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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to Newberry County

R. Scott Sprouse, Circuit Court Judge
—————

STEVE YOUNG,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002412
—————

APPENDIX
—————

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STATE OF SOUTH CAROLINA)	
COUNTY OF NEWBERRY)	COURT OF GENERAL SESSIONS
)	2011-GS-32-00623

STATE OF SOUTH CAROLINA)	
vs.	)	TRANSCRIPT OF RECORD
STEVE YOUNG)	
DEFENDANT)	

November 1, 2013
 Lexington, South Carolina

B E F O R E:

HON. STEVEN H. JOHN, Judge.

A P P E A R A N C E S:

DEPARTMENT OF PROBATION, PAROLE & PARDON SERVICES
 Appearing for the State of South Carolina

ELIZABETH C. FULLWOOD, ASSISTANT PUBLIC DEFENDER
 Attorney for the Defendant

CAROL M. THUEME, RPR
 Official Court Reporter

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EXHIBITS

(There were no exhibits marked.)

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THE PROBATION AGENT: Steve Young.

THE CLERK: Raise your right hand, please.

STEVE YOUNG, after being duly sworn, testified as follows:

THE COURT: Yes, sir, Agent.

THE PROBATION AGENT: Yes, sir. If it please the Court, Daniel Shearer for the Probation Department.

Before you is Steve Young. He's here on a probation matter from Newberry County, that on December 1, 2011, for the offense of assault and battery, 1st degree. That sentence was ten years suspended upon time served, 157 days, and four years probation. That case was ordered PTUP after two years if his restitution was paid. The restitution amount, Your Honor, was \$2,400 with the 20 percent collection fee added to it. He was also ordered to complete 40 hours, attend substance abuse counseling and be drug tested.

Your Honor, this matter actually is before you -- I guess it's kind of hard for us to bring cases before the Court on just a motion, so I kind of issued a citation which really didn't violate him, just asking you to review the case.

Mr. Young has been sentenced to a period of ten years in prison under a Union County indictment -- or two Union County indictments for reckless homicide, death

1 resulting, and leaving the scene of an accident causing
2 death. I do indicate that information in the violation
3 report.

4 Your Honor, those offense dates were a year
5 prior to the sentence date of this probation case. So it
6 does not allow us to address it as a violation even though
7 the conviction date was during the probation case.

8 Also, right before Mr. Young had been convicted,
9 I had gone ahead and did a paperwork review and kind of
10 made an agreement with him that we would readjust the case
11 and put him in perfect standing with our Department prior
12 to the conviction, so just here to -- we do have to ask
13 that the case be tolled, which would just put the case on
14 hold until he got out of prison. However, if you decide
15 that the case should be terminated or revoked
16 concurrently, we would ask that a civil judgment be
17 ordered for the restitution balance owed to Alfred Cromer,
18 who has been notified and I don't believe is present
19 today, and has not indicated either way how he feels about
20 the case.

21 THE COURT: All right. So what you're asking,
22 that the probationary period be tolled?

23 THE PROBATION AGENT: While he's incarcerated.

24 THE COURT: And apparently that was during the
25 August 16, 2012 term of General Sessions court in Union

1 County, correct?

2 THE PROBATION AGENT: Yes, Your Honor.

3 THE COURT: That's when he was convicted?

4 THE PROBATION AGENT: Yes, Your Honor.

5 THE COURT: So you want it tolled from that
6 period of time, so that basically he would have been on
7 probation up to then for approximately nine months?

8 THE PROBATION AGENT: Yes, Your Honor. I don't
9 know if I can actually -- I wanted to make that the date.
10 I don't know if I'm allowed to make or we're allowed to
11 make that the date. I think the date of toll would have
12 to be the date the citation was issued, which is going to
13 be August 21, 2013:

14 I'm sorry, Judge. My supervisor has indicated
15 that actually it would be the date of this order, rather,
16 that the toll date would begin. And you could have -- you
17 have the opportunity for -- to extend the case
18 additionally a year as well. Mr. Young will come out
19 under the 85 percent if he gets good time, he will still
20 be under supervision on that -- the new conviction for a
21 CSC matter.

22 THE COURT: I'm just trying to figure out when
23 the new end date would be for his current probation.

24 So assuming we sign the order today doing what
25 you want --

1 THE PROBATION AGENT: Yes, Judge.

2 THE COURT: -- what is the new end date for his
3 supervision, probationary supervision for this case, not
4 his supervised release?

5 THE PROBATION AGENT: Do you want us to suspend
6 this matter? We can find that information out --

7 (A discussion was held off the record.)

8 THE PROBATION AGENT: Judge, for the record, I'm
9 Daniel Lake, I'm the supervisor for the Probation
10 Department.

11 THE COURT: Yes, sir.

12 MR. LAKE: Judge, the actual time to be tolled
13 would be from today's date through the end date of the
14 case, 11-30-2015, which is a total of 759 days.

15 THE COURT: All right.

16 MR. LAKE: We would add 759 days to the
17 probationary supervision to whatever the SCDC discharge
18 date ends up being.

19 Thank you.

20 THE COURT: Thank you, sir.

21 Now, regarding the -- before he got arrested on
22 those other charges, there were certain -- let's see. He
23 got placed on probation -- so did he do any of the things
24 that he was supposed to have done before he got placed in
25 detention for this other matter while he was on probation,

1 the 40-hours public service employment, the random drug --
2 did he pass the random drug and alcohol testing, did he
3 start going to any substance abuse counseling? Did he do
4 any of that?

5 THE PROBATION AGENT: Judge, he was under
6 supervision for a period of -- I guess that's going to put
7 it for about two years. He could not do the public
8 service per our policy because this defense is statutorily
9 violent. Per our department policy, violent offenders are
10 not permitted to perform public service.

11 THE COURT: All right.

12 THE PROBATION AGENT: The majority of the
13 violations that you could see in this report surround --
14 there was two previous violations that were just trying
15 to -- the first one was the public service, we used that
16 order to delete the public service. The second one was
17 addressing the nonpayment issue. And if he would've
18 tested positive, I would have violated him, so I would
19 assume that there are no positive drug tests or that would
20 be indicated as a previous violation.

21 I do remember -- I took over Mr. Young's case,
22 say, roughly May of 2012. I only personally got to
23 supervise him about three months, but I do remember him
24 being very cooperative. He actually -- when I saw him, he
25 asked to make sure that I'd be his agent when he got out

1 of prison. We did work well together, and he just needs
2 to get a job and get his feet back on solid ground.

3 THE COURT: All right. I'm going accede to the
4 agency's request to toll the time.

5 MS. FULLWOOD: Your Honor?

6 THE COURT: Sir? I'm sorry, ma'am.

7 MS. FULLWOOD: I'm Beth Fullwood, I represent
8 him, and I would like to be heard.

9 THE COURT: I'll be glad for you to do so,
10 ma'am.

11 MS. FULLWOOD: Your Honor, I believe that this
12 is a situation where the Court isn't allowed to toll the
13 probation. He hasn't done anything to violate the terms
14 and conditions of his probation. There's no statute that
15 would allow the Court to toll the probation under these
16 circumstances. I think under State V Meller, that tolling
17 is inappropriate and we'd ask the Court to simply
18 terminate the probation and convert the restitution into a
19 civil judgment.

20 THE COURT: Is he current on all his fees,
21 Agent?

22 THE PROBATION AGENT: No, Judge. He was one
23 payment behind on his supervision fees when he was
24 incarcerated. We stopped the accounts --

25 THE COURT: At that point in time?

1 THE PROBATION AGENT: Yes, sir.

2 THE COURT: How about when he was arrested, the
3 public defender fund, had he paid the public defender fund
4 as ordered?

5 THE PROBATION AGENT: Public defender fund
6 indicates that he has not paid any of that.

7 THE COURT: Was he current on restitution at the
8 time that he was arrested?

9 THE PROBATION AGENT: Judge, he's only paid \$65
10 total to the balance. I would -- we would have
11 restructured that on that May 1, 2012 date, so I would
12 suggest --

13 THE COURT: Well, you're got on the report that
14 it's \$960 behind.

15 THE PROBATION AGENT: That's been running, Your
16 Honor.

17 THE COURT: So at the time of his arrest was he
18 current?

19 THE PROBATION AGENT: No, Judge. I think it
20 would be three payments behind.

21 THE COURT: So he's behind on the public
22 defender's fund, he's behind on his restitution, behind on
23 the payment to the supervision fees.

24 Was he current on his drug test fees?

25 THE PROBATION AGENT: Judge, that has not been

1 paid.

2 THE COURT: Based on his actions on probation
3 during the time that he was out on probation and not under
4 arrest for the other charge, he was in violation of his
5 terms and conditions of probation. I do find those to be
6 a willful violation. I do find, therefore, it is proper
7 to toll the time period since he was not current, he was
8 not doing what he was supposed to be doing under probation
9 at the time he was arrested for the charges that
10 apparently had occurred prior to him being placed on
11 probation; therefore, we will toll the time period and I'm
12 going to extend his probation for an additional year to
13 the five full years of probation.

14 As I understand it, the PSC has been struck
15 already; is that correct?

16 THE PROBATION AGENT: No, Judge, there is two
17 public service accounts that were -- I guess they were
18 converted.

19 THE COURT: Public service employment is what I
20 was talking about.

21 THE PROBATION AGENT: Yes, Judge, public service
22 employment, there was fee arrearages that were converted
23 to public service. Again, I think that was done out of
24 error, not knowing that he could not do that, so I would
25 ask that in the order we could delete the public service.

1 THE COURT: The public service requirement is
2 deleted.

3 Thank you very much.

4 MS. FULLWOOD: Your Honor, I'd simply like to
5 state for the record that the citation that brought
6 Mr. Young before the Court did not make any allegations
7 that he has violated the terms and conditions of his
8 probation.

9 THE COURT: It's set forth on the terms and
10 conditions of the report. It indicates it's before the
11 Court for a review. Review would encompass all of the
12 matters that he was on probation for, including the
13 financial matters.

14 Thank you very much.

15 THE PROBATION AGENT: Judge, also, can we
16 indicate that the case would remain PTUP upon his release
17 as well to motivate him to pay the restitution?

18 THE COURT: Well, it says PTUP after two years.

19 THE PROBATION AGENT: Okay. We'll just leave it
20 that way.

21 THE COURT: So --

22 THE PROBATION AGENT: Two years of active
23 supervision?

24 THE COURT: Active supervision.

25 THE PROBATION AGENT: Yes, sir.

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THE COURT: He hasn't been on active supervision
for two years.

THE PROBATION AGENT: Thank you, sir.

THE COURT: Thank you very much.

MS. FULLWOOD: Thank you, Your Honor.

(The proceedings were concluded.)

*** END OF REQUESTED TRANSCRIPT OF RECORD ***

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEVE YOUNG,

APPELLANT

APPELLATE CASE NO. 2013-002417

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in tolling Young's probation during his period of incarceration for an offense that occurred before his probation when he did not violate his probation according to the probation agent?

STATEMENT OF THE CASE

On November 1, 2013, the Department of Probation, Pardon, and Parole brought Young's current 2011 probation case before the Honorable Steven H. John. Young was represented by Elizabeth C. Fullwood, and the Department was represented by Daniel Shearer. On December 1, 2011, Appellant Steve Young was sentenced in Newberry County to ten years on the charge of assault and battery first degree. The sentence was suspended to time served of 157 days and four years probation which would terminate upon the payment of \$2400 in restitution. R. 1-3, ll. 1 – 25. In August 2012, he was sentenced in Union County to ten years incarceration for the charges of reckless homicide with death resulting, and leaving the scene of an accident. These Union County charges of reckless homicide and leaving the scene of an accident occurred before his conviction for the assault and battery charges in Newberry County in December 2011. However, the conviction for the reckless homicide and leaving the scene of an accident occurred after he was placed on probation in December 2011 in Newberry County. R. 3, ll. 23 – R. 4, ll. 25. The probation agent asked for his 2011 probation to be tolled during his period of incarceration for the 2012 charges for which he must serve 85% of the sentence. The judge ordered that his 2011 probation for 2011-GS-32-00632 be tolled from November 1, 2013 for 759 days through 11-30-2015 or the end of his incarceration. The judge added one year to is probation time to make it five years. R. 3, ll. 1 – R. 12, ll. 7. Young's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

On August 21, 2013, the Department of Probation, Parole and Pardon issued a citation for Steve Young for the purpose of bringing a matter before the court for the purpose of tolling his probation or terminating it. The probation agent, Daniel Shearer, told the court that he issued the citation, which did not really violate Young, because "it was kind of hard to bring cases before the court on just a motion," so he issued the citation asking the judge to review the case. R. 5, ll. 5 – 13; R. 3, ll. 1 - 22.

The agent explained that On December 1, 2011, Young was sentenced in Newberry County for ten years on the charge of assault and battery first degree. The ten years was suspended to time served of 157 days which would terminate upon the payment of \$2400 in restitution. He was also ordered to complete 40 hours of community service, attend substance abuse counseling, and be drug tested. R. 3, ll. 8 – 17.

On August 16, 2012, Young was sentenced in Union County to ten years for reckless homicide with death resulting, and leaving the scene of an accident. R. 3, ll. 23 – R. 5, ll. 2. This incident occurred about a year before he was placed on probation in December 2011. However, he was not convicted and sentenced for the reckless homicide until August 16, 2012 after he was placed on probation. R. 4, ll. 1 – 25. The probation agent asked that the court toll Young's probation until he got out of prison. The agent stated:

Right before Mr. Young had been convicted, I had gone ahead and did a paperwork review and kind of made an agreement with him that we would readjust the case and put him in perfect standing with our Department prior to the conviction, so just here to ---we do have to ask that the case be tolled, which would just put the case on hold until he got out of prison. However, if you decide that the case should be terminated or revoked concurrently, we would ask that a civil judgment be ordered for the restitution balance owed to Alfred Cromer, who has been notified and I don't believe is present today, and has not indicated either way how he feels about the case.

R. 4, ll. 8 – 20.

The judge confirmed that Young was on probation for nine months before he was incarcerated. R. 5, ll.1 – 8. The toll date would be from the date of the hearing on November 1, 2013 for 759 days until November 30, 2015 or the end of his incarceration. R. 6, ll. 19. The judge then asked if Young did any of the things he was suppose to on probation before he was incarcerated. The probation agent responded that Young was under supervision for about two years.¹ The department did not allow him to perform the 40 hours community service because his charge was considered violent and violent offenders were not permitted to perform public service. There was a violation for nonpayment but the agent did not violate him since there were no positive drug tests. Young was very cooperative, and he and the agent worked well together. The agent said young just “needed to get a job and get his feet back on the ground.” R. 6, ll. 20 – R. 8, ll. 2.

When the judge said he would grant the agency’s request to toll the probation time, Young’s attorney told the court that this was a situation where the court was not allowed to toll the probation because Young had not done anything to violate the terms and conditions of his probation. Counsel argued that there was no statute that allowed the court to toll the probation. Counsel then cited the Supreme Court case of State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013) ² Counsel asked the judge to terminate the probation and convert the restitution to a civil judgment. Counsel argued again that tolling was inappropriate. R. 8, ll. 3 – 19.

¹ This time appears contradictory to the nine months that the agent just confirmed with the judge that Young was on probation before his 2012 conviction.

² The transcript spells it State v. Meller which is presumed to be a typographical error.

The judge then asked the agent if Young were current on all his fees. The agent responded that Young was one payment behind on his supervision fees when he was incarcerated. He had not paid the Public Defender Fund, but had paid \$65 on the restitution. The agent said he would have restructured the restitution on May 1, 2012. Appellant was approximately three payments behind on that when he was arrested. The drug tests fees were not paid. R. 8, ll. 20 – R. 10, ll. 1.

The judge then ruled:

Based on his actions on probation during the time that he was out on probation and not under arrest for the other charge, he was in violation of his terms and conditions of probation. I do find those to be a willful violation. I do find, therefore, it is proper to toll the time period since he was not current, he was not doing what he was supposed to be doing under probation at the time he was arrested for the charges that apparently had occurred prior to him being placed on probation; therefore, we will toll the time period and I'm going to extend his probation for an additional year to the full five years of probation.

