
NO. 33247

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

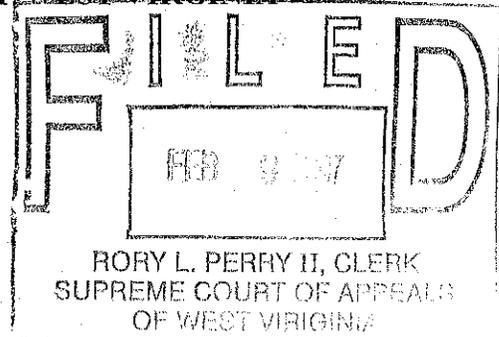
STATE OF WEST VIRGINIA,

Appellee,

v.

JAMES K. HOSBY,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

R. CHRISTOPHER SMITH
ASSISTANT ATTORNEY GENERAL
State Bar ID No. 7269
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

Counsel for Appellee

TABLE OF CONTENTS

	Page
I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW	1
II. STATEMENT OF FACTS	1
III. RESPONSE TO ASSIGNMENT OF ERROR	3
IV. ARGUMENT	4
WHEN EXAMINING THE DECISION OF THE CIRCUIT COURT USING AN ABUSE OF DISCRETION STANDARD, THERE WAS NO ERROR COMMITTED IN REVOKING APPELLANT'S PROBATION DUE TO THE FACT THAT HIS FAILURE TO COMPLY WAS NOT AS A RESULT OF CIRCUMSTANCES BEYOND HIS CONTROL, BUT RATHER WAS CONTUMACIOUS	4
1. The Standard of Review	4
2. When the Standard as Set Forth in <i>Inscore, Supra</i> , Is Applied, No Error Was Committed Because Appellant's Failure to Comply with the Probation Agreement—in Particular, the Failure to Abide by the Reporting Requirement—Was Indeed Contumacious	4
V. CONCLUSION	7

TABLE OF AUTHORITIES

	Page
CASES:	
<i>State v. Inscore</i> , 219 W. Va. 443, 634 S.E.2d 389 (2006)	4
<i>State v. Minor</i> , 175 W. Va. 92, 341 S.E.2d 838 (1986)	5, 6
STATUTES:	
W. Va. Code § 61-5-29(1)	1, 2
W. Va. Code § 61-5-29(2)	1

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

JAMES K. HOSBY,

Appellant.

BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

This is an appeal by James K. Hosby (hereinafter "Appellant") from the October 24, 2005, judgment of the Circuit Court of Jefferson County (Steptoe, J.), which revoked his probation and sentenced him to serve the remainder of a one-year sentence in the Eastern Regional Jail, upon his guilty plea to failure to pay child support in violation of West Virginia Code § 61-5-29(1). On appeal, Appellant claims that the circuit court erred in revoking his probation.

II.

STATEMENT OF FACTS

On April 24, 2004, Appellant was indicted on two felony counts of failure to pay child support, in violation of West Virginia Code § 61-5-29(2), for his failure to support his daughter, Tajsia L. Hosby, in consecutive periods ranging from approximately February 9, 1998 to March 31,

2004.¹ (R. 34-35.) On August 13, 2004, Appellant entered a guilty plea to a count of the lesser misdemeanor offense of failure to pay child support, in violation of West Virginia Code § 61-5-29(1). (R. 102.)

Upon Appellant's guilty plea, he was sentenced to one year in the Eastern Regional Jail, the execution of said sentence to be suspended and a probationary sentence of five years was imposed. (*Id.* at 112-13.) The terms of the probation were that Appellant would pay restitution to his child's mother in the amount of \$13,282.14 to be paid in accordance with the terms set by the probation officer. (*Id.* at 109.) The original Child Support Order of February 9, 1998, mandated that Appellant pay monthly child support in the amount of \$322.00. (*Id.* at 80-81.)

