

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Richland County
Clifton Newman, Circuit Court Judge

Appellate Case No. 2022-000299

THE STATE, RESPONDENT

v.

STACARDO GRISSETT, APPELLANT

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Court of Appeals erred by failing to review the revocation judge's proper refusal to award time served credit for a community supervision revocation as moot, when the issue is capable of repetition and likely to evade review?

2. Whether the revocation judge erred when he declined to give the Appellant credit for time that the Appellant served in custody pending a Community Supervision Program (CSP) violation, when he was still serving his active sentence and when S.C. Code Ann. § 24-13-40 only pertains to pretrial credit, and that the judge revoked less than one year in compliance with S.C. Code Ann. § 24-21-560(C)?

STATEMENT OF THE CASE

Respondent agrees with the statement of the case by Appellant.

ARGUMENTS

- 1. The Court of Appeals erred in dismissing this matter because it is capable of repetition and evading review.**

Respondent agrees with the Court of Appeals that this issue is moot. Appellant has completed his Community Supervision Program (CSP) and his revocation, which means a decision by this court on the merits will have no effect on his situation. However, the question regarding the application of pre-revocation credit in the context of CSP violations can continue to arise in the courts. Furthermore, because CSP revocations are limited to one year pursuant to S.C. Ann. § 24-21-560(C), it would be the rare case where the issue is *not* moot by the time the appellate courts can render a decision. Consequently, this Court can find it appropriate to take jurisdiction if the matter is capable of repetition but would be rendered untimely before final review. *See Hayes v. State*, 413 S.C. 553, 558, 777 S.E.2d 6, 9 (Ct. App. 2015) (quoting *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)) (internal quotation marks omitted). *See also State v. Simpson*, 429 S.C. 83, 837 S.E.2d 669 (Ct. App. 2020), reh'g denied (Feb. 14, 2020) and *Nelson v. Ozmint*, 390 S.C. 432, 434, 702 S.E.2d 369, 370 (2010).

This issue is ripe for clarification, because Appellant's interpretation of S.C. Ann. § 24-13-40 is common, yet as discussed in Part 2, misapprehends the nature of CSP as a distinct form of supervision different from probation.

2. The General Sessions court did not err when it declined to order pre-revocation credit because South Carolina law only requires pre-revocation credit to be applied to a probation revocation and community supervision is not probation.

Appellant argues that the judge erred when he refused to order that Appellant receive credit for the time he served in jail leading up to the revocation hearing. He claims that South Carolina law requires pre-revocation credit to be ordered, and the judge does not have discretion to refuse to award this time.

Appellant relies on S.C. Code Ann. § 24-13-40 and the opinions of *State v. Boggs*, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010) and *Hayes v. State*, 413 S.C. 553, 777 S.E.2d 6 (Ct. App. 2015). However, Appellant misapprehends § 24-13-40, because Appellant was facing a violation of CSP – a type of supervision that is not mentioned in any of the cases cited. CSP is a different form of supervision altogether from probation.

A. Section 24-13-40 does not apply to CSP.

Section 24-13-40 guarantees that any jail time a defendant serves while awaiting trial or a probation violation hearing gets applied to any incarcerative sentence that comes as a result of that trial, plea, or violation of probation.

While the statute clearly makes *pretrial* detention credit mandatory, the time that Appellant served was not served prior to trial. The relevant portion of the statute says, “In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to *trial and sentencing...*” (Emphasis added). Presumably, any pretrial

detention served by Appellant was applied immediately upon entering the Department of Corrections after his original sentencing.¹

Respondent submits that Appellant's CSP violation hearing was not a trial, just as probation violation hearings are not trials. A violation of CSP is handled much in the same way as violations of probation. It is well-settled in South Carolina that probation violation hearings are not trials. *See State v. Hill*, 368 S.C. 649, 658, 630 S.E.2d 274, 279 (2006) and *State v. Franks*, 276 S.C. 636, 638, 281 S.E.2d 227, 228 (1981). "[W]hile the underlying probation violations may be criminal offenses, the probation revocation proceeding is not a criminal trial of those charges." *Hill*, at 658-659, 279.

Section 24-13-40 also requires pretrial detention be applied to the *sentence*. In a probation matter, "the commencement of the service of the sentence follows the revocation of probation." *Id.* The application of pretrial jail time pursuant to § 24-13-40 is the matter discussed in *Hayes*. Upon a revocation, "a court may 'revoke the probation or suspension of [a] sentence' and has the discretion 'to require the defendant to serve all or a portion only of the sentence imposed.'" *Hayes*, 413 S.C. at 560, 777 S.E.2d at 10, citing S.C. Code Ann. § 24-21-460. Probation revocation hearings require a determination by a judge as to how much of the suspended sentence will be revoked. Section 24-13-40 provides for the pre-hearing time (and pretrial time) to be applied to that revocation. However, parole and CSP do not require the imposition of a suspended sentence – the time ordered upon a revocation of parole and CSP is part of a defendant's active and ongoing sentence.