R. 10, ll. 2 – 13.

Defense counsel then stated for the record that “the citation that brought Mr. Young before the court did not make any allegations that he had violated the terms and conditions of his probation.” R. 11, ll. 3 – 8.

The judge responded that the case was before the court for a review which “would encompass all of the matters that he was on probation for, including the financial matters.”

R. 11, ll. 9 – 25.

ARGUMENT

The trial court erred in tolling Young's probation during his period of incarceration for an offense that occurred before his probation when he did not violate his probation according to the probation agent.

South Carolina Code Section 24-21-440 concerns the period of probation. It provides:

The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended within the above limit.

There is no mention of a tolling period. However, in the NOTES OF DECISIONS section, Section 2 concerns the "Tolling of Period." The only case cited is State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013).

In State v. Miller, Id., the Supreme Court held that a tolling of probation must be premised on a violation of a condition of probation or a statutory directive. The Court wrote: "The references to tolling by our own appellate courts have also focused on fault-based grounds. Thus we conclude that the tolling of probation must be premised on a violation of a condition of probation or a statutory directive." The state had not alleged that Miller violated a condition of his probation. The Supreme Court reversed the Court of Appeals and held that Miller's probation would not be tolled during his civil commitment to the Sexually Violent Predator Program. The Supreme Court did recognize that in instances where the Court had previously recognized tolling was appropriate, "the probationer had generally committed some affirmative act to violate the conditions of probation."

The trial judge in Young's case ruled that Young had violated the financial conditions of his probation although the probation agent was clear that the Department was

not charging Young with any violation. The only violation the judge cited was based on Young not being current on his financial payments.

In Bartlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986), the Supreme Court ruled that probation may not be revoked solely on the ground that probationer failed to pay fines or make restitution; the judge must determine on the record that the probationer failed to make a bona fide effort to pay. The Court found that Barlet was improperly deprived of his conditional freedom without a finding of willful violation so reversed and remanded the case for a *de novo* probation revocation hearing. The probation judge in Barlet's case had made no determination as to why Barlet had failed to comply with the terms although Barlet testified to his efforts to find work and make payments. The Supreme Court wrote that the deprivation of Barlet's conditional freedom without the finding of a willful violation contravened the Fourteenth Amendment's due process requirement.

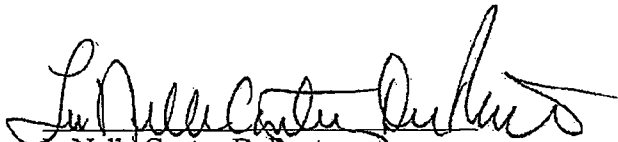
The judge in Young's case abused his discretion based on an error of law. He found that Young had willfully violated his probation solely on not being current on the payment of his fees and restitution. This was done without any questioning of Young or his attorney. No evidence was presented regarding the reason Young was behind on his payments. He had made payments as he behind only one payment on his fees and had made a payment toward his restitution.

The finding by the judge of a violation was in contradiction of the holding in Miller where the Supreme Court was clear that tolling should be based on a violation. The probation here admitted there was no violation. The Probation Citation clearly states "no violations charged."

CONCLUSION

Based on the above, Young's probation should be terminated and the restitution converted to a civil judgment.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

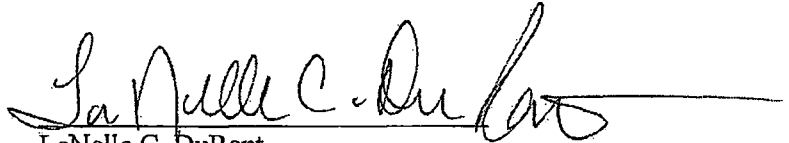
ATTORNEY FOR APPELLANT

This 20th day of June, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

June 20th, 2014

A handwritten signature in black ink, reading "LaNelle C. DuRant", with a long horizontal line extending to the right.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

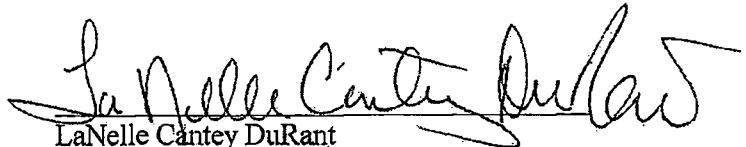
V.

STEVE YOUNG,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Matthew C. Buchanan, Esquire, at S. C. Department of Probation, Parole And Pardon Services, PO Box 50666, Columbia, SC 29250, this 20th day of June, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of June, 2014.

Maeva Hendzel (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Steven H. John, Circuit Court Judge
Case No. 2013-002417

THE STATE, RESPONDENT

v.

STEVE YOUNG, APPELLANT

FINAL BRIEF OF RESPONDENT

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ATTORNEY FOR THE RESPONDENT

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JUN 16 2014

SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

- 1) **The Trial Court properly tolled the Appellant's probation through the finding of willful actions of the Appellant.**

STATEMENT OF THE CASE

On December 1, 2011, Appellant was sentenced to ten years suspended to four years probation for the offense of assault and battery in the first degree in Newberry County. A special condition of probation was that supervision could end early if he paid his financial obligations in full. In August of 2012, after serving almost nine months on probation, Appellant pled guilty in Union County to reckless homicide and leaving the scene of an accident. He received a sentence of ten years incarceration. The Union County offenses occurred before the Appellant was placed on probation for the Newberry offense, so the conviction and sentence was not a violation of that probation.

On November 1, 2013, Appellant's probation agent brought him before the Honorable Steven H. John to request a tolling of his probation during his incarceration on the Union County offenses. Appellant's attorney objected; however, Judge John granted the request and tolled his probation. The court found that Appellant violated probation because he was behind on his supervision fees, three payments behind on restitution, and had not paid into the Public Defender Fund or his drug test fees. (R.p.15).

The Appellant now brings this appeal before this Court.

ARGUMENT

- 1) **The Trial Court properly tolled the Appellant's probation because of the wrongful actions of the Appellant.**

"The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended within the above limit." §24-21-440.

“South Carolina’s appellate courts have expressly recognized the general authority of the circuit court to toll probation.” State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013).

Tolling a defendant’s probation is appropriate when a defendant absconds from supervision. See State v. Hackett, 363 S.C. 177, 609 S.E.2d 553 (Ct.App.2005) (relying on United States v. Green, 429 F.Supp. 1038 (W.D.Tex.1977)).

Although the Appellant did not abscond in this case, he was placed into a situation that prevented his supervision by his own wrongful acts; those being his acts of reckless homicide and leaving the scene of an accident where death was involved.

Appellant relied on Miller because the Supreme Court held that the probationer’s supervision could not be tolled while he was involuntarily committed into the state’s Sexually Violent Predator program. But the Supreme Court focused on the involuntary nature of Miller’s commitment.

“The general rule applied in most jurisdictions is that the tolling of probation is appropriate where the authorities could not supervise the defendant due to the defendant’s wrongful acts. It is based on the principle that a defendant should not be allowed to profit from his own misconduct which prevents supervision by probationary authorities.” Miller, at 37, 537, citing 24 C.J.S. Criminal Law § 2153 (2006).

In the instant case, the trial court appropriately found that Appellant had violated probation. He was substantially behind on his financial obligations, and because of his incarceration due to his own wrongdoing, he was unlikely to be able to become current before the expiration of his probation. “[W]e conclude that the tolling of probation must be premised on a violation of a condition of probation or a statutory directive.” Id.

"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. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006). Therefore, it is the court that determines if a violation exists based on the information provided to the court by the probation agent. Even though the agent did not allege a violation in the citation, the court asked if Appellant was current on his fees. After the agent detailed Appellant's financial arrearages, the court determined him to be in violation. R.p. 8, ll. 20-R.p. 10, ll. 1.

Appellant's reliance on Bartlett v. State, 288 S.C. 481, 343 S.E.2d 620 (1986) is not appropriate. The Supreme Court in Bartlett ruled that probation could not be *revoked* when the only grounds is a non-willful failure to pay financial obligations. While Appellant is correct that Bartlett forbids a revocation of his probation, the trial court in this instance did nothing of the sort. The judge *tolled* Appellant's probation for the period of time while he is incarcerated. The incarceration faced by Appellant was from another sentence entirely.

Instead, the court found that Appellant violated his probation by falling behind on his financial obligations.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully submits that the Trial Court properly tolled probation for the duration of Appellant's incarceration.

Respectfully submitted,



Matthew C. Buchanan
General Counsel

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Parole and Pardon Services
P.O. Box 50666
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(803) 734-9220

Attorney for the Respondent

Columbia, South Carolina
June 13, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Steven H. John, Circuit Court Judge
Case No. 2013-002417

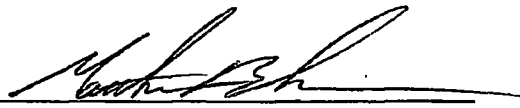
THE STATE, RESPONDENT

v.

STEVE YOUNG, APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.


Matthew C. Buchanan
General Counsel

June 13, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Steven H. John, Circuit Court Judge
Case No. 2013-002417

THE STATE, RESPONDENT

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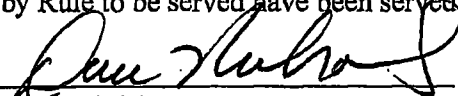
STEVE YOUNG, APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated June 13, 2014, on Appellant this 13th day of June, 2014, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Lanelle Cantey DuRant, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.


Dawn K. Nichols
Executive Administrative Assistant

South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Steve Young, Appellant.

Appellate Case No. 2013-002417

Appeal From Lexington County
Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2015-UP-345
Heard April 13, 2015 – Filed July 15, 2015

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of
Columbia, for Appellant.

Matthew C. Buchanan, of the South Carolina Department
of Probation, Parole and Pardon Services, of Columbia,
for Respondent.

PER CURIAM: Steve Young appeals the circuit court's decision to toll his probation while he is incarcerated for committing criminal offenses that were not a violation of his probation. Specifically, Young contends the circuit court abused

its discretion in tolling his probation because the State did not charge him with any violations of his probation and the circuit court did not find any violations other than his willful failure to remain current on his financial obligations. We affirm.

We find the circuit court did not abuse its discretion in ordering the tolling of Young's probation. See *State v. Miller*, 404 S.C. 29, 33, 744 S.E.2d 532, 535 (2013) ("The determination of probation matters lies within the sound discretion of the [circuit] court. An appellate court will reverse the [circuit] court's decision where there has been an abuse of discretion." (citations omitted)). First, we find tolling was proper because the circuit court found Young willfully violated the terms of his probation. According to our supreme court, the general rule in most jurisdictions is that tolling is appropriate when authorities cannot supervise the probationer due to his wrongful acts because he "should not be allowed to profit from his own misconduct which prevents supervision by probationary authorities." 404 S.C. at 37, 744 S.E.2d at 537. In *Miller*, the court held "[t]he references to tolling by our own appellate courts have . . . focused on fault-based grounds. Thus, . . . the tolling of probation must be premised on a violation of a condition of probation or a statutory directive." *Id.*

Unlike the probationer in *Miller*, who was involuntarily committed to a sexually violent predator program, Young was imprisoned for voluntarily committing criminal offenses. Importantly, the circuit court found Young violated the terms of his probation by willfully failing to make required restitution and fee payments. Although the circuit court found Young had violated his probation, it did not revoke his probation because the subject of the hearing was a motion to toll. Young should not be allowed to profit from his own misconduct by having his probationary term continue to run while he is not under probationary supervision. See 404 S.C. at 37, 744 S.E.2d at 537. Therefore, the circuit court's decision to toll his probation complied with the supreme court's holding in *Miller*. *Id.*

Second, we note the circuit court hearing did not implicate Young's due process rights because it was a motion hearing, not a revocation hearing. See, e.g., *Dangerfield v. State*, 376 S.C. 176, 179, 656 S.E.2d 352, 353-54 (2008) ("Due process considerations apply in contested cases or hearings which affect an individual's property or liberty interests as contemplated by the federal and state constitutions."); see also *State v. Hill*, 368 S.C. 649, 657, 630 S.E.2d 274, 279 (2006) (holding that in a revocation proceeding, a probationer is subject to a deprivation of "limited liberty" because "he is already covered with a criminal sentence").

Finally, we note Young did not object to the circuit court's finding that he violated the terms of his probation by willfully failing to make required payments. Therefore, Young cannot now raise the issue of whether the circuit court's finding of willfulness was improper. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]. Issues not raised and ruled upon in the [circuit] court will not be considered on appeal."). Accordingly, the circuit court's decision is affirmed.

AFFIRMED.

SHORT, LOCKEMY, and McDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

STEVE YOUNG,

APPELLANT

APPELLATE CASE NO. 2013-002417

Appeal from Lexington County

Steven H. John, Circuit Court Judge

Opinion No. 2015-UP-345

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on July 15, 2015. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, Appellant submits the following:

On appeal, Young argued that the trial court erred in tolling his probation during his period of incarceration for an offense that occurred before his probation when he did not violate his probation according to the probation agent. Young asked that his probation be terminated and the restitution converted to a civil judgment.

The Court of Appeals affirmed, in an unpublished opinion, the trial court's tolling of Young's probation during his period of incarceration for an offense subsequent to the one for which he was on probation. The Court held that the trial court properly found that Young had violated the conditions of his probation by failing to remain current on his financial obligations. The Court distinguished the case of State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013), which Young relied on, by holding that Miller was involuntarily committed to the sexually violent predator program while Young voluntarily committed a criminal offense. Second, the Court held that Young's due process rights were not implicated because this was a motion hearing and not a revocation hearing. The Court then opined that Young did not object to the circuit court's finding that he violated his probation by willfully failing to make required payments. Therefore, this point was not preserved for review.

The Court misapprehended the issues.

On August 21, 2013, the Department of Probation, Parole and Pardon issued a citation for Steve Young for the purpose of tolling his probation or terminating it. The probation agent, Daniel Shearer, told the court that he issued the citation, which did not really violate Young, because "it was kind of hard to bring cases before the court on just a motion," so he issued the citation asking the judge to review the case. R. 5, ll. 5 – 13; R. 3, ll. 1 - 22.

The agent explained that On December 1, 2011, Young was sentenced in Newberry County for ten years on the charge of assault and battery first degree. The ten years was suspended to time served of 157 days which would terminate upon the payment of \$2400 in restitution. He was also ordered to complete 40 hours of community service, attend substance abuse counseling, and be drug tested. R. 3, ll. 8 – 17.

On August 16, 2012, Young was sentenced in Union County to ten years for reckless homicide with death resulting, and leaving the scene of an accident. R. 3, ll. 23 – R. 5, ll. 2. This incident occurred about a year before he was placed on probation in December 2011. However, he was not convicted and sentenced for the reckless homicide until August 16, 2012 after he was placed on probation. R. 4, ll. 1 – 25. The probation agent asked that the court toll Young's probation until he got out of prison. The agent stated:

Right before Mr. Young had been convicted, I had gone ahead and did a paperwork review and kind of made an agreement with him that we would readjust the case and put him in perfect standing with our Department prior to the conviction, so just here to ---we do have to ask that the case be tolled, which would just put the case on hold until he got out of prison. However, if you decide that the case should be terminated or revoked concurrently, we would ask that a civil judgment be ordered for the restitution balance owed to Alfred Cromer, who has been notified and I don't believe is present today, and has not indicated either way how he feels about the case.

R. 4, ll. 8 – 20.

The judge confirmed that Young had been on probation for nine months before he was incarcerated. R. 5, ll.1 – 8. The toll date would be from the date of the hearing on November 1, 2013 for 759 days until November 30, 2015 or the end of his incarceration. R. 6, ll. 19. The judge then asked if Young did any of the things he was supposed to on probation before he was incarcerated. The probation agent responded that Young was under supervision for about two years.¹ The department did not allow him to perform the 40 hours community service because his charge was considered violent and violent offenders were not permitted to perform public service. There was a violation for nonpayment but the agent did not violate him since there were no positive drug tests.

