

 ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT

V.

CURTIS GERALD,

APPELLANT

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Opinion No. 2013-UP-143

Appellate Case No. 2011-201786

PETITION FOR REHEARING

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SC Court of Appeals

Pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant's counsel requests a rehearing in his appeal because this Court may have overlooked the issue of subject matter jurisdiction raised in the case. The question of whether the circuit court possessed subject matter jurisdiction to revoke appellant's probation after he learned of the alleged probation violations orally via verbal notification sans a warrant or citation was not addressed in this Court's opinion. Rather, this Court ruled on whether sufficient evidence existed in support of appellant's probation revocation even though the sufficiency of the evidence was not raised as an issue in the case. In support of this motion, counsel submits the following information.

1.) On October 12, 2011, appellant pled guilty to the charge of assault while resisting arrest and was sentenced to imprisonment for a period of two years. Immediately thereafter, the trial judge revoked three years of his probation sentence from his prior possession of cocaine and criminal domestic violence convictions. Then, prior to the probation revocation, the state submitted oral notice verbally to the defense regarding alleged probation violations against appellant rather than noticing appellant of the same via an arrest warrant or citation as required by Felder¹ and Richburg.² A probation violation arrest warrant or citation must be issued and served on any probationer before a circuit court judge can properly revoke a probation sentence. S.C. Code Ann. {24-21-450 and §24-21-460 (Supp. 1998). See also S.C. Code Ann. 24-21-300; State v. Richburg, 304 SC 162, 403 S.E. 2d 315 (1991); State v. Felder 313 SC 55, 437 S.E. 2d 42 (1993). If a warrant or citation has not been issued, the trial court lacks subject matter jurisdiction to revoke one's probation; and therefore, any revocation or attempted revocation is a nullity. Appellant's counsel is unaware of any case or statute in existence indicating that oral notification may supplant the citation or warrant requirement necessary for the circuit court to attain jurisdiction in probation cases.

2.) During this circuit court proceeding, there was no language or reference presented in the record regarding whether a probation citation or an arrest warrant had been in existence and served on appellant. In a written explanation filed by trial counsel as a basis of an appeal per Rule 203 (B)(iv), SCAR, the matter of the circuit court's lack of jurisdiction to revoke appellant's probation sentence in the instant case was outlined as follows:

I (trial counsel) represented the above-named defendant before Judge Edward B. Cottingham on October 21, 2011, at which time the defendant entered a guilty plea to his/her pending charges. It was not until this time (i.e. the time of the guilty plea) that Defendant and myself, as his legal counsel, were notified (via verbal notice only) by Mr. Russell Anderson

¹ State v. Felder, 313 SC 55, 437 S.E.2d 42 (1993).

² State v. Richburg, 304 SC 162, 403 S.E.2d 315 (1991).

with Probation, Parole, and Pardon Services that the Court would also need to address possible violation(s) by Defendant on his probationary sentence. It is because of the lack of *proper* notice given to Defendant and myself, as his legal counsel, regarding these alleged violation(s) that I argue stand to support a sufficient legal basis for an appeal in this matter.

3.) Even though there was information in existence indicating that a warrant was drawn on February 10, 2010, in the case; nonetheless, since appellant was not served with a probation violation arrest warrant or citation at the circuit court proceeding, the revocation of his probation sentence was null and void. Appellant's probation revocation sentence cannot stand as valid because the probation revocation court lacked subject matter jurisdiction to entertain the matter of appellant's alleged probation violations.

4.) On appeal, this Court held that the probation revocation court possessed jurisdiction to hear appellant's probation matter by way of the following authorities:

PER CURIAM: Affirmed pursuant to Rule 22 (b), SCARC, and the following authorities: *State v. Allen*, 370 S.C. 88, 94, 634 S.E. 2nd 653, 655 (2006) (The determination of whether to revoke probation in whole or part rests within the sound discretion of the trial court.); *State V. Hamilton* 333 S.C. 642, 647, 511 S.E. 2nd 94, 96 ("This court's authority to review such a decisions confined to correcting errors of law unless the legal or evidentiary basis indicates the circuit [court's] decision was arbitrary or capricious.); S.C. Code Ann. § 24-21-300 (2007) ("The issuance of a citation or warrant during the period of supervision gives jurisdiction to the court... at *any* hearing of the violation." (emphasis added)); *State v. Ellis*, 397 S.C. 576, 581 n.3, S.E. 2nd 5, 8 n.3 (2012) (stating the circuit court has subject matter jurisdiction to hear and decide probation violation revocations, and that "citations and warrants simply confer authority in those courts already in possession of jurisdiction.")

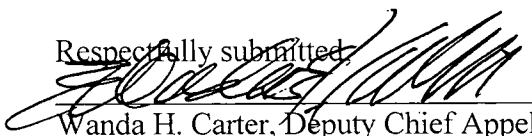
5.) Clearly, the Hamilton and Ellis cases cited by this Court stand for the rule that a circuit court judge can exercise his discretion in revoking one's probation if there is sufficient evidence to establish that the probationer has violated the conditions of his probation. However, Hamilton and Ellis are not controlling in the present case because the issue in the case at bar was not whether

sufficient evidence existed to revoke appellant's probation, but rather whether the probation revocation court possessed subject matter jurisdiction initially to even entertain the sufficiency of the evidence regarding the alleged probation violations listed against appellant. Neither Hamilton nor Ellis address the question of whether oral notice would suffice as sufficient notice therein supplanting or adding to the citation and warrant requirements necessary to attain jurisdiction over a probation matter. Also, this Court cited in its opinion the Allen case, which held that probation rulings that are not the result of an abuse of discretion are valid and that the requirement that the probationer not associate with a person who has a criminal record is a valid condition of probation. Again, Allen is not controlling in this case because appellant's issue did not concern an analysis of whether there was sufficient evidence of the probation allegations alleged or the validity of a particular condition of probation, but rather whether the probation court possessed jurisdiction initially to entertain the probation allegations presented in the case.

As a result, appellant's argument that the probation court lacked subject matter jurisdiction to revoke his probation because he received oral notice of the same made verbally to him by the state when the law would require the issuance of an arrest warrant or citation to satisfy proper notice in such a matter was not ruled upon by this Court on direct appeal.

WHEREFORE, the undersigned counsel requests that this petition for rehearing be granted in order to obtain a ruling by this Court on the issue of whether oral notification made verbally by the state would invoke subject matter jurisdiction in a probation revocation case despite the requirement that only a citation or an arrest warrant can lawfully do so.

Respectfully submitted,



Wanda H. Carter, Deputy Chief Appellate Defender

This 24th day of April, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

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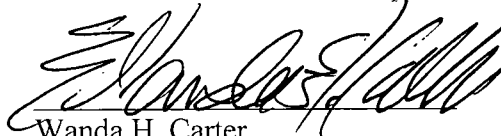
V.

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CERTIFICATE OF SERVICE

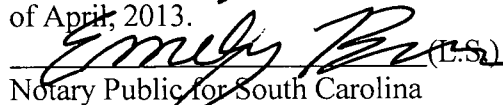
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Tommy Evans, Jr. Esquire, at the South Carolina Department of Probation, Parole & Pardon Services, PO Box 50666, Columbia, SC 29250 and Curtis Gerald, at 504 Sandridge Loop, Longs, SC 29568, this 24th day of April, 2013.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 24th day
of April, 2013.


Notary Public for South Carolina

My Commission Expires: November 16, 2022.