On May 18, 2005, Appellant's probation officer, Ms. Kimberly Rowland, filed a Motion for Revocation of Probation. (*Id.* at 123.) In this motion, Ms. Rowland alleged that Appellant violated the following terms of the probation agreement: 1) failed to cooperate and comply with the terms of the agreement; 2) failed to report to the probation officer in January 2005, March 2005, April 2005, and May 2005; 3) failed to make regular child support payments; 4) failed to report to the probation officer changes in employment and failed to keep her informed of his employment status; and 5) failed to make regular restitution payments as agreed to in the probation agreement. (*Id.* at 125.)

A Probation Revocation Hearing was held on June 24, 2005. (Tr. 1.) At this hearing, Appellant admitted to failing to report to the probation officer, failing to make regular child support payments, failing to report to the probation officer regarding his employment status, and failing to

¹Count One of the Indictment charged Appellant with persistent failure to pay child support for twelve consecutive months, during a period from approximately July 1, 2002 to September 1, 2003; and Count Two of the Indictment charged him with persistent failure to pay child support for a period from approximately February 9, 1998 to March 31, 2004, resulting in an arrearage of not less than eight thousand dollars, to wit: \$11,067.92. (R. 34-35.)

make regular restitution payments. (Tr. 4-9.) Regarding Appellant's failure to report to the probation officer in January 2005, March 2005, and April 2005, Appellant stated that he was traveling back and forth from Jefferson County to Winchester Hospital and D.C. General to care for his sick mother who suffered a stroke and that he was "a wreck." (*Id.* at 7-9.) With respect to his missing the reporting requirement in May 2005, Appellant stated that he "got kicked by a horse." (*Id.* at 9.) Appellant testified at the hearing that he failed to pay child support for a time but was then current, yet he was still behind on restitution payments (*Id.* at 7.) Appellant's mother also testified on his behalf at this hearing as to his visiting her at the various hospitals and caring for her. (*Id.* at 14-18.) At the conclusion of the hearing, the court ruled to raise the stay of execution of Appellant's sentence and required him to serve the remainder of it in the Eastern Regional Jail. (*Id.* at 27.) This ruling was then stayed pending this Court's appellate review per Appellant's motion. (*Id.* at 27-28.)

III.

RESPONSE TO ASSIGNMENT OF ERROR

Appellant's assignment of error is quoted below, followed by the State's responses:

Petitioner contends that the court erred in revoking his probation because his failure was a result of factors outside his control and was not contumacious.

State's Response:

When applying an abuse of discretion standard, the court did not commit error in revoking Appellant's probation due to the fact that his failure to comply with the terms of the probation agreement was not completely out of his control—in particular, with respect to the reporting requirements—and was indeed contumacious.

IV.

ARGUMENT

WHEN EXAMINING THE DECISION OF THE CIRCUIT COURT USING AN ABUSE OF DISCRETION STANDARD, THERE WAS NO ERROR COMMITTED IN REVOKING APPELLANT'S PROBATION DUE TO THE FACT THAT HIS FAILURE TO COMPLY WAS NOT AS A RESULT OF CIRCUMSTANCES BEYOND HIS CONTROL, BUT RATHER WAS CONTUMACIOUS.

Appellant contends that the circuit court erred in revoking his probation and requiring him to serve the remainder of his sentence in jail. However, when examining this decision on an abuse of discretion standard, there was no error committed by the court. When the entire record is observed, it is evident that, although Appellant had to deal with some difficult circumstances, his failure to comply with the probationary agreement—in particular, the reporting requirement—was contumacious.

1. The Standard of Review.

When reviewing the findings of fact and conclusions of law of a circuit court sentencing a defendant following a revocation of probation, we apply a three-pronged standard of review. We review the decision on the probation revocation motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to a *de novo* review.

Syl. Pt. 1, *State v. Inscore*, 219 W. Va. 443, 634 S.E.2d 389 (2006).