¹ This time appears contradictory to the nine months that the agent just confirmed with the judge that Young was on probation before his 2012 conviction.

Young was very cooperative, and he and the agent worked well together. The agent said Young just “needed to get a job and get his feet back on the ground.” R. 6, ll. 20 – R. 8, ll. 2.

When the judge said he would grant the agency’s request to toll the probation time, Young’s attorney told the court that this was a situation where the court was not allowed to toll the probation because Young had not done anything to violate the terms and conditions of his probation. Counsel argued that there was no statute that allowed the court to toll the probation. Counsel then cited the Supreme Court case of State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013)² Counsel asked the judge to terminate the probation and convert the restitution to a civil judgment. Counsel argued again that tolling was inappropriate. R. 8, ll. 3 – 19.

The judge then asked the agent if Young were current on all his fees. The agent responded that Young was one payment behind on his supervision fees when he was incarcerated. He had not paid the Public Defender Fund, but had paid \$65 on the restitution. The agent said he would have restructured the restitution on May 1, 2012. Appellant was approximately three payments behind on that when he was arrested. The drug tests fees were not paid. R. 8, ll. 20 – R. 10, ll. 1.

The judge then ruled:

Based on his actions on probation during the time that he was out on probation and not under arrest for the other charge, he was in violation of his terms and conditions of probation. I do find those to be a willful violation. I do find, therefore, it is proper to toll the time period since he was not current, he was not doing what he was supposed to be doing under probation at the time he was arrested for the charges that apparently had occurred prior to him being placed on probation; therefore, we will toll the time period and I’m going to extend his probation for an additional year to the full five years of probation.

R. 10, ll. 2 – 13.

² The transcript spells it State v. Meller which is presumed to be a typographical error.

Defense counsel then stated that “the citation that brought Mr. Young before the court did not make any allegations that he had violated the terms and conditions of his probation.” R. 11, ll. 3 – 8.

The judge responded that the case was before the court for a review which “would encompass all of the matters that he was on probation for, including the financial matters.” R. 11, ll. 9 – 25.

South Carolina Code Section 24-21-440 concerns the period of probation. It provides:

The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended within the above limit.

There is no mention of a tolling period. However, in the NOTES OF DECISIONS section, Section 2 concerns the “Tolling of Period.” The only case cited is State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013).

In State v. Miller, Id., the Supreme Court held that a tolling of probation must be premised on a violation of a condition of probation or a statutory directive. The Court wrote: “The references to tolling by our own appellate courts have also focused on fault-based grounds. Thus we conclude that the tolling of probation must be premised on a violation of a condition of probation or a statutory directive.” The state had not alleged that Miller violated a condition of his probation. The Supreme Court reversed the Court of Appeals and held that Miller’s probation would not be tolled during his civil commitment to the Sexually Violent Predator Program. The Supreme Court did recognize that in instances where the Court had previously recognized tolling was appropriate, “the probationer had generally committed some affirmative act to violate the conditions of probation.”

The trial judge in Young’s case ruled that Young had violated the financial conditions of his probation although the probation agent was clear that the Department was not charging Young with

any violation. The only violation the judge cited was based on Young not being current on his financial payments.

In Bartlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986), the Supreme Court ruled that probation may not be revoked solely on the ground that probationer failed to pay fines or make restitution; the judge must determine on the record that the probationer failed to make a bona fide effort to pay. The Court found that Barlet was improperly deprived of his conditional freedom without a finding of willful violation so reversed and remanded the case for a *de novo* probation revocation hearing. The probation judge in Barlet's case had made no determination as to why Barlet had failed to comply with the terms although Barlet testified to his efforts to find work and make payments. The Supreme Court wrote that the deprivation of Barlet's conditional freedom without the finding of a willful violation contravened the Fourteenth Amendment's due process requirement.

The Court erred in holding that the circuit court properly found Young violated his probation based on his failure to meet his financial obligations. This Court overlooked the fact that Young had made some payments. However, the trial judge did not hold a hearing nor ask any questions about the willfulness of Young not making payments. Young had no positive drug tests; he reported regularly and did well with his probation agent. This Court found that Young's attorney did not object when the trial judge found that Young had violated his probation by failing to pay. This was in error as on R. 11, ll. 4-8, defense counsel objected by stating to the judge that the citation made no allegations that Young had violated his probation. This was after the judge's ruling. The trial judge's ruling of a violation without any questioning was an error.

The Court distinguished Miller from Young's case by holding that Miller was involuntarily committed while Young voluntarily committed a criminal offense. This Court overlooked the fact

that Miller was sent to the Sexually Violent Program based on the fact that he had been incarcerated for a criminal sexual offense which he voluntarily committed. But for that offense, Miller would not have been in the SVP Program

The Court wrote that Young should not be allowed to benefit from his wrongful acts. Young was going to prison for ten years. This was not benefiting from his wrongful act which occurred before he was placed on probation. He would be supervised by law enforcement authorities while in prison-not probation agents but still prison guards. This was not as though he had absconded from probation supervision and was not under the supervision of anyone.

Young's liberty and property interests were involved when the trial court tolled his probation because upon his release from prison, he would be facing five years of probation with all of the financial obligations that involved in addition to the \$2400 restitution. This would be more difficult because he would then have a criminal record of being incarcerated ten years. There was a stronger potential of having his revocation revoked. Young's due process interests were at stake.

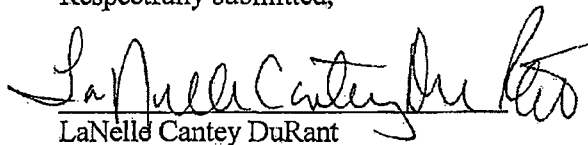
The judge in Young's case abused his discretion based on an error of law. No evidence was presented regarding the reason Young was behind on his payments. He had made payments as he behind only one payment on his fees and had made a payment toward his restitution.

The finding by the judge of a violation was in contradiction of the holding in Miller where the Supreme Court was clear that tolling should be based on a violation. The probation agent here admitted there was no violation. The Probation Citation clearly states "no violations charged."

Young's probation should be terminated and the restitution converted to a civil judgment.

WHEREFORE, we respectfully request this Court to reconsider its ruling, and remand Young's case for a reversal of the order tolling probation, and for termination of his probation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant". The signature is written in a cursive style with a horizontal line drawn through the middle of the text.

LaNelle Cantey DuRant
Appellate Defender

This 23rd day of July, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

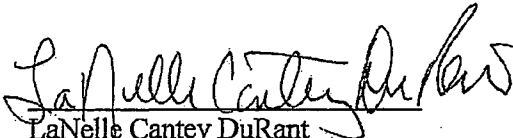
STEVE YOUNG,

APPELLANT

APPELLATE CASE NO. 2013-002417

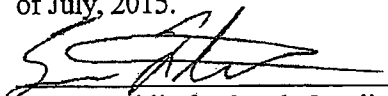
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon, Matthew Buchanan, Esquire, at South Carolina Department of Probation, Parole & Pardon Services, P.O. Box 50666, Columbia, SC 29250, and Mr. Steve Young # 265045, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 23rd day of July, 2015.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 23rd day
of July, 2015.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE, RESPONDENT

v.

STEVE YOUNG, APPELLANT

APPELLATE CASE NO. 2013-002417

Appeal from Lexington County

The Honorable Steven H. John, Circuit Court Judge

Opinion No. 2015-UP-345

RETURN OF PETITION FOR REHEARING

The Respondent, the State of South Carolina by and through its attorney does hereby make this return to the Appellant’s July 23, 2015 Petition for Rehearing. The State respectfully requests that Appellant’s Petition for Rehearing be denied and dismissed.

Pursuant to the Appellate Court Rules, a party is only entitled to a rehearing if there are points that have been overlooked or misapprehended by the Court. The Respondent contends that

the Court has applied the law correctly and has not overlooked nor misapprehended any law or issue that was necessary to make a valid decision in this case.

The Appellant challenged the trial court's order tolling his probation while he served a prison sentence for a separate, unrelated offense. When the Appellant was placed on probation, he had a pending charge for reckless homicide. After being sentenced to prison for that offense, his probation agent brought him before the circuit court requesting an order tolling his probation while he served his prison sentence.

This Court upheld the judge's tolling of Appellant's probation. The trial judge ruled Appellant had violated his probation for being behind in his supervision fees and restitution and used that violation as the basis for tolling his probation and extending his probation for one additional year to the statutory maximum of five years.

Despite the Appellant's insistence that this violated the holding in State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013), this Court properly distinguished Miller from the facts in this case. Miller held that tolling an offender's probation is only appropriate on fault-based grounds. In that case, the appellant had been committed involuntarily to the state's Sexually Violent Predator program. Therefore, tolling was not permissible.

In the present case however, the Appellant was convicted of Reckless Homicide and sentenced to a term of incarceration. Even though both involve confinement, the distinguishing factor is the criminal nature of Reckless Homicide – it's the Appellant's misconduct that caused him to be imprisoned, instead of Miller's mental illness that resulted in his commitment.

Furthermore, the trial court appropriately found that Appellant had violated probation. He was substantially behind on his financial obligations, and because of his incarceration due to his own wrongdoing, he was unlikely to be able to become current before the expiration of his

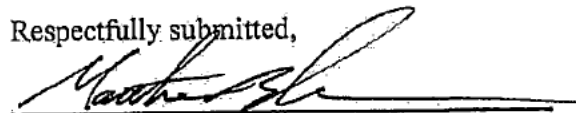
probation. “[W]e conclude that the tolling of probation must be premised on a violation of a condition of probation or a statutory directive.” Miller, at 37, 537.

The finding of a violation is within the sole discretion of the trial court. “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. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006). This Court properly determined that the trial court’s finding of a violation was in its discretion. Therefore, with the finding of a violation, the trial court had the authority to toll the Appellant’s probation under Miller.

Furthermore, the trial court only tolled the Appellant’s probation, and did not revoke any portion of it. Bartlett v. State, 288 S.C. 481, 343 S.E.2d 620 (1986) only prohibits the revocation of probation for non-willful failure to pay financial obligations. Bartlett is silent on other measures that the court may take in order to see that the offender pays those obligations. In fact, the court is expected to review restitution cases that have fallen into arrears regardless of willfulness. “The department, through its agents, must initiate legal process to bring every probationer, whose restitution is six months in arrears, back to court, regardless of willful failure to pay. The judge shall make an order addressing the probationer’s failure to pay.” S.C. Code Ann. §17-25-322(C).

WHEREFORE, the Respondent respectfully submits that this Court was correct in its ruling and requests that the Appellant’s Petition for Rehearing be denied.

Respectfully submitted,



Matthew C. Buchanan
General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

Attorney for the Respondent

Columbia, South Carolina
August 4, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE, RESPONDENT

v.

STEVE YOUNG, APPELLANT

APPELLATE CASE NO. 2013-002417

Appeal from Lexington County

The Honorable Steven H. John, Circuit Court Judge

Opinion No. 2015-UP-345

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that this 4th day of August, 2015, I served the following documents:

- 1. Return to Petition for Rehearing; and
- 2. Certificate of Service;

by first class mail, postage prepaid as follows:

LaNelle DuRant, Appellate Defender
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589



**Dawn K. Nichols,
Executive Administrative Assistant**

S. C. Department of Probation, Parole and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

The South Carolina Court of Appeals

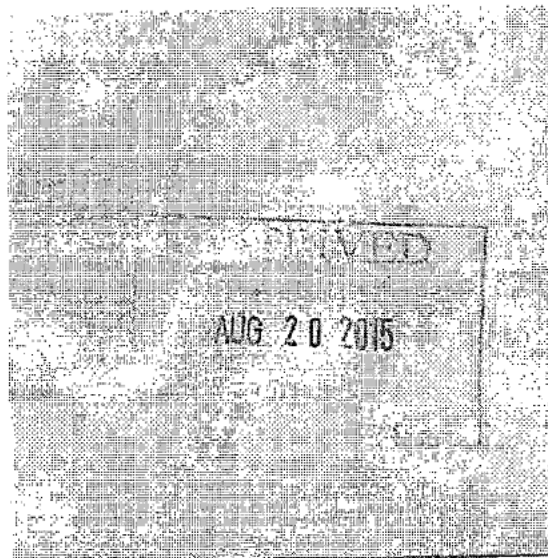
The State, Respondent,

v.

Steve Young, Appellant.

Appellate Case No. 2013-002417

ORDER



After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Holtz, Jr. J.

Jenny E. Beck J.

Stephane L. McDonald J.

Columbia, South Carolina

cc:
 LaNelle Cantey DuRant, Esquire
 Matthew C. Buchanan, Esquire
 The Honorable W. Jeffrey Young

FILED

August 20, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Steven H. John, Circuit Court Judge

Opinion No. 2015-UP-345 (S.C. Ct. App. filed 7/15/2015)

2011-GS-36-00623

THE STATE,

RESPONDENT,

V.

STEVE YOUNG,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 8/20/2015.

STATEMENT OF THE CASE

On November 1, 2013, the Department of Probation, Pardon, and Parole brought Young's current 2011 probation case before the Honorable Steven H. John. Young was represented by Elizabeth C. Fullwood, and the Department was represented by Daniel Shearer. On December 1, 2011, Appellant Steve Young was sentenced in Newberry County to ten years on the charge of assault and battery first degree. The sentence was suspended to time served of 157 days and four years probation which would terminate upon the payment of \$2400 in restitution. R. 1-3, ll. 1 – 25. In August 2012, he was sentenced in Union County to ten years incarceration for the charges of reckless homicide with death resulting, and leaving the scene of an accident. These Union County charges of reckless homicide and leaving the scene of an accident occurred before his conviction for the assault and battery charges in Newberry County in December 2011. However, the conviction for the reckless homicide and leaving the scene of an accident occurred after he was placed on probation in December 2011 in Newberry County. R. 3, ll. 23 – R. 4, ll. 25. The probation agent asked for his 2011 probation to be tolled during his period of incarceration for the 2012 charges for which he must serve 85% of the sentence. The judge ordered that his 2011 probation for 2011-GS-32-00632 be tolled from November 1, 2013 for 759 days through 11-30-2015 or the end of his incarceration. The judge added one year to his probation time to make it five years. R. 3, ll. 1 – R. 12, ll. 7. Young's attorney filed a notice of appeal. The Court of Appeals affirmed the trial court's tolling of Young's probation during his period of incarceration in an unpublished opinion on July 15, 2015. State v. Young, Op. No. 2015-UP-345 (Ct. App. filed July 15, 2015). Counsel filed a petition for rehearing which was denied on August 20, 2015. This petition for a writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in affirming the trial court's tolling of Young's probation during his period of incarceration for an offense that occurred before his probation when he did not violate his probation according to the probation agent.

On August 21, 2013, the Department of Probation, Parole and Pardon issued a citation for Steve Young for the purpose of bringing a matter before the court for the purpose of tolling his probation or terminating it. The probation agent, Daniel Shearer, told the court that he issued the citation, which did not really violate Young, because "it was kind of hard to bring cases before the court on just a motion," so he issued the citation asking the judge to review the case. R. 5, ll. 5 – 13; R. 3, ll. 1 - 22.

The agent explained that On December 1, 2011, Young was sentenced in Newberry County for ten years on the charge of assault and battery first degree. The ten years was suspended to time served of 157 days which would terminate upon the payment of \$2400 in restitution. He was also ordered to complete 40 hours of community service, attend substance abuse counseling, and be drug tested. R. 3, ll. 8 – 17.

On August 16, 2012, Young was sentenced in Union County to ten years for reckless homicide with death resulting, and leaving the scene of an accident. R. 3, ll. 23 – R. 5, ll. 2. This incident occurred about a year before he was placed on probation in December 2011. However, he was not convicted and sentenced for the reckless homicide until August 16, 2012 after he was placed on probation. R. 4, ll. 1 – 25. The probation agent asked that the court toll Young's probation until he got out of prison. The agent stated:

Right before Mr. Young had been convicted, I had gone ahead and did a paperwork review and kind of made an agreement with him that we would readjust the case and put him in perfect standing with our Department prior to

the conviction, so just here to ---we do have to ask that the case be tolled, which would just put the case on hold until he got out of prison. However, if you decide that the case should be terminated or revoked concurrently, we would ask that a civil judgment be ordered for the restitution balance owed to Alfred Cromer, who has been notified and I don't believe is present today, and has not indicated either way how he feels about the case.

