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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Circuit Court
The Honorable Frank R. Addy, Jr., sitting in Greenwood County

Trial Court Case No. 2002GS2309233, 2002GS2309234,
2002GS2309235, 2002GS2309239 (Greenville County)

Appellate Case No. 2022-000641

STATE OF SOUTH CAROLINA, ...RESPONDENT

v.

PATRICK LEE BOOKER,.....APPELLANT

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in concluding that the community supervision program is a collateral consequence of sentencing and that appellant's guilty plea was not taken in violation of due process rights?

2. Did the trial court err in concluding that the Director of Probation had power by virtue of South Carolina law to place Appellant on CSP?

3. Does allowing the Director of Probation to alter the terms of judicially imposed sentences violate the separation of powers doctrine?

STATEMENT OF THE CASE

Appellant was charged with four counts of armed robbery, assault and battery of a high and aggravated nature (ABHAN), carjacking, possession of a weapon during the commission of a violent crime, threatening the life of a public official, and assault on a correctional facility employee. On November 5, 2003, Appellant entered guilty pleas to the charges in the Greenville County Court of General Sessions and was sentenced to concurrent terms of twenty years for each count of armed robbery, ten years for ABHAN, twenty years for carjacking, five years for the weapon charge, five years for threating the life of a public official, and five years for assault on a correctional facility employee. Appellant did not appeal from the guilty pleas.

While imprisoned, Appellant filed several applications for post-conviction relief, all of which were denied. One of these, bearing case number 2008-CP-23-07865, included an allegation that Appellant's guilty plea had been entered involuntarily because the trial judge failed to inform him of the mandatory participation in the Community Supervision Program ("CSP"). This case was appealed and relief was denied by the Supreme Court.

Appellant was released from incarceration to CSP on or about August 10, 2020 in accordance with S.C. Code Ann. § 24-21-560. (R.p.1). The South Carolina Department of Probation, Parole and Pardon Services ("Respondent" or "SCDPPPS") supervises individuals that have been released to CSP, which includes issuing services of process and bringing them before general sessions court when they have violated the terms of the program. Such service was issued upon Appellant on April 6, 2022 for failure to pay monetary obligations, those being the supervision fees incurred by participation in CSP and, as such, failing to follow the advice and instructions of his supervising agent. Because Appellant had moved from Greenville County where

he was convicted to Greenwood County where he was being supervised, the hearing was held in Greenwood.

A hearing on this violation was convened before the Honorable Frank R. Addy at the Greenwood County Courthouse on April 18, 2022. (R.p.16-p.28). Evidence was presented to the court that, despite being gainfully employed and fully able to pay the monetary obligation, Appellant willfully failed to do so. Appellant argued that, because he was not informed by the court at the time of the entry of his guilty plea that he would have to participate in CSP, such placement on the program was null and void for lack of due process. Judge Addy found participation on CSP to be a collateral consequence of sentencing and, as such, the plea was not taken in violation of his due process rights. Because of this, the fees were properly assessed and Appellant must pay them. Judge Addy ordered the fees be paid by June 6, 2022, when his supervision was due to end. Additionally, realizing that Appellant may wish to appeal, he ordered Appellant to deposit the fees with the Clerk of Court pending resolution of the appeal. (R.p.30-p.31). This was appealed to the Court of Appeals on May 4, 2022.

Appellant failed to comply with this order, and another hearing was held before Judge Addy on August 15, 2022. (R.p.39-52). At this hearing, Appellant included the argument that the Director of SCDPPPS did not have the authority to put anyone on CSP because it violates separation of powers. This argument derived from Appellant's CSP Certificate, also known as SCDPPPS Form 1150, which ordered him to enter CSP and was signed by the Director of SCDPPPS. Appellant viewed this as an administrative order that altered the terms of the court order that issued his original sentence. Judge Addy held that, due to Appellant's continued failure to pay, he was in civil contempt of court and could expunge that by payment of all outstanding fees before that Friday at 5:00 p.m. Were he not to do that, he must turn himself in to SCDPPPS.

Appellant ultimately paid the fees. Prior to the issuance of a written order that was submitted to this court with Appellant's second notice of appeal, the fees were deposited with the Clerk of Court. This second notice of appeal was filed on September 20, 2022.[1] Appellant's initial brief was timely filed January 27, 2023. The brief was not served upon Respondent, who received it only when forwarded via email from the South Carolina Attorney General's Office but, because it was served upon the state, no objection was raised.

Standard of Review

"In criminal cases, the Appellate Court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted).

Review is limited to determining whether any evidence supports the trial court's finding. State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). Upon such review, an appellate court may reverse only when the trial court's decision is clear error. State v. Pichardo, 367 S.C. 84, 95, 623 S.E. 2d 840, 846 (Ct. App. 2005). Under the "clear error" standard, the appellate court will not reverse a trial court's finding of fact simply because it may have decided the case differently. Id. at 96, 623 S.E.2d at 846. [T]his deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

[1] The two notices of appeal were consolidated by this court's clerk with notification to the parties via letter dated October 3, 2022. As such, Respondent will address both the April 28, 2022 and September 1, 2022 orders.

