2d at 97).

Here, because the alleged victim admitted the domestic violence incidents never occurred, there was insufficient evidence to find Petitioner violated the conditions of his probation.¹ Therefore, the court’s decision to revoke was error since it lacked basis in evidence.

¹ *But see State v. Gleaton*, 172 S.C. 300, 174 S.E. 12, 14 (1934) (citing *State v. Sullivan*, 127 S.C. 186, 121 S.E. 47, 52 (1923) (Cothran, J. dissenting) (If probationer’s breach of conditions appears by the record of his conviction, the circuit judge may act upon the production of this record, unless the defendant shall deny his identity or allege *nul tiel* record).

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 8th day of January, 2021.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Anthony Termaine Avera 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 Daniel D. Hall, which was held on May 7, 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 Anthony Termaine Avera.

Respectfully Submitted,

Joanna K. Delany

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

This 8th day of January, 2021.

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.”

January 8, 2021.

sl Joanna K. Delany

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