R. 4, ll. 8 – 20.

The judge confirmed that Young was on probation for nine months before he was incarcerated. R. 5, ll.1 – 8. The toll date would be from the date of the hearing on November 1, 2013 for 759 days until November 30, 2015 or the end of his incarceration. R. 6, ll. 19. The judge then asked if Young did any of the things he was suppose to do when on probation before he was incarcerated. The probation agent responded that Young was under supervision for about two years.¹ The department did not allow him to perform the 40 hours community service because his charge was considered violent and violent offenders were not permitted to perform public service. There was a violation for nonpayment but the agent did not violate him since there were no positive drug tests. Young was very cooperative, and he and the agent worked well together. The agent said Young just “needed to get a job and get his feet back on the ground.” R. 6, ll. 20 – R. 8, ll. 2.

When the judge said he would grant the agency's request to toll the probation time, Young's attorney told the court that this was a situation where the court was not allowed to toll the probation because Young had not done anything to violate the terms and conditions of his probation. Counsel argued that there was no statute that allowed the court to toll the probation. Counsel then cited the Supreme Court case of State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013)² Counsel asked the

¹ This time appears contradictory to the nine months that the agent just confirmed with the judge that Young was on probation before his 2012 conviction.

² The transcript spells it State v. Meller which is presumed to be a typographical error.

judge to terminate the probation and convert the restitution to a civil judgment. Counsel argued again that tolling was inappropriate. R. 8, ll. 3 – 19.

The judge then asked the agent if Young were current on all his fees. The agent responded that Young was one payment behind on his supervision fees when he was incarcerated. He had not paid the Public Defender Fund, but had paid \$65 on the restitution. The agent said he would have restructured the restitution on May 1, 2012. Appellant was approximately three payments behind on that when he was arrested. The drug tests fees were not paid. R. 8, ll. 20 – R. 10, ll. 1.

The judge then ruled:

Based on his actions on probation during the time that he was out on probation and not under arrest for the other charge, he was in violation of his terms and conditions of probation. I do find those to be a willful violation. I do find, therefore, it is proper to toll the time period since he was not current, he was not doing what he was supposed to be doing under probation at the time he was arrested for the charges that apparently had occurred prior to him being placed on probation; therefore, we will toll the time period and I'm going to extend his probation for an additional year to the full five years of probation.

R. 10, ll. 2 – 13.

Defense counsel then stated for the record that “the citation that brought Mr. Young before the court did not make any allegations that he had violated the terms and conditions of his probation.” R. 11, ll. 3 – 8.

The judge responded that the case was before the court for a review which “would encompass all of the matters that he was on probation for, including the financial matters.” R. 11, ll. 9 – 25.

Discussion

South Carolina Code Section 24-21-440 concerns the period of probation. It provides:

The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended within the above limit.

There is no mention of a tolling period. However, in the NOTES OF DECISIONS section, Section 2 concerns the "Tolling of Period." The only case cited is State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013).

In State v. Miller, Id., the Supreme Court held that a tolling of probation must be premised on a violation of a condition of probation or a statutory directive. The Court wrote: "The references to tolling by our own appellate courts have also focused on fault-based grounds. Thus we conclude that the tolling of probation must be premised on a violation of a condition of probation or a statutory directive." The state had not alleged that Miller violated a condition of his probation. The Supreme Court reversed the Court of Appeals and held that Miller's probation would not be tolled during his civil commitment to the Sexually Violent Predator Program. The Supreme Court did recognize that in instances where the Court had previously recognized tolling was appropriate, "the probationer had generally committed some affirmative act to violate the conditions of probation."

The trial judge in Young's case ruled that Young had violated the financial conditions of his probation although the probation agent was clear that the Department was not charging Young with any violation. The only violation the judge cited was based on Young not being current on his financial payments.

In Bartlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986), the Supreme Court ruled that probation may not be revoked solely on the ground that probationer failed to pay fines or make restitution; the judge must determine on the record that the probationer failed to make a bona fide effort to pay. The Court found that Barlet was improperly deprived of his conditional freedom without a finding of willful violation so reversed and remanded the case for a *de novo* probation

revocation hearing. The probation judge in Barlet's case had made no determination as to why Barlet had failed to comply with the terms although Barlet testified to his efforts to find work and make payments. The Supreme Court wrote that the deprivation of Barlet's conditional freedom without the finding of a willful violation contravened the Fourteenth Amendment's due process requirement.

The judge in Young's case abused his discretion based on an error of law. He found that Young had willfully violated his probation solely on not being current on the payment of his fees and restitution. This was done without any questioning of Young or his attorney. No evidence was presented regarding the reason Young was behind on his payments. He had made payments as he behind only one payment on his fees and had made a payment toward his restitution.

The finding by the judge of a violation was in contradiction of the holding in Miller where the Supreme Court was clear that tolling should be based on a violation. The probation here admitted there was no violation. The Probation Citation clearly states "no violations charged."

The Court of Appeals affirmed, in an unpublished opinion, the trial court's tolling of Young's probation during his period of incarceration for an offense subsequent to the one for which he was on probation. The Court held that the trial court properly found that Young had violated the conditions of his probation by failing to remain current on his financial obligations. The Court distinguished the case of State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013), which Young relied on, by holding that Miller was involuntarily committed to the sexually violent predator program while Young voluntarily committed a criminal offense. Second, the Court held that Young's due process rights were not implicated because this was a motion hearing and not a revocation hearing. The Court then opined that Young did not object to the circuit court's finding that he violated his

probation by willfully failing to make required payments. Therefore, this point was not preserved for review.

The Court of Appeals erred in holding that the circuit court properly found Young violated his probation based on his failure to meet his financial obligations. This Court overlooked the fact that Young had made some payments. However, the trial judge did not hold a hearing nor ask any questions about the willfulness of Young not making payments. The trial judge's ruling of a violation without any questioning was an error.

The Court of Appeals overlooked the fact that Miller was sent to the Sexually Violent Program based on the fact that he had been incarcerated for a criminal sexual offense which he voluntarily committed. But for that offense, Miller would not have been in the SVP Program.

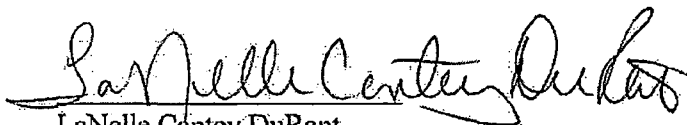
The Court wrote that Young should not be allowed to benefit from his wrongful acts. Young was going to prison for ten years. This was not benefiting from his wrongful act which occurred before he was placed on probation. He would be supervised by law enforcement authorities while in prison-not probation agents but still prison guards. This was not as though he had absconded from probation supervision and was not under the supervision of anyone.

Young's liberty and property interests were involved when the trial court tolled his probation because upon his release from prison, he would be facing five years of probation with all of the financial obligations that involved in addition to the \$2400 restitution. This would be more difficult because he would then have a criminal record of being incarcerated ten years. There was a stronger potential of having his revocation revoked. Young's due process interests were at stake.

CONCLUSION

Based on the above, certiorari should be granted, and Young's probation should be terminated and the restitution converted to a civil judgment.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 31st day of August, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Steven H. John, Circuit Court Judge

Opinion No. 2015-UP-345 (S.C. Ct. App. filed 7/15/2015)
2011-GS-36-00623

THE STATE,

RESPONDENT,

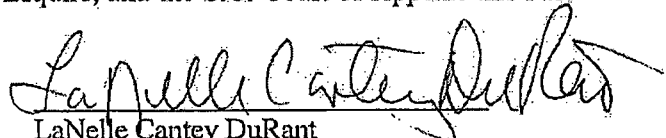
V.

STEVE YOUNG,

PETITIONER

CERTIFICATE OF SERVICE

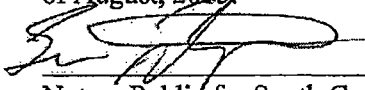
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Matthew Buchanan , Esquire, and the S.C. Court of Appeals this 31st day of August, 2015.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 31st day
of August, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
The Honorable Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2015-UP-345 (S.C. Ct. App. Filed 7/15/2015)
Appellate Case No. 2011-GS-36-00623

THE STATE, RESPONDENT

v.

STEVE YOUNG, APPELLANT

RETURN TO PETITION FOR WRIT OF CERTIORARI

**Matthew C. Buchanan
General Counsel**

**South Carolina Department of Probation
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250**

ATTORNEY FOR THE RESPONDENT

TABLE OF CONTENTS

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QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the trial court's tolling of Young's probation during his period of incarceration, when the trial court found a violation and did not revoke the probation.

STATEMENT OF THE CASE

On December 1, 2011, Petitioner Steve Young was sentenced to ten years suspended to four years probation for the offense of assault and battery in the first degree in Newberry County. A special condition of probation was that supervision could end early if he paid his financial obligations in full. In August of 2012, after serving almost nine months on probation, Petitioner pled guilty in Union County to reckless homicide and leaving the scene of an accident. He received a sentence of ten years incarceration. The Union County offenses occurred before the Petitioner was placed on probation for the Newberry offense, so the conviction and sentence was not a violation of that probation.

On November 1, 2013, Petitioner's probation agent brought him before the Honorable Steven H. John to request a tolling of his probation during his incarceration on the Union County offenses. Judge John granted the request over Petitioner's objections and tolled probation. The court found that Petitioner violated probation because he was behind on his supervision fees, three payments behind on restitution, and had not paid into the Public Defender Fund or his drug test fees.

Petitioner filed an appeal. The Court of Appeals affirmed the trial court's tolling of Young's probation during his period of incarceration on July 15, 2015. *State v. Young*, Op. No. 2015-UP-345 (Ct. App. filed July 15, 2015, rehearing denied August 20, 2015). Young has now filed a petition for certiorari.

ARGUMENT

The Court of Appeals did not err in affirming the trial court's tolling of Young's probation during his period of incarceration, where the trial court found a violation and did not revoke probation.

The Respondent contends that the Appellate Court has applied the law correctly, and has not erred in affirming the trial court's tolling of Young's probation while he served a separate incarcerative sentence.

The Petitioner challenged the trial court's order tolling his probation while he served a prison sentence for a separate, unrelated offense. When the Petitioner was placed on probation, he had a pending charge for reckless homicide. After being sentenced to prison for that offense, his probation agent brought him before the circuit court requesting an order tolling probation while he served his prison sentence.

The Court of Appeals upheld the judge's tolling of Petitioner's probation. The trial judge ruled Petitioner had violated his probation for being behind in his supervision fees and restitution and used that violation as the basis for tolling his probation and extending his probation for one additional year to the statutory maximum of five years.

Despite the Petitioner's insistence that this violated the holding in State v. Miller, 404 S.C. 29, 744 S.E.2d 532 (2013), the Court of Appeals properly distinguished Miller from the facts in this case. Miller held that tolling an offender's probation is only appropriate on fault-based grounds. In that case, the appellant had been committed involuntarily to the state's Sexually Violent Predator program; therefore, tolling was not permissible.

In the present case however, the Petitioner was convicted of Reckless Homicide and sentenced to a term of incarceration. Even though both involve confinement, the distinguishing

factor is the criminal nature of Reckless Homicide – it's the Petitioner's misconduct that caused him to be imprisoned, instead of Miller's mental illness that resulted in his commitment.

Furthermore, the trial court appropriately found that Petitioner had violated probation. He was substantially behind on his financial obligations, and because of his incarceration due to his own wrongdoing, he was unlikely to be able to become current before the expiration of his probation. "[W]e conclude that the tolling of probation must be premised on a violation of a condition of probation or a statutory directive." Miller, at 37, 537.

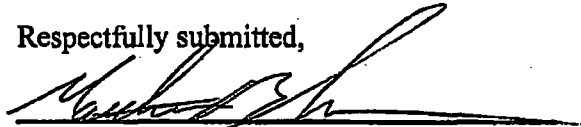
The finding of a violation is within the sole discretion of the trial court. "The trial court must determine whether the State has presented sufficient evidence to establish that a probationer has violated the conditions of his probation." State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006). The Court of Appeals properly determined that the trial court's finding of a violation was in its discretion. Therefore, with the finding of a violation, the trial court had the authority to toll the Appellant's probation under Miller.

Furthermore, the trial court only tolled the Petitioner's probation, and did not revoke any portion of it. Bartlett v. State, 288 S.C. 481, 343 S.E.2d 620 (1986), only prohibits the revocation of probation for non-willful failure to pay financial obligations. Bartlett is silent on other measures that the court may take in order to see that the offender pays those obligations. In fact, the court is expected to review restitution cases that have fallen into arrears regardless of willfulness. "The department, through its agents, must initiate legal process to bring every probationer, whose restitution is six months in arrears, back to court, regardless of willful failure to pay. The judge shall make an order addressing the probationer's failure to pay." S.C. Code Ann. §17-25-322(C).

CONCLUSION

The Respondent respectfully submits that the Court of Appeals was correct, in its ruling and requests that Certiorari be denied.

Respectfully submitted,



Matthew C. Buchanan
General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

Attorney for the Respondent

Columbia, South Carolina
September 17, 2015

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
The Honorable Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2015-UP-345 (S.C. Ct. App. Filed 7/15/2015)
Appellate Case No. 2011-GS-36-00623

THE STATE, RESPONDENT

v.

STEVE YOUNG, APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that this 17th day of September, 2015, I served the following documents:

1. Return to Petition for Writ of Certiorari; and
2. Certificate of Service;

by first class mail, postage prepaid as follows:

Lanelle Cantey DuRant, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589



Dawn K. Nichols,
Executive Administrative Assistant
S. C. Department of Probation, Parole and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

The Supreme Court of South Carolina

The State, Respondent,

v.

Steve Young, Petitioner.

Appellate Case No. 2015-001840

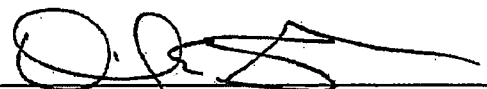
Lower Court Case No. 2011-GS-36-00623

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

February 16, 2016

cc:

Matthew C. Buchanan, Esquire

~~LaNelle Cantey DuRant, Esquire~~

Alan McCrory Wilson, Esquire

The Honorable Beth Carrigg

The Honorable Jenny Kitchings



The South Carolina Court of Appeals

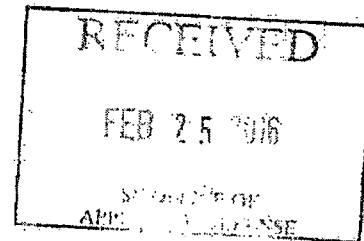
JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 25, 2016

The Honorable Beth Carrigg
205 E Main St Ste 146
Lexington SC 29072-3557



REMITTITUR

Re: The State v. Steve Young
Lower Court Case No. 2011GS3600623
Appellate Case No. 2013-002417

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: ~~LaNelle Cantey DuRant, Esquire~~
Matthew C. Buchanan, Esquire

FORM 5

STATE OF SOUTH CAROLINA)
)
COUNTY OF Newberry)
)
Steve Young # 265045)
)
Full name and prison number (if any) of Applicant.)

