STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK JOSEPH MILES,

APPELLANT

APPELLATE CASE NO 2019-000958

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The remand sentencing hearing judge erred in denying appellant's request for time served credit accrued during his house arrest/GPS monitoring time per S.C. Code Ann. 24-13-40 on the assumption that the plea judge considered the matter since the sentence was a negotiated sentence because trial counsel admitted during the PCR hearing that he failed to bring the issue of house arrest/GPS monitoring credit to the attention of the plea judge at the plea proceeding.

STATEMENT OF THE CASE

Appellant Derrick J. Miles pled guilty to second degree burglary during the July 2013 term of the Berkeley County General Sessions Court before Judge Stephanie P. McDonald and was sentenced to a negotiated fifteen-year prison term. ROA 5-16. Appellant was represented by William Runyon at the plea proceeding, and Assistant Solicitor Colleen Dixon appeared on behalf of the state. Appellant did not enjoy the benefit of a direct appeal in the case.

On December 23, 2013, appellant filed a PCR application with the Berkeley County Office of the Clerk of Court. ROA 18-24. An amended PCR application was filed on June 19, 2015. ROA 30-31. The respondent filed a return dated March 31, 2015, requesting that a hearing be held in the case. ROA 25-28.

A PCR hearing was convened on July 21, 2015, at the Charleston County Courthouse before Judge Roger E. Henderson. ROA 32-72. Appellant was present at the hearing and represented by Lance S. Boozer, and Assistant Attorney General J. Rutledge Johnson appeared on behalf of the state.

On August 28, 2015, Judge Henderson issued an Order of Dismissal denying appellant's claims of ineffective assistance of counsel in the case. ROA 75-83.

Appellant appealed Judge Henderson's Order of Dismissal. Per the PCR appeal, the South Carolina Supreme Court issued an Order dated June 21, 2017, remanding the case on the question of whether "petitioner should be given credit for time served on house arrest." See Derrick J. Miles v. State, Memorandum Opinion No. 2017-MO-012 (filed June 21, 2017). ROA 104-105. A Remand Sentencing Hearing was held on May 28, 2019, at the Berkeley County Courthouse before Judge R. Markley Dennis. Appellant was present at the hearing and represented by the undersigned counsel and Assistant Bryan Alfaro appeared on behalf of the

state. ROA 106–121. Per Order dated May 29, 2019, Judge Dennis denied sentencing relief on the request for house arrest credits. ROA 123. Appellant appealed. This brief follows.

STANDARD OF REVIEW

A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support. In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). In criminal cases, the appellate court sits to review errors of law only. State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009) (quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "'bound by the trial court's factual findings unless they are clearly erroneous.'" Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." State v. Slocumb, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015).

ARGUMENT

The remand sentencing hearing judge erred in denying appellant's request for time served credit accrued during his house arrest/GPS monitoring time per S.C. Code Ann. 24-13-40 on the assumption that the plea judge considered the matter as the sentence was a negotiated sentence because trial counsel admitted during the PCR hearing that he failed to bring the issue of house arrest/GPS monitoring credit to the attention of the plea judge at the plea proceeding

Appellant was arrested and jailed for first degree burglary on October 25, 2011, but granted release on bail per an Order Setting Bond filed on June 29, 2012. ROA 84-85. On July 25, 2013, appellant pled guilty to second degree burglary at the Berkeley County General Sessions Court before Judge McDonald. During the plea proceeding, Judge McDonald gave appellant time served credit for the months that he spent in jail from October 25, 2011, to his release on bond on June 29, 2012. The sentence follows:

> Plea Judge: Has he served any time on this?
>
> Counsel: He was in Berkeley County jail for a year (365 days)...**prior** to being released on bond. ROA 8, lines 8 – 18
>
> Plea Judge: The negotiated term is 15 years. I will give credit for the 365 days served. ROA 16, lines 21 – 22.

However, at no point during the plea proceeding did trial counsel request time served for the **second** 365 days that followed jail time when appellant was on house arrest (while out on bond) from June 2012 through July 2013. Appellant pled guilty on July 25, 2013. Subsequently, appellant filed a PCR action. A PCR hearing was held on July 21, 2015, before Judge Henderson.

During the PCR hearing, appellant testified that he did not receive his full time served credit, i.e., "one year in the county jail [**plus**] three hundred seventy-eight days under house arrest with GPS monitoring" per S.C. Code Ann. 24-13-40. ROA 48, l. 23–.p. 50 l.1. In other words, appellant

received credit for time served while jailed, but failed to receive time served credit while out on bond during house arrest. Appellant's PCR testimony explaining the same follows:

> A. Yes, sir, I was expecting – I had 365 days that I did get credit for when I was in the Berkeley County Detention Center; but under the new law that was passed 45 days before I pled it allows, under 24-13-40 I believe, it allows for me to get the credit for the home detention on GPS. I was only allowed to work and home. I couldn't even stop at a gas station and gas my company truck up. So I was supposed to get the credit for that time served too under that law.
>
> Q. What discussion did you have with [trial counsel] about that?
>
> A. No, all [trial counsel] said is I would get credit for all time served.
>
> Q. So you thought that that meant the 365 plus the time on ankle monitor?
>
> A. Yes, sir. ROA 49, lines 1-17.

Trial counsel testified at the PCR hearing and admitted that he failed to request time served credit for appellant from 2012-2013 during which time appellant was on house arrest under the ankle monitor while out on bond, and agreed that "[he] probably should have called that to the court's attention." ROA 61, l. 18 – p. 62, l. 7.