ARGUMENT

1. **The Community Supervision Program is a collateral consequence of sentencing and, therefore, the trial court did not err in finding Appellant's guilty plea was entered properly and in accordance with his due process rights.**

Appellant styles this matter as a criminal appeal in which he challenges the validity of his guilty plea, but to treat it as a direct criminal appeal or post-conviction relief application would be inappropriate. Appellant should not receive the opportunity to litigate the validity of his plea at this juncture after filing several post-conviction relief applications and other lawsuits regarding these same convictions. Regardless, Respondent recognizes Appellant's ability to appeal the decision of the Honorable Frank R. Addy, Jr. regarding Appellant's requirement to pay fees associated with his participation in the Community Supervision Program (CSP). Because his participation in CSP is bound up in these legal arguments that have been previously litigated, Respondent is compelled to address them to some degree.

The threshold issue in this argument is whether CSP is a collateral or direct consequence of sentencing. This is fundamental because it is well-settled South Carolina law that collateral consequences do not have to be disclosed to or discussed with a defendant prior to entry of a guilty plea or sentencing.

> The imposition of a sentence may have a number of collateral consequences, however, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of the collateral consequences. Parole eligibility typically is a collateral consequence of sentencing about which a defendant need not be specifically advised before entering a guilty plea. This is because parole eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole, and Pardon Services.

Brown v. State, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400-01 (1991).

Though CSP is explicitly different from parole, it is similar in function and supervision. Notably, it is also supervised by Respondent, Department of Probation, Parole, and Pardon

Services. CSP has specifically been held to be a collateral consequence of sentencing via our Supreme Court in the opinion of Jackson v. State, 349 S.C. 62, 562 S.E.2d 475 (2002). Judge Addy relied upon this opinion for his reasoning and Appellant asserts both he and the South Carolina Supreme Court spent too little time and consideration analyzing the issue. He avers that, had further analysis been correctly conducted, one would see that CSP is a direct consequence rather than collateral.

To support this theory, Appellant presents case law from around the country, most of which is not binding upon this court. Regardless, these cases hold that when the law requires mandatory supervision "to be served following completion of the period of confinement, the parole term necessarily is a direct consequence of the guilty plea." Carter v. McCarthy, 806 F.2d 1373 (9th Cir. 1986). These cases concern actions taken by states to impose a period of supervision after an offender is tried, sentenced, and released from incarceration, thus creating direct (rather than collateral) consequences that have a "definite, immediate and largely automatic effect on the range of defendant's punishment." Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364 (4th Cir. 1973).

CSP is not a mandatory parole term, despite Appellant's arguments to the contrary. Conversely, CSP functions by decreasing the amount of time an offender spends in an institution by allowing them to earn good time credits and receive other benefits, thus allowing them to spend up to 15% of their sentence in the community. This time in the community is part of an offender's original sentence and does not add any time to his punishment, which was contemplated and forbidden in the cases cited by Appellant. The South Carolina Supreme Court has specifically held that length of service on CSP, when combined with actual carceral time, may not exceed the length of the original sentence. State v. McGrier, 378 S.C. 320, 332, 663

S.E.2d 15, 21 (2008). This crucial aspect differentiates CSP from the other examples Appellant puts forward.

Because CSP is clearly a collateral consequence of a conviction, it is viewed like parole and does not have to be explained to a defendant before plea entry or sentencing. Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004); Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983). An important corollary is that, in order for a defendant to show that he deserves relief from a guilty plea he believes was improperly entered, he must show that he was actively misinformed about parole eligibility and he relied on that information. Griffin, 278 S.C. at 621, 300 S.E.2d at 483. Because he has not met this burden, Appellant cannot receive relief on this ground.

2. Statutory law vests the Director of the South Carolina Department of Probation, Parole and Pardon Services with the authority to administer the Community Supervision Program, which does not alter the terms of a defendant's original sentence.

Appellant argues that, because participation in the Community Supervision Program (CSP) was not specifically included in the pronouncement of his sentence, it is unconstitutional for S.C. Code Ann. § 24-21-560 to allow the Director of the South Carolina Department of Probation, Parole and Pardon Services to sign a certificate admitting him to the program. He argues that the trial judge committed an error of law in determining otherwise and ordering him to pay supervision fees.