IN THE COURT OF COMMON PLEAS

2016CP3600165

FILED
NEWBERRY COUNTY
2016 APR 10 AM 10:00
JACKIE S. BOWERS
CLERK OF COURT
VOID

APPLICATION FOR

POST-CONVICTION RELIEF

17-27-20 A (S)

I, Jackie S. Bowers, Clerk of Court, Newberry, South Carolina, do hereby certify that this is a true copy of the original filed in this office.
MAR 17 2016
Jackie S. Bowers
Clerk of Court

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Livesay corr. Inst. B
2. Name and location of Court which imposed sentence Newberry County
3. Name(s) of co-defendant(s) (if any) Richard Johnson, Detrina Walden
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011-65-36 00 632 ²³ 10 yrs Assault and Battery first degree
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) December 1, 2011, 10 yrs suspended to time served of 157 day and four years probation
 - (b) _____

- (c) _____
- 6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty YES
 - (b) after a plea of not guilty _____
 - (c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES

8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - i. Appeal from In The Court of Appeal
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. The petition for writ of Certiorari is denied
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. February 16, 2016
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. Order Unpublished Opinion No 2015-01-345
 - ii. Heard April 13, 2015 - Filed July 15, 2015
 - iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) NA
 - (b) _____
 - (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

see Attachment

- (a) Due process rights were violated And his probation revocation hearing was unlawful
- (b) Ineffective Assistance of Counsel parole, probation revocation hearing
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

see Attachment

- (a) _____
- (b) _____
- (c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. NA
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. NA
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. NA
 - ii. _____
 - iii. _____

iv. _____

(d) the date of each such disposition:

i. NA _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. NA _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NA

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. NA _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. NA _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) NA _____

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? _____
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Elizabeth C. Fullwood, LANELL, CANTLEY DURANT
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NA
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Elizabeth C. Fullwood, LANELLE CANTLEY DURANT
- ii. _____
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Probation revocation HEARING, APPEAL
- ii. _____
- iii. _____
19. State clearly the relief you seek in filing this application:
probation terminated and restitution converted to civil judgment
20. Are you now under sentence from any other court that you have not challenged?
NA

STATE OF SOUTH CAROLINA)
)
County of)

VERIFICATION

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Steve Young

SWORN to and subscribed before me this 7th
day of March, 2016.

Katherine Scott (L.S.)
Notary Public .

My Commission Expires: 9/25/2022



**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- ~~(2)~~ Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Stoneford
Applicant

SWORN or affirmed to and subscribed before me this 7th day of March, 2016

Katherine Scott
Notary Public

My Commission Expires: 9/25/2022

FILED
NEWBERRY COUNTY
2016 MAR 17 AM 10 01
JACKIE S. BOWERS
CLERK OF COURT

The defendant alleges that his rights in the U.S.C.A. Const 14 Amend was violated in the probation revocation hearing on November 2013.

FILED
NEWBERRY COUNTY
2016 MAR 17 AM 10 35
JACQUE S. BOWERS
CLERK OF COURT

- A. Denied Due process of the U.S.C.A. Const 14 Amend in his probation revocation hearing was unlawful.
 - 1. The state had not allege the stere young violated a condition of his probation. Citing Miller 404 S.C. 29, 744 S.E.2d 532 (2013)
 - 2. The only violation the judge cited was base on that stere young not being current on his financial payment. In Bartlet v. State 288 S.C. 481, 343 S.E.2d 620 (1986), the Supreme Court ruled that probation may not be revoked solely on the ground that probationee failed to pay fines or make restitution; the judge must determine on the record that the probationee failed to make a bona fide effort to pay.

B. Ineffective Assistance of Counsel parole, probation revocation hearing of the U.S.C.A Const 6. Amend

- 1. Counsel was ineffective for not objecting when the trial judge found that stere young had violated his probation by failing to pay.
- 2. Counsel was ineffective for not informing him of the procedures of the revocation hearing; and not informing him he had the right to object on the record.

FILED
NEWBERRY COUNTY
2016 MAR 17 AM 10 01
JACQUE S. BOWERS
CLERK OF COURT

The defendant alleges that his rights in the U.S.C.A. Const 6. Amend was violated in the probation revocation hearing on November 10, 2013.

FILED
NEWBERRY COUNTY
2016 MAR 10 AM 10 35
JACKIE S. BOWERS
CLERK OF COURT

- A. Denied Due process of the U.S.C.A. Const 14 Amend in his probation revocation hearing was unlawful.
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B. Ineffective Assistance of Counsel parole, probation revocation hearing of the U.S.C.A. Const 6. Amend

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FILED
NEWBERRY COUNTY
2016 MAR 17 AM 10 01
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CLERK OF COURT

Mrs. Jackie S. Powers 3/14/2016

I've corrected the mistakes
and Steve Young & Stephen
Young is me. They have
my name spelled Steve
Young here in SCDC but my
name is really spelled
Stephen Young. I apologize
for any inconvenience on my
part.

Thanks
Steve Young

FILED
NEWBERRY COUNTY

2016 MAR 17 AM 10 11

JACKIE S. BOWERS
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	OF THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF NEWBERRY)	
	)	2015-CP-36-165
Steve Young,)	
S.C.D.C. No. 265045,)	
)	
Applicant,	)	RETURN
)	
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	
<hr/>		

Respondent, making its Return to the application for post-conviction relief (PCR) filed March 17, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted at the September 2011 term of the Newberry County Grand Jury for Attempted Murder (2011-GS-36-623). Applicant was represented by Charles Verner, Esquire. On December 1, 2011, Applicant pled guilty before the Honorable Frank Addy, Jr., to the lesser included offense of assault and battery (first degree). He was sentenced to imprisonment for ten years provided upon the service of time-served, the balance was suspended with four years' probation to follow. The probation was to be terminated upon payment after two years if the restitution was paid. Applicant did not appeal his plea or sentence.

In August of 2012, after serving almost nine months on probation, Applicant pled guilty in Union County to reckless homicide (2011-GS-44-234) and leaving the scene of an accident (2011-GS-44-235). He received a sentence of ten years incarceration. The Union County offenses occurred before Applicant was placed on probation for the Newberry offense, so the

conviction and sentence was not a violation of that probation. On November 1, 2013, Applicant's probation agent brought him before the Honorable Steven H. John and made a motion to request a tolling of his probation during his incarceration on the Union County offenses. Applicant was represented by Elizabeth Fullwood, Esquire. Applicant's attorney objected to the probation agent's motion; however, Judge John granted the request and tolled his probation. Judge John further found that Applicant violated probation because he was behind on his supervision fees, three payments behind on restitution, and had not paid into the Public Defender Fund or his drug test fees.

Applicant filed a notice of appeal from Judge John's order tolling his probation. After briefing and oral argument, the South Carolina Court of Appeals affirmed the circuit court's decision by an unpublished opinion filed July 15, 2015. State v. Steve Young, Op. No. 2015-UP-345 (Ct. App. Filed July 15, 2015). Applicant filed a Petition for Rehearing on July 23, 2015. This petition was denied by an order filed August 20, 2015.

Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. The Supreme Court denied the petition on February 16, 2016. The remittitur was sent February 25, 2016.

II.

In his current application for post-conviction relief, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective Assistance Counsel parole, probation revocation hearing"
2. "Denied due process...probation revocation hearing was unlawful"

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at evidentiary hearing. All amendments should be made well in advance of hearing and should be filed as required by Rule 11, SCRCP(a).

Attached herewith and incorporated herein are the Newberry County Clerk of Court records regarding the subject conviction, the relevant appellate records, Applicant's records from the South Carolina Department of Corrections, and the probation revocation hearing transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent submits Applicant's allegation of ineffective assistance of probation revocation counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the proceeding "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance

by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

With respect to probation revocation counsel, the Strickland standard applies. A probationer has a right to counsel, though not a Sixth Amendment one. Turner v. State, 384 S.C. 451, 455, 682 S.E.2d 792, 794 (2009); see also Gagnon v. Scarpelli, 411 U.S. 778 (1973). Rather, Rule 602(a), SCACR, requires the appointment of counsel for indigent defendants in probation revocation proceedings. Nonetheless, "the same analysis for ineffectiveness that applies in other PCR proceedings involving claims against counsel should, by analogy, apply in PCR proceedings involving claims against probation counsel." Turner, 384 S.C. at 455, 682 S.E.2d at 794; see e.g., United States v. Wren, 682 F.Supp. 1237 (S.D.Ga. 1988). However, since a probation revocation hearing is not a formal adversarial proceeding, "the Court must review counsel's performance in light of the particular type of proceeding involved." Wren, 682 F.Supp. at 1242; see also United States v. Cates, 402 F.2d 473, 474 (4th Cir. 1968) ("A revocation hearing is an informal proceeding and rules of evidence need not be strictly observed." (citing United States v. Williams, 378 F.2d 665 (4 Cir. 1967))).

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of probation revocation counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JUSTIN J. HUNTER
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

_____, 2017

STATE OF SOUTH CAROLINA)
)
 COUNTY OF NEWBERRY)
)
 STEVE YOUNG, #265045)
)
 Applicant,)
)
 vs)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent,)
 _____)

IN THE COURT OF COMMON PLEAS

2016-CP-36-0165

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Carson M. Henderson, Esquire
The Henderson Law Firm, PC
109-B Oak Ave.
Greenwood, SC 29646

DATED this the 15th day of May, 2017.

Jennifer Jennison

 Jennifer Jennison, Legal Assistant
 For Respondent

State of South Carolina)
) Court of Common Pleas
 County of Newberry)
 Post Conviction Relief

2016-CP-36-00165

Steven Young)
 vs.) Transcript of Record
)
)
 State of South Carolina)
 Defendant)

October 12, 2017
 Laurens, South Carolina

B E F O R E:

Honorable R. Scott Sprouse, Judge

A P P E A R A N C E S:

Justin Hunter, Assistant Attorney General
 Attorney for the State

Carson Henderson, Esq.
 Attorney for the Applicant

Joy E. Holston
 Official Court Reporter

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1 THE COURT: Yes, sir.

2 MR. HUNTER: The next case is Steve Young versus
3 State of South Carolina, 2015-CP-36-165. Your Honor, he
4 was indicted September, 2011 in Newberry County for
5 attempted murder, 2011-GS-36-623. He was represented by
6 Charles Verner. And on December 1st, 2011 he plead guilty
7 before Judge Addy to assault and battery first degree. He
8 was sentenced to imprisonment for 10 years, provided upon
9 the service of time served, balance was suspended with
10 four years of probation to follow. Your Honor, in August
11 2012 he plead guilty in Union County to reckless homicide
12 and leaving the scene of an accident and received 10 years
13 incarceration. These Union County charges occurred before
14 he was tentatively placed on probation for a Newberry
15 offense. And the commission and sentence in Union was not
16 tentatively deemed to be a violation of that, of his
17 Newberry probation. On November 1st, 2013 his probation
18 agent brought him before Judge John and made a motion to
19 request a tolling of his probation. Essentially the
20 probation agent asked that his Newberry probation be
21 tolled while he was in SCDC for Union County charges. He
22 was represented by Beth Fullwood. Judge John granted the
23 request and tolled his probation until he was released
24 from SCDC. Judge also found that he was behind on his
25 supervision fees, behind on his payments and restitution

1 and not paid into his public defender fund. He did file
2 an appeal from Judge John's order tolling probation.
3 After brief and an oral argument the Court of Appeals
4 affirmed the Judge John's decision, filed an unpublished
5 opinion. He moved for a rehearing which was denied. He
6 petitioned to the Supreme Court which was denied. The
7 remitter was sent February 25th, 2016. He filed this
8 current action March 17th, 2016. He is present today
9 represented by Mr. Carson Henderson.

10 THE COURT: All right, Mr. Henderson.

11 MR. HENDERSON: Very briefly, Your Honor, before I
12 call my first witness I just want to go over the documents
13 I handed up to you.

14 THE COURT: Okay.

15 MR. HENDERSON: The documents in the clip, Your
16 Honor, would be the direct appeal documents, those are the
17 final briefs of the State and of the Defendant. There is
18 a copy of the order there, petition for rehearing is
19 there, the State's return to that is. The petition for
20 Cert is there and then the remittitur is there, Your
21 Honor. And the only reason I wanted His Honor to have
22 that is to really hone in on the issue here and the sole
23 issue is going to be, Your Honor, that the Judge did not
24 go into Mr. Young's financial ability to pay and that
25 trial counsel did not object to that. That is going to be

1 the issue that Your Honor is going to hear about. And
2 then I have also handed up a set of sentence sheets and
3 put those in chronological order to Your Honor from when
4 Mr. Young plead in front of Judge Addy in December of '11
5 in Newberry. You are going to see a probation order,
6 actually two probation orders. Then you are going to see
7 his guilty pleas from Union County, the sentence sheets.
8 And then the probation order that we are here today on
9 which happened back in November of 2013, Your Honor. That
10 is just to kind of give you an outline.

11 THE COURT: Okay.

12 MR. HENDERSON: And I would call my client, Your
13 Honor. I call Steve Young.

14 STEVE YOUNG, being
15 first duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 By Mr. Henderson:

18 Q Please state your full name for the record.

19 A Steve Young.

20 Q Steve, I know you are soft spoken but I do need for
21 you to speak out so Madam Court Reporter can take down
22 everything you say. Okay.

23 A Yes, sir.

24 Q And I am going to cover some dates with you to start
25 off. Now, do you recollect pleading guilty in Newberry

1 and receiving probation?

2 A Yes, sir.

3 Q Okay. And I will represent to you that was on
4 December the 1st of 2011. Do you remember that?

5 A Yes, sir.

6 Q Okay. And so you were on probation for a period of
7 time?

8 A Yes, sir.

9 Q Okay. I want to turn your attention to Union County.
10 You actually plead guilty up in Union County, didn't you?

11 A Yes, sir.

12 Q And I will represent to you that that date was August
13 the 16th of 2012. Does that sound right?

14 A Yes, sir.

15 Q And you actually caught time on that sentence?

16 A Yes, sir.

17 Q That is why you are still in SCDC?

18 A Yes, sir.

19 Q Okay. So you were on probation there for about eight
20 and a half months, correct?

21 A Yes, sir.

22 Q Okay. I want to talk to you a little bit about that
23 time that you were on probation. During that period of
24 time were you working?

25 A Yes, sir.

- 1 Q And where were you working at?
- 2 A Amick Farms.
- 3 Q Amick Farms.
- 4 A Yes, sir.
- 5 Q And tell His Honor where that is.
- 6 A Batesburg.
- 7 Q And what County is that?
- 8 A Lexington.
- 9 Q Okay. And what type of work goes on there?
- 10 A Process, kill and process chickens.
- 11 Q Kind of dirty work?
- 12 A Yes, sir.
- 13 Q How much were you making per hour?
- 14 A Minimum wage.
- 15 Q Okay. About how many hours a week were you working?
- 16 A Let's see, I would say about 40, sometimes less.
- 17 Q So at most 40 hours?
- 18 A Yes, sir.
- 19 Q Right at minimum wage?
- 20 A Yes, sir.
- 21 Q Let me ask you, during that probation time who were
- 22 you living with?
- 23 A Me and my girlfriend.
- 24 Q And what is your girlfriend's name?
- 25 A Kimberly Young.

1 Q And I understand y'all have subsequently gotten
2 married?

3 A Yes, sir.

4 Q But at that time y'all were not married?

5 A No, sir.

6 Q And was Kimberly working during this period of time?

7 A No, sir.

8 Q And why wasn't she working?

9 A Because of medical reasons.

10 Q And tell His Honor what those medical reasons were?

11 A She was threatening a miscarriage.

12 Q Did she actually miscarry?

13 A No, sir.

14 Q So that child was delivered?

15 A Yes, sir.

16 Q Okay, healthy I hope?

17 A Yes, sir.

18 Q Okay. During this time were any children living with
19 you and Kimberly?

20 A Yes, sir.

21 Q And tell His Honor how many children were living with
22 you?

23 A Four.

24 Q And their ages?

25 A 15 to 4.

1 Q Were any of them working?

2 A No, sir.

3 Q And you said your wife wasn't working?

4 A No, sir.

5 Q Was there any other source of outside income in the
6 home besides you working?

7 A No, sir.

8 Q Okay. Were you paying rent?

9 A Yes, sir.

10 Q And where were you living at?

11 A At [REDACTED] in Gaston, Lexington County.

12 Q And do you recall what your rental payment was?

13 A Yes, sir.

14 Q And what was that?

15 A \$650.00.

16 Q And who was paying that?

17 A Me.

18 Q And I suppose you had utilities?

19 A Yes, sir.

20 Q And can you tell His Honor about the amount of the
21 monthly utility bill?

22 A Light bill was like, a little, over \$200.00 and
23 something dollars.

24 Q Okay. And who was paying that?

25 A I was.

1 Q Okay. Let me ask you, were you or anybody in the
2 household receiving any food stamps?

3 A No, sir.

4 Q Okay. Any other outside source of income other than
5 you working at Amick Farms?

6 A No, sir.

7 Q And, Steve, did you have a drivers license at this
8 time?

9 A No, sir.

10 Q So you were depending on other people to get to work?

11 A Yes, sir.

12 Q Okay. But you were working?

13 A Yes, sir.

14 Q Now, during this probation period you actually paid
15 some of your financial obligation, didn't you?

16 A Yes, sir.

17 Q And whose money was that?

18 A Mine.

19 Q Your money?

20 A Yes, sir.

21 Q Your mama wasn't giving you any money?

22 A No, sir.

23 Q Was anybody else giving you any money?

24 A No, sir.

25 Q Okay. Were you paying your probation associated fees

1 as best you could?