Parole hearings are also not considered trials. The U.S. Supreme Court has held that, "the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a

¹ Each of the sentence sheets' boxes were checked stating, "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." R. 37-39.

defendant in such a proceeding does not apply to parole revocations.” *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 2600 (1972) (citing *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254 (1967)). The Court continues, saying that “[p]arole arises after the end of the criminal prosecution, including imposition of the sentence.” *Id.*

It stands, therefore, to reason that violation hearings of CSP, being another form of supervision following a conviction that may result in a revocation if its terms and conditions are violated, are not considered trials either.

Therefore, the portion of § 24-13-40 that refers to pretrial jail credit does not apply in the context of CSP violations. Furthermore, the holding in *Boggs* regarding a sentencing court’s obligation to award such credit also does not apply in this context.

B. CSP is a part of the defendant’s active sentence, so any time served is already applied to the ongoing sentence.

Community Supervision begins upon the conclusion of at least 85 percent of a “no parole offense” as defined in S.C. Code Ann. § 24-13-100. A sentence for a “no parole offense” must include a term of community supervision, defined in S.C. Code Ann. § 24-21-560. The Department of Probation, Parole and Pardon Services operates the CSP and develops the guidelines and requirements of supervision. S.C. Code Ann. § 24-21-560.

Although CSP is frequently compared to probation,² it is calculated differently. Probation is imposed by the General Sessions court after suspending all or a portion of the sentence.³ The probation period is limited to five years.⁴ The term of probation is therefore unrelated to the

² “The CSP is a more stringent, closely monitored form of supervision than normal probation.” *State v. Dawkins*, 352 S.C. 162, 167, 573 S.E.2d 783, 785 (2002).

³ S.C. Code Ann. § 24-21-410.

⁴ S.C. Code Ann. § 24-21-440.

sentence, meaning that the term of probation can exceed the maximum incarceration allowed by law. Offenders do not receive credit toward their incarceration while serving probation because the sentence is suspended.

This is not the case with CSP. Offenders on CSP are still prisoners completing their active sentences. As this Court has held, CSP includes both the suspended and unsuspended portions of the sentence. “We now definitively state that the ‘original sentence,’ as referenced in § 24-21-560(D), includes both the suspended and unsuspended portions of a circuit court's sentence; it is, in fact, the total sentence handed down by the court.” *State v. Picklesimer*, 388 S.C. 264, 268, 695 S.E.2d 845, 848 (2010). Therefore, the time a prisoner serves on CSP is counted and applied directly towards his or her sentence. “[U]nder no circumstances shall a defendant be incarcerated, or forced to participate in mandatory CSP or residual probation, stemming from the same conviction, outside of the time given by the trial judge in the original sentence, which encompasses both the suspended and unsuspended portions of the sentence.” *Id.* 388 S.C. at 270, 659 S.E.2d at 848-849.

This same concept of an active sentence being served while in the community is found in parole. An inmate released to parole is allowed to serve his sentence in the community while under the supervision of the Department of Probation, Parole and Pardon Services instead of the Department of Corrections.⁵ The parolee’s sentence is ongoing and active, only being served in the community rather than in the institutions.

Parolees facing revocations before the Board of Paroles and Pardons who serve time in county jails awaiting their hearings do not receive “pretrial” credit pursuant to § 24-13-40.

⁵ See S.C. Code Ann. § 24-21-660. “Any prisoner who has been paroled is subject during the remainder of his original term of imprisonment, up to the maximum, to the conditions and restrictions imposed in the order of parole or by law imposed.” See also S.C. Code Ann. § 24-21-670.

Parolees are still serving their active sentence when released to parole and “shall continue on parole until the expiration of the maximum term or terms specified in [their] sentence...” S.C. Code Ann. § 24-21-670. Whether the parolee is in the community complying with the terms of parole or in a county jail awaiting a violation hearing, he is serving his original sentence until its expiration date.