To support his proposition, Appellant looks to Earley v. Murray, 451 F.3d 71 (2nd Cir. 2006).[2] He states that the court found "(1) the only sentence known to the law is the sentence or

[2] Appellant repeatedly states that this is the opinion of now-Supreme Court Justice Sonia Sotomayor, perhaps in order to lend it weight. Though she sat on the hearing panel, the opinion was written by Chief Judge John M. Walker, Jr. Further, though Appellant initially cites the main

judgment entered upon the records of the court, and (2) the judgment of the court establishes a defendant's sentence, and that sentence may not be increased by an administrator's amendment." Initial Brief of Appellant, p.16. Respondent agrees with these holdings and acknowledges the veracity thereof; however, these do not pertain to the issue at hand.

In Earley, petitioner's sentence was administratively amended after the entry of his guilty plea to add a five-year term of post-release supervision. This was done because the State of New York passed a law mandating such service, but none of the attorneys, parties, or the judge in the guilty plea were aware at the time. It was not until the Department of Corrections actually added this time to his sentence that Earley became aware of the situation.

Appellant likens his situation to Earley's due to his misapprehension of the actual nature of CSP. As discussed in Argument 1, CSP does not constitute an addition or extension of an inmate's sentence, but rather allows them to serve the end of their sentence outside of prison walls. The involvement of SCDPPPS's Director is administrative in the most basic sense of the word – someone must develop the guidelines for the program and authorize the transition from prison to the community. This power is granted to the Director by statute, and it was in place many years before Appellant entered his plea.[3]

In sum, there was no administrative addition to Appellant's sentence that would be violative of the case law he cites or any other law preventing amendment of a sentence issued by a trial judge. At the time of the entry of his plea and now, CSP was a collateral consequence of sentencing that allows an offender to serve part of their previously mandated sentence outside

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opinion in Earley v. Murray, he repeatedly cites to a second opinion at 462 F.3d 147, which denied Respondent Murray's petition for rehearing.

[3] CSP took effect January 1, 1996. *See* 1995 S.C. Laws Act 83 (H.B. 3096).

prison walls. Because Appellant has failed to present any issues that constitute error on the part of the trial court, he cannot receive relief on this ground.

3. **The Director of the South Carolina Department of Probation, Parole and Pardon cannot and does not alter offenders' sentences, therefore no separation of powers violation can be found.**

As a threshold matter, this argument is not preserved for review and, as such, should not be considered by this court. This argument was neither raised nor ruled upon by the trial court. For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004) (citing JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review)); *cf.* Sevens & Wilkinson of S.C., Inc. v. Cty. of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review.")).

If an issue is not presented to and ruled upon by the circuit court judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Constitutional arguments are no exception to the issue preservation rule. State v. Carlson, 363 S.C. 586, 595–96, 611 S.E.2d 283, 288 (Ct. App. 2005); *see, e.g.,* State v. Owens, 378 S.C. 636, 664 S.E.2d 80 (2008) (confrontation clause and due process arguments not preserved for review). Accordingly, the argument now made on appeal—that Petitioner's constitutional rights

were violated by a violation of the separation of powers doctrine—is not preserved for this Court's review. State v. Jennings, 394 S.C. 473, 481–82, 716 S.E.2d 91, 95 (2011).

Without conceding that the separation of powers argument was not preserved for review, Respondent submits that the Constitution was not violated by operation of CSP or the Director's actions. The argument, as Appellant makes it, is a reframing of Argument 2 insofar as he criticizes his belief that the Director of SCDPPPS modified the trial court's original sentence when he signed Appellant's CSP certificate.

To support his position, Appellant cites the cases of State v. Stevens, 373 S.C. 595, 646 S.E.2d 870 (2007) and State v. Archie, 322 S.C. 135, 470 S.E.2d 380 (1996). Both of these opinions are instances where SCDPPPS inappropriately modified terms of a probationer's supervision, thus violating separation of powers because it constituted imposition of a sentence. These are distinguishable from the facts at hand because, as argued above, there was no addition to Appellant's sentence. Rather, his sentence was modified – arguably in his favor – to allow him to serve the end of his prison term in the community rather than behind bars. He was never required to serve a longer or harsher sentence than the one issued at the time of sentencing.

Appellant briefly argues a due process violation, but seems to couch that in his separation of power argument. Further, he presents information about his 2008 post-conviction relief application and the results thereof, which he argues now-Justice John Cannon Few did not adequately consider. Respondent does not believe that consideration of this information is appropriate other than, as argued above, to show that he has exhausted the remedies available to him in challenging his plea and involvement in CSP. Also notably, he asks for the vacation of his guilty plea, which is not relief that this court can grant at this juncture. Because the trial court's order dealt only with the imposition of CSP and its accompanying fees, only those issues are before

the court. Appellant has not met the burden to receive relief on any of these grounds and, as such, the trial court's ruling should be affirmed.

Conclusion

The trial court's ruling that Appellant was subject to the imposition of the Community Supervision Program and its related fees must be affirmed.

Respectfully submitted,

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Columbia, South Carolina
August 2, 2023

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed June 5, 2023, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 2th day of August, 2023.

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