2 A Yes, sir.

3 Q Okay. Did you consider yourself in a financial
4 position at that point and time to be current with all of
5 your financial obligations?

6 A No, sir.

7 Q Were you trying as best you could?

8 A Yes, sir.

9 Q Okay. Now I want to turn your attention to the day
10 that you, you had this probation hearing that we are here
11 about. And again I will represent to you that was
12 November the 1st of 2013.

13 A Yes, sir.

14 Q And I think you were down in Lexington County?

15 A Yes, sir.

16 Q And I think Ms. Fullwood is sitting out here
17 represented you on that, didn't she?

18 A Yes, sir.

19 Q And nice lady, isn't she?

20 A Yes, sir.

21 Q A good lawyer?

22 A Yes, sir.

23 Q Okay. And you were there, I wasn't there, I have
24 read the transcript. And it turns out that day that
25 probation wasn't alleging any violations by you, is that

1 correct?

2 A Correct.

3 Q And that they were just trying to seek to alter your,
4 terms of your probation, the length of your probation?

5 A Yes, sir.

6 Q And Ms. Fullwood objected, didn't she? I mean she
7 complained after the Judge--

8 A Yes sir, yes sir.

9 Q In fact the Judge, I believe, reading the transcript,
10 he did it before he actually gave Ms. Fullwood a chance to
11 talk.

12 A Right.

13 Q But when Ms. Fullwood was offering her defense of
14 you, did she go into any of your financial ability to pay?

15 A I don't recall.

16 Q I will represent to you she didn't. That she didn't
17 go into your, any of your ability to pay. Do you remember
18 that?

19 A I can't remember.

20 Q Okay. You understand that your PCR application is
21 alleging that she didn't go into your financial ability to
22 pay?

23 A Yes, sir.

24 Q I mean, is that accurate or not?

25 A It's accurate.

1 Q It is accurate, okay. Now, what you have told His
2 Honor today, is that a true and accurate kind of what your
3 financial condition was back in late 2011, early 2012?

4 A Yes, sir.

5 Q I mean, were you struggling to survive?

6 A Yes, sir.

7 Q Okay. And you were paying as best you can?

8 A Yes, sir.

9 Q Let me ask you. Do you believe that there was a
10 reasonable chance that if Ms. Fullwood had gone into your
11 financial ability to pay that His Honor, the Judge at that
12 hearing may very well had terminated your probation and
13 converted it to civil judgment?

14 A Yes, sir.

15 Q But she didn't go into your financial ability to pay,
16 did she?

17 A No, sir.

18 Q Okay. Again, I want to make sure I am not asking
19 confusing questions to you. Because actually your PCR
20 petition is well laid out. I am telling you that, that is
21 not a question. And you saw all the appellate documents
22 on this, didn't you?

23 A Yes, sir.

24 Q And you read it?

25 A Yes, sir.

1 Q And you saw that the Court of Appeals even pointed
2 out that it wasn't raised about your financial inability
3 to pay?

4 A Yes, sir.

5 Q Okay. So you think if His Honor, back in 2013 had
6 known about your inability to pay, do you think that would
7 have made a difference in how he, what he did on your
8 probation?

9 A Yes, sir.

10 Q Okay. You think it is more likely than not he may
11 very well had suspended it, just canceled it?

12 A Yes, sir.

13 Q Turned it into a judgment?

14 A Yes, sir.

15 Q And you understand what a judgment is?

16 A Yes, sir.

17 Q That you owe people money?

18 A Yes, sir.

19 Q Okay.

20 MR. HENDERSON: Your Honor, I don't think I have
21 anything further of this witness.

22 THE COURT: Yes, sir.

23 MR. HUNTER: Nothing from the State on this witness.

24 THE COURT: Thank you, sir, you may step down.

25 MR. HENDERSON: And, Your Honor, I would call Ms.

1 Fullwood.

2 BETH FULLWOOD, being
3 first duly sworn, testified as follows:

4 DIRECT EXAMINATION

5 By Mr. Henderson:

6 Q Beth, please state your full name for the record?

7 A Elizabeth Fullwood.

8 Q And you represented Steve in this probation hearing,
9 correct?

10 A I did.

11 Q And actually you and I and the Attorney General were
12 just talking about what happened that day?

13 A We were.

14 Q And kind of give His Honor a little bit of background
15 about that, it seems like the trial Judge actually had
16 made a ruling before he ever heard from you?

17 A Well, I am not sure how my office came to get this
18 case because there is no order of appointment in the file.
19 Nevertheless it does show that two days before the hearing
20 we talked to Mr. Young over the telephone, our screener
21 did. He was at the Department of Corrections, I think he
22 was at Kershaw, though I am not sure.

23 MR. YOUNG: Yes.

24 A You were? Okay. And I took the case because I had
25 represented the probationer in the Miller case, one of the

1 cases that was in the trial court. So I thought well, you
2 know, I know about this issue. It was pretty clearcut,
3 the citation. He was brought into court on a probation
4 violation as the result of a citation. But the citation
5 clearly stated, no violation alleged. So I read the
6 report that the probation officer gives the Court. So, in
7 my mind it was a Miller situation and that was that. So
8 we get in the court, there is a colloquy between the
9 hearing Judge and the probation officer. And the Court
10 makes a ruling tolling the probation at that point. Then
11 I spoke up and made my Miller argument and the Court then
12 began to go into whether or not he had complied with all
13 of the terms and conditions of his probation. And the
14 fact that the probation officer spoke up on Mr. Young's
15 behalf and said he had been a pretty good probationer.
16 And the Court started talking about the money. Now, I
17 imagine Mr. Young and I spoke a little bit before the
18 hearing, I didn't go into his financial situation because
19 there was nothing alleged about his violation. And he was
20 clearly not in a position to make payments because he was
21 incarcerated at the Department of Corrections. The Judge
22 then started focusing on some of the arrearages he had and
23 then all of a sudden made a finding that he had violated
24 probation and therefore he had jurisdiction to do what he
25 wanted as far as tolling the probation because there had

1 been a violation.

2 Q Actually I think he called it a willful violation.

3 A Yeah, yeah. At that point, I was very surprised of
4 the ruling. And I said, well, for the record there has
5 been no obligation that he has violated any terms and
6 conditions of probation, basically that is not before the
7 Court. Apparently and artfully because the Court of
8 Appeals ruled that I had not raised the question, as I
9 recall. Now, I did not allege, and I think I should have
10 alleged that he was entitled to some sort of a hearing on
11 his ability to pay. I never seen a case in that light
12 before. And I was just so surprised I didn't do that,
13 that I didn't do that. I just, it didn't come into my
14 mind to do that. I sort of had blinders on, I was just
15 thinking about this as a straight Miller situation. And
16 that is basically what happened.

17 Q You would agree with me too that if he is alleging
18 that it is only money issues, that he is entitled to a
19 hearing on whether he's willfully not paid?

20 A Absolutely.

21 Q Okay. And you heard me go into detail with Mr. Young
22 about his financial condition, you know, previously. Not
23 at that time, he was incarcerated.

24 A Right.

25 Q And we would agree that his income was probably zero

1 in prison?

2 A Right.

3 Q But it sounds like he was living a pretty hard
4 financial life before he got put into prison.

5 A And I don't think even his financial, well, his
6 arrearages were that unreasonable in light of pleas I have
7 seen in the past on other probation cases.

8 Q I agree with you, he was actually making, made some
9 restitution payments, correct?

10 A Right.

11 Q I think he was one month behind on his supervision at
12 the time of incarceration?

13 A I don't recall.

14 Q I will represent to you that is what is in the trial
15 transcript.

16 A Okay. That is what it is then.

17 Q Yes, so he is making payments for restitution and
18 supervision fees. And you heard him say he was having a
19 hard time doing that. And I will represent to you the
20 transcript says he had not paid his public defender fund,
21 I guess the \$500.00 dollar fee.

22 A Right.

23 Q And said he had not been paying his drug test
24 supervision fees?

25 A Right.

1 Q But the probation agent says he is passing his drug
2 tests?

3 A Right.

4 Q Okay. And like I said, it seems like he and the
5 probation agent had a good repoire?

6 A Oh yes, they did.

7 Q Are you telling His Honor it just kind of caught you
8 flatfooted when the Judge went down this road?

9 A That's right.

10 Q And sua sponte.

11 A Correct. And it was an awkward position to be trying
12 to make an argument after the Court had made the ruling
13 because the Court says, you don't argue with the Court
14 after a ruling is made. But, of course, I had to some way
15 insert his position onto the record.

16 Q Right. And, again, you didn't go into his financial
17 ability to pay?

18 A I did not.

19 Q Didn't ask the Court to do that?

20 A I did not.

21 Q And ask the Court to conduct a hearing on that?

22 A No, I didn't.

23 Q And you have been around the block, you have
24 practiced a lot of law, a lot longer than I have. And is
25 it a fair chance that, has shown how, there is a fair

1 probabilty that the Judge would have terminated the
2 probation and converted it to a civil judgment?

3 A Right. That is about the only thing the Judge could
4 have done, if I had made that motion and we had gone into
5 that I think that is the only choice the Court would have
6 had.

7 Q Right. And you think that, is it fair to say that
8 you believe the gun got jumped when there wasn't a finding
9 of willfulness. I mean that the, the probation tolling
10 and the, should have gone into his ability to pay before
11 His Honor went down that road?

12 A That's correct.

13 Q And you didn't ask His Honor to go down that road
14 either beforehand or after?

15 A I didn't, no.

16 MR. HENDERSON: Your Honor, I don't have any further
17 questions.

18 THE COURT: Anything from the State?

19 CROSS-EXAMINATION

20 By Mr. Hunter:

21 Q When did you first talk to the probation agent about
22 this case?

23 A I don't remember, since we had just talked, just,
24 screened him two days before it could have been the day of
25 the probation hearing.

1 Q Okay. So, I guess, did you know what the probation
2 agent was going to do at that hearing, did you know what
3 he was going to say, let you know beforehand?

4 A When we opened the file, we have the citation and I
5 think the probation violation report already.

6 Q Okay.

7 A So, I knew that he was just, it is really, he brought
8 him to court on a citation. But what he was really trying
9 to do was make a motion, kind of.

10 Q Right. Didn't the, I believe the citation doesn't
11 allege any violation, correct?

12 A Not only that but it clearly states it is not
13 alleging, there are no violations.

14 Q Right. And so is it fair to say they were just
15 looking at, to have that matter, essentially any they
16 could bring him before the Judge on the tolling issue?

17 A That's right.

18 Q Now, so as far as the tolling goes, was the State
19 saying it should be tolled because of these financial
20 violations?

21 A No, they wanted it tolled because he was
22 incarcerated.

23 Q So essentially toll it while he is, obviously not
24 able to be on probation because he is in--

25 A For what he is in for right now.

1 Q Okay. So, if you were to object to the, I guess,
2 financial part of it do you think it still would have been
3 tolled because of SCDC?

4 A Well, to get around Miller, to get around Miller, the
5 holding in Miller the Judge would have had to find a
6 willful violation. Okay. So, and there was no, not only
7 was that matter not properly before the Court, but the
8 only violation that could possibly be found and wasn't
9 alleged was money. And since he couldn't pay the money he
10 couldn't be on that basis.

11 Q So I guess my question, were they, do you think it
12 was going to be tolled anyway because of SCDC regardless
13 of the monetary issues?

14 A I just, especially, I just thought that Miller would
15 prohibit them from doing that.

16 Q Well, I guess what I am getting at, he can't be on
17 probation while he is in SCDC, correct?

18 A That's right.

19 Q So I guess what I am getting at, and what is your
20 opinion, would it have been tolled anyway because of his
21 incarceration status, regardless of his monetary status?

22 A I don't know.

23 Q I believe you said that, you know, you raised it to
24 the Judge's attention but it was after his, after the
25 ruling was already made. Is that correct?

1 A That is correct.

2 Q And another question, did you know going into this
3 that they were going to get into the money issues?

4 A No.

5 Q Okay. And is it fair to say that the Judge seemed to
6 just take that on his own?

7 A He did.

8 Q Okay.

9 MR. HUNTER: I beg the Court's indulgence for one
10 second.

11 Q And just to make sure, there were no, there was no
12 revocation, correct?

13 A No.

14 Q Okay. That is all I have. Thank you, ma'am.

15 MR. HENDERSON: Just very briefly, Your Honor.

16 REDIRECT EXAMINATION

17 By Mr. Henderson:

18 Q Going back to Miller, and I think this is pretty
19 well, a tolling of probation must be premised on a
20 violation of a condition of probation or a statutory
21 director. I think that is about straight out of Miller?

22 A That's right.

23 Q And, again, the probation agent wasn't alleging any
24 violations?

25 A Right.

1 Q The Judge brought up financial obligations on his
2 own?

3 A That's right.

4 Q Is that fair to say?

5 A That's right.

6 Q And then you didn't go into his ability to pay or
7 inability to pay?

8 A That's right.

9 Q Okay.

10 A I was more focused on the fact that that wasn't even
11 before the Court on that day.

12 Q Absolutely.

13 A I think he was entitled to a hearing on his ability
14 to pay.

15 Q And if the Court had found an inability to pay they
16 couldn't have tolled his probation?

17 A That's right.

18 Q They couldn't have extended his probation?

19 A That's right.

20 Q Okay. I don't have anything further.

21 THE COURT: Anything else from the State?

22 MR. HUNTER: Not from the State, Your Honor.

23 THE COURT: You may step down.

24 MR. HUNTER: Your Honor, may she be excused?

25 MR. HENDERSON: No objection, Your Honor.

1 THE COURT: You are excused.

2 MS. FULLWOOD: Thank you, Your Honor.

3 MR. HENDERSON: That is the petitioner's case, Your
4 Honor.

5 MR. HUNTER: And, Your Honor, the State has no
6 witnesses. If you would like, since this is a legal issue
7 do you want to hear oral argument or would you just prefer
8 proposed orders?

9 THE COURT: What I would like for each side to do is
10 submit me a proposed order and I will take it under
11 advisement. If y'all could do that within ten days,
12 submit me a proposed order and then I will consider it.
13 It raises an interesting legal question in this case. And
14 I would like to hear from each side, your analysis of the
15 law, set forth full findings of fact and the applicable
16 law you wish me to consider.

17 MR. HUNTER: Would you like those submitted hard copy
18 to your office or email?

19 THE COURT: Email to my law clerk, a copy to the
20 other side.

21 MR. HENDERSON: Thank you, Your Honor.

22 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

23

24

25

1 CERTIFICATE OF REPORTER

2
3 State of South Carolina)
4 County of Newberry)
5

6
7
8 I, Joy E. Holston, Official Court Reporter for the
9 Eighth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete transcript of record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the County of Newberry, South
14 Carolina on the 12th day of October, 2017.