Similar to parole, when an inmate serving a no-parole sentence is released upon reaching eighty-five percent of his sentence, his term of CSP must begin. S.C. Code Ann. § 24-21-560(A). This period of supervision continues the active sentence that started in the Department of Corrections and ends when the inmate successfully completes CSP⁶ or reaches one hundred percent of his sentence. See *State v. McGrier*, 378 S.C. 320, 332, 663 S.E.2d 15, 21 (2008). “[A]n inmate whose CSP is revoked is limited to serving an amount of time equal to the remaining fifteen percent balance of this sentence.” *Id.*

In light of the foregoing, Appellant’s argument that § 24-13-40 requires that he receive “pretrial” credit is misguided. The jail time that elapsed while Appellant was awaiting his CSP violation hearing is considered service on his active sentence. When he arrived at the detention facility, he had 497 days left of his sentence. He served 198 days prior to his CSP revocation hearing so, at the time of the hearing, he had 299 days remaining. Unlike in the days leading up to a probation revocation, wherein the judge has not yet decided how much (if any) of the suspended sentence to impose, the inmate on CSP has a fixed and finite amount of days remaining to serve. In the event of a violation, the only question before the judge is whether the inmate is to serve that time in the community, or in detention.⁷

⁶ S.C. Code Ann. § 24-21-560(E).

⁷ If the inmate has more than 365 days remaining of his sentence, then the court is limited to revoking only up to one year, and upon release the inmate will again return to serve a new term of CSP. S.C. Code Ann. § 24-21-560(D).

The Honorable Judge Clifton Newman correctly stated this during the hearing, “[Appellant is] an inmate from the Department of Corrections in the community supposedly being supervised.” (R. p. 10, l. 24-25 – p. 11, l. 1). The CSP is a continuation of an inmate’s active sentence.

In requesting pre-revocation credit, Appellant essentially asked the court to give him double credit towards his sentence. If the court ordered the 198 days to be applied to his remaining 299 days left of his sentence, the time he served while at the county jail would ultimately be applied to his sentence twice.

Respondent submits that this is not the correct interpretation of CSP revocations. Instead, a court confronted with a revocation of CSP can only consider the time remaining on the active sentence. The time spent prior to the violation hearing – presuming that the inmate was not absconded – has already been applied to his sentence.

3. The judge did not exceed the one-year revocation limit.

Appellant argues that the judge exceeded the one-year limit when he revoked Appellant’s CSP. This is incorrect. The judge revoked the remainder of his CSP, which was 299 days and clearly a period of time less than one year.

Appellant points out that when his pre-revocation time spent in detention is added to his revocation, his total incarceration exceeds one year. While that is true, it still stands that the judge did not revoke more than one year. As explained in Part 2 above, Appellant was serving an active sentence and was receiving credit toward his sentence while awaiting his revocation hearing at the county jail. Since that time was already served and applied towards his sentence,

the judge could not retroactively order Appellant to serve that time again. Instead, the judge had only what lay before him: the 299 days which constituted the remainder of Appellant's sentence.

Offenders on CSP are considered inmates, according to § 24-21-560. Consequently, every day an inmate spends on CSP is a day served of the sentence, whether in the community or incarcerated awaiting a violation hearing. To follow Appellant's argument that the judge must consider the inmate's previously-served time, then every day spent on CSP would therefore have to be credited toward a revocation, which strains credulity. In another scenario, if an inmate spends an entire year awaiting a CSP violation hearing, the judge would be powerless to address the violation if Appellant's argument is followed.

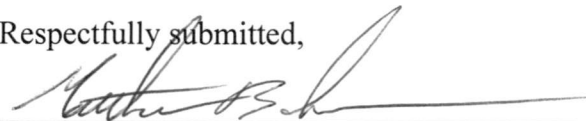
While it would certainly be in the court's discretion to consider the time the inmate has served in the county jail while awaiting the revocation hearing, the court is not obligated to award that time to the inmate. As discussed earlier, § 24-13-40 is inapplicable to CSP. The time Appellant is asking for is not pretrial credit, which the statute and *Boggs* guarantees. That time was already applied when Appellant was first sent to the Department of Corrections after his conviction.

Instead, Appellant has been serving his active sentence while awaiting his violation hearing. That time he spent in the county jail was already served and credited toward his total sentence, so the only amount the judge had left was the unserved portion of Appellant's sentence. Had there been more than a year left of his sentence, the judge, per the limitations of § 24-21-560(C), would have been restricted to revoking only one year of his sentence. But, because the judge's revocation was less than one year, he did not violate the limitation of § 24-21-560(C).

CONCLUSION

Respondent acknowledges that despite the mootness of Appellant's claim, this is one ripe for consideration and capable of evading review. This review should, however, reject Appellant's argument and reliance upon § 24-13-40 as misplaced because CSP is an active part of an inmate's sentence. Section 24-13-40 only applies to pretrial credit and pre-revocation credit for probation revocations. Furthermore, the judge only revoked 299 days, which is less than the one-year limitation on revocations in § 24-21-560(C). Therefore, Respondent submits that this Court should determine that the judge's actions were proper in declining to award pre-revocation credit to Appellant.

Respectfully submitted,



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