The PCR judge ruled that appellant failed to meet his burden of proof that counsel promised him credit for time served on house arrest. ROA 81. On PCR appeal, appellant raised the question of whether trial counsel erred in filing to request time served credits for him at the plea proceeding. On June 21, 2017, the South Carolina Supreme Court held as follows:

> Petitioner seeks a writ of certiorari from the denial of his application for [PCR]. The petition for a writ of certiorari is granted. We…direct the court of general sessions to determine if, in its discretion, petitioner should be given credit for time served on house arrest. *See* S.C. Code Ann. § 24-13-40 (Supp. 2016) (stating sentence credit "may be given for any time spent under monitored house arrest"). **REMANDED**.See Miles v. State, Memorandum Opinion No. 2017-MO-012 (June 21, 2017). ROA 104 – 105.

During the remand sentencing hearing held in the case, counsel for appellant advanced the argument in effect that the plea judge was never presented with the request for house arrest time served credit due to ineffective assistance of trial counsel in that counsel failed to raise the issue; and therefore, the purpose of the remand sentencing hearing was to explore the question of whether the issue of house arrest credit had been considered by the plea judge. ROA 110, l. 22 – p. 111, l. 20; ROA 115, l. 6 – p. 116, l. 18. The record indicated that the issue of house arrest credit was overlooked, and that trial counsel failed to raise the matter at the plea proceeding. Hence, the inescapable conclusion reached is that because the matter was not addressed by trial counsel at the plea proceeding, and the record is devoid of any mention of the matter, then it appeared that appellant did not receive his due credit by the plea judge for time spent on house arrest/GPS monitoring. The prejudice is obvious in that if house arrest time served credit had been granted to appellant by the plea judge, then a shortened sentence would have been the result.

The remand sentencing hearing judge ruled that since the plea judge sentenced appellant per a negotiated sentence, this meant that the plea judge had already considered house arrest credit as a part of the negotiated sentence; and in effect summarily and erroneously dismissed the issue of whether the plea judge considered house arrest credit for appellant. ROA 112, l. 5- p. 113, l. 22, ROA.116, l. 19 – p. 121, l. 25. This was an assumption made by the remand sentencing hearing judge that lacked evidentiary support. To the contrary, the remand sentencing judge's assumption that the plea judge contemplated house arrest credit and factored the same into the negotiated sentence was untenable where trial counsel admitted that he did not make the request for house arrest credit to the plea judge. Counsel's failure to request house arrest credit begs the question of whether the plea judge considered house arrest credit in finalizing the negotiated sentence. Therefore, the matter to be explored at the remand sentencing hearing was not properly resolved.

S.C. Code Ann § 24-13-40 reads as follows:

> In every case in computing the time served by a prisoner, full credit against the sentence shall be given for time served prior to trial and sentencing. *Provided, however,* that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall no receive credit for time served prior to trial in reduction of his sentence for the second offense.

In State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004), the Court held that time served credit under § 24-13-40 could only be given to inmates serving time in a penal institution and not on home detention. However, on June 7, 2013, S.C. Code Ann. § 24-13-40, was amended to read as follows:

> The computation of the time served...must be calculated from the date of the imposition of the sentence.....[and] full credit against the sentence must be given for time served prior to trial and sentencing and may be given for any time spent under monitored house arrest.

Consequently, S.C. Code Ann. § 24-13-40 as amended meant that Higgins was no longer controlling on the issue of whether to bestow time served credit while on home detention. Therefore, counsel erred in failing to request credit for time served for appellant while he was on house arrest, which would have shaved an additional year off his sentence since he had already received a year's worth of credit for time served while in jail. The amendment went to effect on June 7, 2013, and appellant pled guilty and was sentenced on July 25, 2013. Therefore, the amendment allowing house arrest time served was applicable in his case.

Ambiguity or doubts relative to a sentence should be resolved in favor of the accused. State v. DeAngelis, 257 S.C. 44, 183 S.E.2d 906 (1971). For example, in DeAngelis, the Court held that when sentences are vague and indefinite then the terms will run concurrent. Here, the remand sentencing hearing judge's assumption that consideration for house arrest credit had already been

given by the plea judge when the finalized negotiated sentence was reached lacked evidentiary support, especially since trial counsel admitted he did into bring the matter to the plea judge's attention and admitted that he should have done so. Clearly, the remand sentencing hearing judge abused his discretion in assuming the plea judge considered house arrest credit in the negotiated sentence simply because the sentence was a negotiated sentence. Compare by analogy State v. Boggs, 388 S.C. 314, 696 S.E.2d 597 (2010), where the Court held in effect that a requirement regarding served credit under 24-13-40 is mandatory and must be followed by a trial judge.

In the case at bar, counsel's error in failing to request the receipt of house arrest time served credit for appellant while he was out on bond and GPS monitoring constituted deficient legal representation of appellant during his guilty plea proceeding in violation of the Sixth Amendment. See Hill v. Lockhart, 484 U.S. 52 (1985). Appellant was prejudiced as a result because due to counsel's error, because had counsel brought this sentencing matter regarding house arrest credit to the attention of the plea judge, then a reasonable probability exists that appellant would have received that additional house arrest credit and been granted an additional year's worth of time off his sentence. The appellate court agreed and remanded the case for a hearing on this very matter.

At the very least, the remand sentencing hearing judge in this case should have entertained the facts and considered the house arrest question rather than abusing his discretion by assuming that the plea judge considered house arrest when finalizing the negotiated sentence where trial counsel admitted that the matter was not made known to or before the plea judge. The remand sentencing hearing judge's failure to give appellant credit for time served while on house arrest constituted error.

CONCLUSION

Based on the foregoing argument, counsel for appellant would request that this Court remand the case for a second remand sentencing hearing, or in the alternate grant appellant's request for time served credit while out on house arrest/GPS monitoring in the case.

s/Wanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of March, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

March 30, 2020

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