15 I do further certify that I am neither of kin,
16 counsel nor interest to any party hereto.

17
18 January 27, 2018
19

20 *Joy Holston*
21

22 Joy E. Holston, Court Reporter

23 My Commission expires: May 2, 2026
24
25

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF NEWBERRY	)	EIGHTH JUDICIAL CIRCUIT
)	
STEVE YOUNG (#765045),)	
)	
Petitioner,	)	ORDER GRANTING
	)	POST-CONVICTION RELIEF
v.)	
	)	C/A No. 2016-CP-36-165
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	
_____)	

TRIAL JUDGE:	HON. R. SCOTT SPROUSE
COURT REPORTER:	JOY E. HOLSTON
PETITIONER’S ATTORNEY:	CARSON M. HENDERSON
RESPONDENT’S ATTORNEY:	JUSTIN J. HUNTER
DATE OF HEARING:	THURSDAY, OCTOBER 12, 2017

This matter came before the Court on Thursday, October 12, 2017, at 9:30 a.m. upon the Petitioner Steve Young’s application for post-conviction relief. Mr. Young was present and was represented by Carson M. Henderson of the Greenwood County Bar. The State was represented by Justin J. Hunter of the S.C. Attorney General’s Office.

Upon reviewing the clerk’s file and hearing sworn testimony, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. Mr. Young pled guilty to assault and battery 1st degree (Indictment No. 2011-GS-36-0623) on December 1, 2011, in Newberry County. He was sentenced to ten (10) years suspended to four (4) years probation. He was ordered to pay \$2,000.00 in restitution and to participate in public service employment..

2. An Order was issued on May 1, 2012, terminating Mr. Young’s obligation to perform public service employment as a condition of his probation.

3. An Order was issued on May 31, 2012, restructuring Mr. Young's financial obligations while on probation. According to a probation affidavit dated April 24, 2012, Mr. Young was in arrears on his financial obligations for fine, restitution, and supervision fees.

4. On August 16, 2012, Mr. Young pled guilty to reckless homicide (Indictment No. 2011-GS-44-0234) and leaving the scene of an accident involving death (Indictment No. 2011-44-0235) in Union County. He received ten (10) years.

5. On September 25, 2013, Mr. Young was served with a probation citation regarding his Newberry County probation case. The citation indicates "[n]o violations charged." The probation agent's affidavit indicates "[c]itation issued to give the Court subject-matter jurisdiction over Indictment #: 11-GS-36-00623."

6. On November 1, 2013, a probation hearing was held, and the hearing judge issued an Order tolling Mr. Young's probation until his release from prison and extending Mr. Young's probation period by one (1) year. The hearing judge found that Mr. Young willfully failed to comply with the terms of his probation by not making required financial payments. Mr. Young was represented by Elizabeth C. Fullwood of the Lexington County Bar.

7. Mr. Young appealed the Order dated November 1, 2013. The Court of Appeals affirmed the Order in Unpublished Opinion No. 2015-UP-345 on July 15, 2015. The Court of Appeals noted: "Finally, we note Young did not object to the circuit court's finding that he violated the terms of his probation by willfully failing to make required payments. Therefore, Young cannot now raise the issue of whether the circuit court's finding of willfulness was improper."

8. Mr. Young timely filed his pro se Application for Post-Conviction Relief on or about March 17, 2016. Mr. Young alleged the following claims: “due process rights were violated and his probation revocation hearing was unlawful” and “ineffective assistance of counsel parole, probation revocation hearing.”

9. The State filed its Return on or about May 15, 2017.

10. At the PCR hearing, the Court heard sworn testimony from Mr. Young and Ms. Fullwood. The following documents were provided to the Court by Mr. Young:

- A. Sentence Sheet and Order of Restitution dated December 1, 2011;
- B. Consent Order Imposing Additional Conditions of Probation dated May 1, 2012;
- C. Order dated May 31, 2012, along with the corresponding Financial Probation Citation and Affidavit dated April 24, 2012;
- D. Sentence Sheets dated August 16, 2012;
- E. Order dated November 1, 2013, along with the corresponding Probation Citation and Affidavit dated August 21, 2013;
- F. Final Brief of Appellant dated June 20, 2014;
- G. Final Brief of Respondent dated June 13, 2014;
- H. Unpublished Opinion dated July 15, 2015;
- I. Petition for Rehearing dated July 23, 2015;
- J. Return of Petition for Rehearing dated August 4, 2015;
- K. Order dated August 20, 2015;

L. Petition for Writ of Certiorari to the Court of Appeals dated August 31, 2015;

M. Order dated February 16, 2016; and

N. Remittitur dated February 25, 2016.

11. The contents of these documents are hereby incorporated into and made a part of this Order.

12. The Court has reviewed the Rough Draft Transcript of Record of the PCR hearing prepared by court reporter Joy E. Holston. This transcript is hereby incorporated into and made a part of this Order.

13. Mr. Young testified as follows:

A. While on probation from December 1, 2011, through August 16, 2012, he worked at Amick Farms in Batesburg, South Carolina, processing chickens. He earned minimum wage and worked no more than forty (40) hours per week;

B. He lived with his girlfriend and four (4) children, none of whom worked;

C. He paid monthly rental in the amount of \$650.00;

D. He paid the monthly light bill which was more than \$200.00;

E. He didn't receive food stamps;

F. There was no source of household income other than his employment at Amick Farms;

G. Nobody, including his mother, gave him any money;

H. He didn't have a driver's license;

I. He paid his probation financial obligations as best he could; and

J. There was a reasonable chance that the Court would have terminated his probation and converted his financial obligations into a civil judgment, if Ms. Fullwood had presented evidence of his inability to pay his probation financial obligations.

14. The State didn't cross-examine Mr. Young. The Court finds Mr. Young's testimony to be credible, truthful, forthright, and an accurate reflection of his financial condition while he was on probation from December 1, 2011, through August 16, 2012. Mr. Young would have grossed approximately \$1,247.00 per month at his job, and his monthly rental and utilities bills would have equalled about two-thirds ($\frac{2}{3}$) of his monthly gross income.

15. Ms. Fullwood testified as follows:

A. She thought the November 1, 2013, probation hearing would be governed by State v. Miller, 744 S.E.2d 532 (S.C. 2013) because Mr. Young's Probation Citation and Affidavit didn't allege any violations;

B. She didn't discuss Mr. Young's financial situation with the Court because the Probation Citation and Affidavit didn't allege any violations, including the non-payment of financial obligations;

C. The Court found that Mr. Young had willfully failed to pay his financial obligations prior to hearing argument from her;

D. She should have alleged, at that point, that Mr. Young was entitled to a hearing on his ability to pay, but she failed to do so;

E. Mr. Young was "absolutely" entitled to a hearing on his ability to pay;

F. There was a "fair probability" that the Court would have terminated Mr. Young's probation and converted his financial obligations into a civil judgment, if she had

presented evidence of Mr. Young's inability to pay his probation financial obligations, because "[t]hat is about the only thing the Judge could have done if I had made that motion and we had gone into that";

G. Mr. Young being incarcerated in the S.C. Department of Corrections, in and of itself, was insufficient reason for the Court to toll and extend Mr. Young's probation absent the finding of a willful probation violation;

H. No alleged probation violations were properly before the Court on November 1, 2013; and

I. If the Court had determined that Mr. Young was unable to pay his financial obligations, the Court couldn't have tolled and extended his probation.

16. The Court finds Ms. Fullwood's testimony to be credible and forthright.

17. In State v. Miller, 744 S.E.2d 532, 537 (S.C. 2013), our Supreme Court held that "the tolling of probation must be premised on a violation of a condition of probation or a statutory directive." Furthermore, the Court indicated that a probationer's conduct which occurred before the guilty plea sentencing for which the probationer is on probation for doesn't support the tolling of probation. Id.

18. This Court finds that Ms. Fullwood properly objected to the probation hearing Judge's tolling and extension of Mr. Young's probation pursuant to Miller. The Probation Citation and Affidavit issued to Mr. Young prior to the November 1, 2013, didn't allege any violations, including the non-payment of financial obligations, which Ms. Fullwood pointed out to the hearing judge. Furthermore, on November 1, 2013, Mr. Young was incarcerated in SCDC

for Union County offenses which occurred prior to the issuance of his probationary sentence in Newberry County on December 1, 2011.

19. In Barlet v. State, 343 S.E.2d 620, 622 (S.C. 1986), in an appeal from the denial of post-conviction relief, our Supreme Court held that “[p]robation may not be revoked solely on the ground the probationer failed to pay fines or to make restitution. The judge must determine on the record that the probationer failed to make a bona fide effort to pay.” At his probation revocation hearing, Barlet testified, without contradiction, to his bona fide efforts to find work, pay fees, and make restitution, yet the trial judge made no determination as to why Barlet had not complied with probation terms. The Supreme Court reversed the trial court’s denial of post-conviction relief.

20. In Nichols v. State, 417 S.E.2d 860, 862 (S.C. 1992), in an appeal from the denial of post-conviction relief, our Supreme Court held that “[p]robation may not be revoked solely for failure to make required payments of fines or restitution without the court first making a determination on the record that a probationer has not made a bona fide effort to pay.” The Supreme Court reversed the trial court’s denial of post-conviction relief, finding that Nichols’ trial counsel was ineffective for not asking the hearing judge to make a judicial determination about Nichols’ ability to pay.

21. In State v. Spare, 647 S.E.2d 706 (S.C. Ct. App. 2007), our Court of Appeals held that probation can’t be revoked solely on the basis of failure to pay money unless the record reflects the hearing judge made the following findings:

A. The State has presented sufficient evidence to establish that a probationer has violated the terms of his probation;

B. The probationer made a willful choice not to pay, in that he had the funds to pay and chose not to pay, or lacked the funds to pay and didn't make a bona fide effort to acquire the funds; and

C. If the Court finds the probationer couldn't pay despite bona fide efforts to acquire the resources to do so, the Court may not imprison the probationer unless it also finds that alternate measures aren't adequate to meet the State's interests in punishment and deterrence.

22. This Court understands that Mr. Young's probation wasn't revoked at the hearing on November 1, 2013. However, the holdings in Barlet, Nichols, and Spare also seem to apply when a hearing judge tolls or extends a probationer's term of probation solely because of the probationer's failure to pay financial obligations. In this situation, a probationer's attorney should ask to hearing judge to make specific findings on the record about the probationer's ability to pay.

23. When the hearing judge in Mr. Young's case ruled that Mr. Young had willfully failed to pay his financial obligations, Ms. Fullwood should have asked the judge to allow her to present evidence of Mr. Young's inability to pay his probation financial obligations. Ms. Fullwood admitted such in her testimony.

24. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 334 S.E.2d 813 (S.C. 1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 334 S.E.2d 813.

25. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The Court presumes that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 386 S.E.2d 624 (S.C. 1989).

26. The reviewing Court applies a two (2) pronged test in evaluating allegations of ineffective assistance of trial counsel. First, the Applicant must prove that counsel’s performance was deficient. Under this prong, the Court measures an attorney’s performance by its “reasonableness under professional norms.” Cherry, 386 S.E.2d at 625, citing Strickland. Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 386 S.E.2d at 625.

27. Upon applying the above law to the facts of Mr. Young’s case, the Court finds that Ms. Fullwood’s performance was deficient and unreasonable for the following reasons:

A. Her failure to present evidence of Mr. Young’s inability to pay his probation financial obligations, after the hearing judge decided to toll and extend Mr. Young’s probation based solely on a willful failure to pay, and Ms. Fullwood’s acknowledgment that Mr. Young was “absolutely” entitled to a hearing on ability to pay; and

B. Her failure to ask the hearing judge to make findings on the record regarding Mr. Young’s ability to pay.

28. The Court finds that Mr. Young was prejudiced by Ms. Fullwood's failure to present evidence of his inability to pay and her failure to ask the hearing judge to make findings on the record. Mr. Young and Ms. Fullwood both testified that the hearing judge probably would have terminated Mr. Young's probation and converted any unpaid obligations to a civil judgment, if Ms. Fullwood had presented evidence of inability to pay and asked the hearing judge to make findings on the record. This Court, as noted above, finds Mr. Young's testimony about his financial condition while on probation to be credible and forthright.

29. The Court finds that Mr. Young has shown that there is a reasonable probability that, but for Ms. Fullwood's errors, his probation would not have been tolled and extended at the hearing on November 1, 2013, based upon a willful failure to pay his probation financial obligations.

IT IS THEREFORE ORDERED that the tolling and extension of Mr. Young's probation on November 1, 2013, based upon a willful failure to pay financial obligations shall be and are hereby vacated and reversed.

IT IS FURTHER ORDERED that Mr. Young shall be subject to the terms of his probation which existed immediately prior to the probation hearing on November 1, 2013.

IT IS SO ORDERED.

HON. R. SCOTT SPROUSE
 Presiding Circuit Court Judge
 Eighth Judicial Circuit

_____, South Carolina

_____, 2017

STATE OF SOUTH CAROLINA)
 COUNTY OF NEWBERRY)
 Steve Young,)
 S.C.D.C. No. 265045,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 OF THE EIGHTH JUDICIAL CIRCUIT

2016
 2015-CP-36-165

ORDER OF DISMISSAL

FILED
 NEWBERRY COUNTY
 2017 NOV - 1 AM 11: 06
 ELIZABETH P. FOLK
 CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed March 17, 2016. Respondent made its Return on or about May 15, 2017. An evidentiary hearing into the matter was convened on October 12, 2017, at the Laurens County Courthouse. Applicant was present at the hearing and represented by Carson Henderson, Esquire. Justin J. Hunter, Esquire, of the South Carolina Attorney General's Office represented the Respondent. At the hearing, Applicant testified on his own behalf. Elizabeth Fullwood, Esquire, also testified. This Court also had before it a copy of the records of the Newberry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's relevant probation records, Respondent's Return, and the probation revocation hearing transcript.

I. PROCEDURAL HISTORY

Newberry County Guilty Plea

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted at the September 2011 term of the Newberry County Grand Jury for Attempted Murder (2011-GS-36-623). Applicant was represented by Charles Verner, Esquire. On December 1, 2011, Applicant pled guilty before the Honorable Frank Addy, Jr., to the lesser

D.S.S

included offense of assault and battery (first degree). He was sentenced to imprisonment for ten years provided upon the service of time-served, the balance was suspended with four years' probation to follow. The probation was to be terminated upon payment after two years if the restitution was paid. Applicant did not appeal his plea or sentence.

Union County Guilty Plea

Applicant was placed on probation for the Newberry County charges in December 2011. In August of 2012, after serving almost nine months on probation, Applicant pled guilty in Union County to reckless homicide (2011-GS-44-234) and leaving the scene of an accident (2011-GS-44-235). He received a sentence of ten years' incarceration. The Union County offenses occurred before Applicant was placed on probation for the Newberry offense, so the conviction and sentence was not a violation of that probation.

Probation Tolling Hearing

On November 1, 2013, Applicant's probation agent brought him before the Honorable Steven H. John and made a motion to request a tolling of his probation during his incarceration on the Union County offenses. The hearing was not a revocation hearing. Applicant was represented by Elizabeth Fullwood, Esquire. Applicant's attorney objected to the probation agent's motion; however, Judge John granted the request and tolled his probation. Judge John further found that Applicant violated probation because he was behind on his supervision fees, three payments behind on restitution, and had not paid into the Public Defender Fund or his drug test fees.

Applicant filed a notice of appeal from Judge John's order tolling his probation. After briefing and oral argument, the South Carolina Court of Appeals affirmed the circuit court's decision by an unpublished opinion filed July 15, 2015. State v. Steve Young, Op. No. 2015-UP-

345 (Ct. App. Filed July 15, 2015). Applicant filed a Petition for Rehearing on July 23, 2015. This petition was denied by an order filed August 20, 2015. Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. The Supreme Court denied the petition on February 16, 2016. The remittitur was sent February 25, 2016.

PCR Application

In his application, Applicant alleged he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. "Counsel was ineffective for not objecting when the trial judge found that Applicant violated his probation by failing to pay"
 - b. "Counsel was ineffective for not informing him of the revocation hearing; and not informing him he had the right to object on the record"

II. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's

performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

With respect to probation counsel, the Strickland standard applies. A probationer has a right to counsel, though not a Sixth Amendment one. Turner v. State, 384 S.C. 451, 455, 682 S.E.2d 792, 794 (2009); see also Gagnon v. Scarpelli, 411 U.S. 778 (1973). Nonetheless, "the same analysis for ineffectiveness that applies in other PCR proceedings involving claims against counsel should, by analogy, apply in PCR proceedings involving claims against probation counsel." Turner, 384 S.C. at 455, 682 S.E.2d at 794; see e.g., United States v. Wren, 682 F.Supp. 1237 (S.D.Ga. 1988).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the probation hearing transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

Relevant Facts

Applicant alleged that Counsel was ineffective for not objecting when the trial judge found that Applicant violated his probation by failing to pay.