2. When the Standard as Set Forth in *Inscore, Supra*, Is Applied, No Error Was Committed Because Appellant's Failure to Comply with the Probation Agreement—in Particular, the Failure to Abide by the Reporting Requirement—Was Indeed Contumacious.

When applying this deferential standard as set forth in *Inscore, supra*, the record shows that there was no abuse of discretion by the Jefferson County Circuit Court and no error was committed.

The State concedes that Appellant was going through some difficult circumstances with traveling

to take care of his sick mother and being injured by a horse, yet the fact remains that he could have called the probation officer, as he was required to do on a monthly basis, to inform her of his difficulties. During the time period where Appellant admitted to failing to report to his probation officer, he made no attempt to call her. (*Id.* at 13-14.) Indeed, Appellant admits that in January, March, April, and May of 2005, he did not make a single telephone call to his probation officer explaining his circumstances and difficulties in making his required payments. (*Id.* at 12-13.) While it is true that at the time of this hearing Appellant had caught up in his child support payments, as the State pointed out, this payment was made the day before the hearing and it took his being hauled before the court to make it. (*Id.* at 20.) Additionally, it was established at this hearing that Appellant had failed to make any reduction in the arrearage. (*Id.* at 20-21.) In light of all of this, the court did not abuse its discretion in revoking Appellant's probation due to the fact that his failure to comply with the probationary agreement was not due to circumstances beyond his control but rather was contumacious.

Appellant cites the holding in *State v. Minor*, 175 W. Va. 92, 341 S.E.2d 838 (1986), in support of his claim that the court committed error in the revocation of his probation. In *Minor*, the Court held "probation may not be revoked for failure to pay restitution, costs and attorney's fees unless the probationer's failure is contumacious." *Id.*, Syl. Pt. 1. However, as established above, Appellant's failure was indeed contumacious. He failed to establish in this hearing whether or not he was employed during the time that he was traveling to visit and take care of his mother. He merely stated that he was "going back and forth." (Tr. 13.) Additionally, this absolutely fails to address his negligence in failing to call the probation officer to report his situation. In *Minor, supra*, the Court ruled that the probation revocation was erroneous where it was based on a failure to pay

restitution, yet in that case the probationer reported her financial difficulties to the probation officer and even offered to pay the arrearage within 30 days. *Id.* at 94, 341 S.E.2d at 840. Clearly, when these cases are compared, Appellant's failure to comply with his probationary agreement was contumacious in that no attempt to contact his probation officer was made.

By the time of the hearing, Appellant had obtained employment with Staples and presumably could have made the requisite payments. (Tr. 22.) In light of this, the circuit court looked into home confinement, but concluded that electronic monitoring was not feasible to keep track of Appellant. (Tr. 23-25, 27.) The court stated that based on the overriding principle of standing behind the requirements of probation, there must be consequences for not adhering to them. The court ruled that Appellant had materially breached his probation agreement, and therefore raised the stay of execution and ordered that Appellant serve the remainder of his one-year sentence in jail. (*Id.* at 27.)

In examining the entire record, there was no abuse of discretion by the circuit court in revoking Appellant's probation, and no error was committed.

V.

CONCLUSION

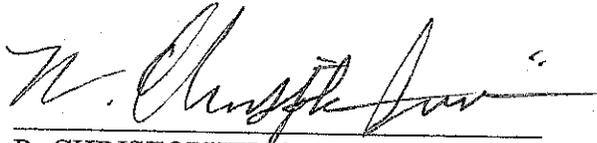
For the foregoing reasons, the judgment of the Circuit Court of Jefferson County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



R. CHRISTOPHER SMITH
ASSISTANT ATTORNEY GENERAL
State Bar ID No. 7269
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 9th day of February, 2007, addressed as follows:

James T. Kratovil, Esq.
Kratovil & Amore
211 West Washington Street
P.O. Box 337
Charles Town, WV 25414

A handwritten signature in cursive script, appearing to read "R. Christopher Smith", written over a horizontal line.

R. CHRISTOPHER SMITH