At the probation hearing, the State asked the presiding judge to toll Applicant's probation while he was incarcerated in the Department of Corrections for his Union County convictions. Judge John indicated that he would grant the agency's request, but gave Counsel the opportunity to respond. Counsel argued that the court was not allowed to toll Applicant's probation because Applicant had not violated the terms and conditions of his probation. The probation judge then asked the probation agent if Applicant was current on all of his fees. The probation agent indicated that Applicant was one payment behind on his supervision fees, had not paid into the public defender fund, was \$960 behind on his restitution payments, and had not paid his drug testing fees. The probation judge concluded the following:

Based on his actions on probation during the time that he was out on probation and not under arrest for the other charge, he was in violation of his terms and conditions of probation, a willful violation. I do find those to be I do find, therefore, it is proper to toll the time period since he was not current, he was not doing what he was supposed to be doing under probation at the time he was arrested for the charges that apparently had occurred prior to him being placed on probation; therefore, we will toll the time period and I'm going to extend his probation for an additional year to the five full years of probation.

Probation Hearing transcript p. 10, ll. 2-13.

Applicant testified at the PCR hearing that he was working while on probation and was trying his best to make his payments but was unsuccessful. Counsel testified that she argued to the judge that tolling Applicant's probation was improper but did not make the proper objection to the judge's finding that Applicant's nonpayment was a willful violation.

Findings

This Court finds that Counsel was not deficient for failing to object to the probation hearing judge's finding that Applicant's failure to make his payments constituted a willful violation. Evidence was presented at the probation hearing that Applicant was one payment behind on his supervision fees by the time he was incarcerated, three payments (\$960) behind on

his restitution, had not paid into the public defender fund, and had not paid any of his drug testing fees. With no evidence presented at the probation hearing to contradict the probation agent, this Court finds Counsel did not act unreasonably in making a baseless objection.

Furthermore, Applicant has failed to show that he was prejudiced by Counsel's actions. This Court finds Counsel's failure to object to the judge's finding that Applicant's non-payment was willful would not change the outcome of the case for two main reasons:

First, no evidence was presented at the probation hearing that would have changed the judge's findings had an objection been made. The judge made his findings based on the unrefuted and unchallenged testimony from the probation agent that outlined in detail Applicant's failure to make his required payments. Even if Counsel had made an objection, the probation judge would likely have overruled the objection based on the lack of contrary evidence presented at the probation hearing. It would be speculation for this Court to find that Counsel's objection would have been sustained because no evidence was presented at the probation hearing to challenge the probation agent's detailed testimony of Applicant's nonpayment. Although Applicant testified at the PCR hearing that he had a paying job and was trying, but struggling, to make payments, it would be speculation for this Court to say that Applicant's current testimony would have changed the probation judge's ruling. Furthermore, it would be improper for this Court to change the probation judge's ruling based on findings that were not presented to the probation judge.

Second, this Court finds that Applicant's probation would have had to be tolled, regardless of whether Counsel objected to the judge's finding of willful nonpayment, because of Applicant's incarceration in the Department of Corrections. Tolling a defendant's probation is appropriate when a defendant absconds from supervision. See State v. Hackett, 363 S.C. 177,

609 S.E.2d 553 (Ct.App.2005). Although Applicant did not abscond in this case, this Court finds that he was placed into a situation that prevented his supervision by his own wrongful acts – those being his Union County convictions for reckless homicide and leaving the scene of an accident where death was involved. The South Carolina Supreme Court has held:

“The general rule applied in most jurisdictions is that the tolling of probation is appropriate where the authorities could not supervise the defendant due to the defendant’s wrongful acts. It is based on the principle that a defendant should not be allowed to profit from his own misconduct which prevents supervision by probationary authorities.”

State v. Miller, 404 S.C. 29, 37, 744 S.E.2d 532, 537 (2013). In the instant case, the probation judge appropriately found that Applicant had violated his probation based on the unrefuted and detailed testimony from the probation agent that Applicant was substantially behind on several of his financial obligations. Most importantly, because of Applicant’s incarceration due to his own wrongdoing, this Court finds he was unlikely to be able to become current before the expiration of his probation. It is clear that Applicant cannot be on supervised on probation and incarcerated in the South Carolina Department of Corrections at the same time. The Court of Appeals found that “[Applicant] should not be allowed to profit from his own misconduct by having his probationary term continue to run while he is not under probationary supervision.” State v. Steve Young, Op. No. 2015-UP-345 (Ct. App. Filed July 15, 2015). This Court agrees and finds that Applicant’s probation would have to be tolled while he is incarcerated, regardless of whether Counsel objected to the judge’s finding of willful nonpayment. As such, Applicant cannot show that he was prejudiced by Counsel’s actions, and his PCR application must be dismissed.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate Counsel’s performance was unreasonable under prevailing

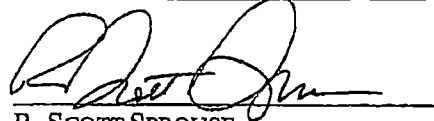
professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 30 day of October, 2017.



R. SCOTT SPROUSE
Presiding Judge
Eighth Judicial Circuit

Wahulla, South Carolina

WITNESSES

Kevin Goodman
Newberry Police Department

WARRANT NUMBER

M795251

TRUE BILL

Cindy A. O'Neil

Foreman of the Grand Jury

Date: 9/12/2011

VERDICT

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

September Term, 2011

Indictment # 11GS36-0623

THE STATE

vs.

Stephen Young

INDICTMENT FOR

ATTEMPTED MURDER

16-03-0029

THE STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

INDICTMENT FOR
ATTEMPTED MURDER
16-03-0029

At a Court of General Sessions, convened on the 2nd day of September, 2011 the Grand Jurors of Newberry County present upon their oath:

That Stephen Young, did in Newberry County, state aforesaid, on or about the 26th day of June, 2011 willfully and unlawfully, with the intent to kill and with malice aforethought, attempted to kill Alfred Cromer, in violation of Section 16-3-29 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.



Solicitor

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Newberry
STATE VS. Stephen Young

INDICTMENT/CASE#: 11GS36-0623

AKA:
Race: BLK Sex: M Age:

AW#: M795251
Date of Offense: 2011-06-26
S.C. Code §: 16-3-0029

DOB: [redacted] SS#: [redacted]
Address: [redacted]
City, State Zip Union, SC
DL# [redacted] SID# [redacted]

CDR Code # 3410

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or X PLEADS

TO: A+B 1st degree 0-10y

In violation of § 16-3-600 of the S.C. Code of Laws, bearing CDR Code # 3412

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS 17-25-45
(CSC w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (Defendant Initial)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST:

[Signature] 78607 [Signature] [Signature]
Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 10 days/months/years or under the Youthful Offender Act not to exceed years.

and/or to pay a fine of \$; provided that upon the service of 10 days/months/years and/or payment
of \$; plus costs and assessments as applicable; the balance is suspended with probation for 4 months/years
and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are
incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:

The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the
State Department of Corrections. Credit 157 days = jail.

The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to SC Code §17-25-135.
Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65
(Criminal Domestic Violence) to ship, transport, possess or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred, Def. Waives Hearing Ordered 40 PTUP after 2 yrs if [redacted] no issue
Total: \$ 2000 plus 20% fee: \$ 40 days/hours Public Service Employment

Payment Terms:
 set by SCDPPPS

Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal, consecutive weekly/monthly
prmts. of \$ beginning
\$ paid to Public Defender Fund

Recipient: <u>PI Application</u>	<u>40.00</u>
*Fine:	\$ <u> </u>
\$14-1-206 (Assessments 107.5%)	\$ <u> </u>
\$14-1-211(A)(1) (Conv. Surcharge)	\$100 <u>100.00</u>
\$14-1-211(A)(2) (DUI Surcharge)	\$100 <u> </u>
\$56-5-2995 (DUI Assessment)	\$12 <u> </u>
\$56-1-286 (DUI Breath Test)	\$25 <u> </u>
\$35.13 (Public Def/Prob)	\$600 <u>500.00</u>
\$73.3, 1B TP (Law Enforce. Funding)	\$25 <u>25.00</u>
\$33.7, 1B TP (Drug Court Surcharge)	\$150 <u> </u>
\$50-21-114(BUI Breath Test Fee)	\$50 <u> </u>
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea <u> </u>
\$90.11 TP (SCCJA Surcharge)	\$5 <u>5.00</u>
3% to County (if paid in installments)	\$ <u>18.90</u>
TOTAL	\$ <u>688.90</u>

Other:

Appointed PD or appointed other counsel, §47.12 requires
\$500 be paid to Clerk during probation

Court Reporter: [Signature]
Sentence Date: 9/24/11
PRESIDING JUDGE: [Signature]
Judge Code: 2111319

[Signature]
Clerk of Court/ Deputy Clerk

PROBATION CITATION

No. C-32-13-0179

SOUTH CAROLINA v. STEVE NMN YOUNG, STEPHEN YOUNG		COUNTY: LEXINGTON	
		SCDC # 265045	SID # 01292476
TO: STEVE NMN YOUNG, STEPHEN YOUNG			
YOU ARE HEREBY NOTIFIED to appear in the above named case at the time, date and place specified below.			
Place		Room	
		Date and Time	
YOU ARE HEREBY NOTIFIED that you are charged with violating the conditions of your supervision as stated below.			
Violations Charged No violations charged. Motion for review of the Probation sentence imposed by Judge Addy Jr. in cause number GS-36-00623 at the 12/01/2011 term of General Sessions Court holden in Newberry County, Newberry, South Carolina pursuant to statute 24-21-430.			
YOU ARE HEREBY NOTIFIED that you have the rights listed below.			
List of Rights: You have the right at the hearing to question any person who appears as a witness against you and to have witnesses appear on your behalf. You may present evidence on your behalf. You may have an attorney represent you. If you cannot afford an attorney, an attorney will be appointed for you. You must advise the agent or the court in writing of your desire for an attorney. It is your responsibility to make arrangements for your witnesses and your attorney to appear at the hearing.			
IF YOU FAIL TO APPEAR AT THE TIME, DATE AND PLACE SHOWN ABOVE, THE HEARING WILL BE HELD IN YOUR ABSENCE AND YOU MAY BE INCARCERATED.			
LEXINGTON, South Carolina		Probation and Parole Agent Daniel R Schirra <i>(Signature)</i>	
Date 8/21/2013		Agent # 0587	
A copy of the citation was served by the undersigned and given to the individual named therein at the time, date, and place indicated below.			
Place <i>Kershaw Corr Inst.</i>		Date and Time <i>9/25/13</i>	
		Serving Officer's Signature <i>(Signature)</i>	
Sworn to and subscribed before me this <u>25</u> day of <u>September</u> , <u>2013</u>			
<i>Catherine A. Amason</i> Signature of Notary Public		My Commission Expires December 22, 2018 My Commission Expires _____	

STATE OF SOUTH CAROLINA

AFFIDAVIT

County of LEXINGTON

Personally appeared before me, Daniel R Schirra, who first being duly sworn, deposes and says that STEVE NMN YOUNG, STEPHEN YOUNG did within this county and State on the 21 day of August, 2013, violate certain conditions of release in the following particulars:

DESCRIPTION OF VIOLATION

No violations charged. Motion for review of the Probation sentence imposed by Judge Addy Jr. in cause number 11-GS-36-00623 at the 12/01/2011 term of General Sessions Court holden in Newberry County, Newberry, South Carolina pursuant to statute 24-21-430.

The Affiant states that there is probable cause to believe the defendant named committed the violations set forth and that such probable cause is based on the following facts:

No violations charged. Citation issued to give the Court subject-matter jurisdiction over Indictment #: 11-GS-36-00623. State moves for court to review the probation case of Steve Young due to a conviction for the offense of Reckless Homicide, Death Results (2011-GS-44-00234) and Leaving the Scene of an Accident Causing Death (2011-GS-44-00235) at the 8/16/12 term of Court in Union County Court, receiving a sentence of 10 years and 7 years respectively, concurrent. The conviction is not considered a violation of the the current probation case as the incident date of 1/14/2011 occurred before the begin date of supervision.

Sworn to and subscribed
before me this 21 day of
August, 2013

[Signature]
Signature of Notary Public

[Signature]
Affiant

My Commission Expires: 8/19/20

587

STATE OF SOUTH CAROLINA

County of Lexington
STATE vs.

Stephen Young

AKA:
Race: Blk Sex: M
DOB: [REDACTED]
SSN: [REDACTED]
SID#: 01292476

IN THE COURT OF GENERAL SESSIONS

Indictment Number: 11 -GS- 36 - 0623
Probation CW#: C-32-13-0179

Name of Original Offense: A+B 1st degree
Original A/W#: M795251
Date of Original Offense: 6/26/2011
Conviction S.C. Code §: 16-3-600
Conviction CDR Code #: 3 1 4 1 1 2
Original Sentence: 10 yrs. Svsa, CTS + 4 yrs. Prob.
ORDER (157 days)

The above named defendant has been charged with violating the conditions of probation ordered on 12/1/11 in the Court of General Sessions of Newberry County, and/or the additional conditions ordered by the Court in probation continuation order(s) issued on 5/31/12, as set forth in the attached warrant(s) or citation(s) dated 9/25/13. After hearing the evidence and being duly advised, in the (presence/absence) of the defendant, I find that the above named defendant has violated the following condition(s) of probation: (List by number or indicate special conditions as provided in the affidavit)

Therefore, IT IS ORDERED that:

- the suspended sentence be revoked and the above named defendant be required to serve _____ months/years, the remainder of the original sentence, and/or pay \$ _____.
- the suspended sentence be revoked and the above named defendant be required to serve _____ months/years of the original sentence and/or pay \$ _____; thereupon to be reinstated on probation, subject to the conditions set forth in the attached order and not inconsistent with this order.
- the above named defendant is continued on probation as provided for in the original sentence, subject to the conditions set forth therein and not inconsistent with this order.
- probation is reduced to time served under supervision and the defendant is discharged from supervision on this date.
- the above named defendant is placed on active electronic monitoring pursuant to §23-3-540 (mandatory if convicted of first degree criminal sexual conduct with a minor or lewd act, discretionary if convicted of any other applicable sex offense against a minor).
- Financial Obligations: Order satisfies: Department fees (arrearage) Civil judgment: Department fees
 Fines and other fees (arrearage/balance) Fines and other fees
 Restitution (and 20% arrearage/balance) Restitution (and 20%)
- Additional Conditions ordered by the Court:
TOLL PROBATION FROM TODAY UNTIL HIS RELEASE FROM SCDC
DATE PSE REQUIREMENT AND PSE EXEMPTION FULL, extend probation (1) one year
- The defendant is given credit for pre-revocation hearing detention time on current probation violation to be calculated and applied by the SC Department of Corrections.
- The defendant has previously served 157 DAYS months/years on this sentence.
(spit sentence time and/or prior partial revocation time)
- The defendant was previously placed on active electronic monitoring pursuant to §23-3-540.

This 10th day of NOV, 2013, at LEXINGTON, SC

[Signature]
Presiding Judge 11th Judicial Circuit

You are hereby advised that under the law the Court may at any time revoke or modify any condition of this probation; impose any lawful conditions it deems proper; or extend your period of probation not to exceed five (5) years. At any time within the period of your probation, the Court may require you to serve any part of the original sentence imposed.

This is to certify that I have read, or have had read to me, the order and the conditions set out therein. I agree to comply with such conditions and the conditions of my attached probation order during the period of my probation. I have received a copy of this Court's order and all attachments.

Offender's Signature _____ Witnessed by _____

Signed this _____ day of _____, at _____, SC