

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Richland County Circuit Court
The Honorable Jocelyn Newman, Judge

FEB 22 2024

SC Court of Appeals

Appellate Case No. 2023-001547

SCDPPPSRESPONDENT

v.

DAVID M. LAMBERT,APPELLANT

BRIEF OF RESPONDENT

Matthew C. Buchanan
General Counsel
SC Bar 73740

**South Carolina Department of Probation,
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ATTORNEY FOR RESPONDENT

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STATEMENT OF APPELLANT'S ISSUE ON APPEAL

Did the Circuit Court err in concluding that the Department can close a community supervision case as unsuccessful and impose residual probation?

STATEMENT OF RESPONDENT'S ISSUES ON APPEAL

The Circuit Court did not err in concluding that upon an unsuccessful expiration of a community supervision case because of unpaid restitution, the previously-ordered probation shall begin.

STATEMENT OF THE CASE

Respondent agrees with the Statement of the Case as presented by Appellant.

Standard of Review

The decision to revoke probation is addressed to the discretion of the circuit judge. *White*, 218 S.C. at 134–35, 61 S.E.2d at 756; *State v. Proctor*, 345 S.C. 299, 546 S.E.2d 673 (Ct. App. 2001); *State v. Hamilton*, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999). A reviewing court will only reverse this determination when it is based on an error of law or a lack of supporting evidence renders it arbitrary or capricious. *Proctor*, 345 S.C. at 301, 546 S.E.2d at 674. The court has much discretionary authority in dealing with guilty persons who are in a probationary status. *Shannon v. Young*, 272 S.C. 61, 248 S.E.2d 914 (1978).

Arguments

1. **It is appropriate for the court-ordered probation to begin if a community supervision program ends unsuccessfully due to nonpayment of ordered restitution, because the entire sentence is only discharged upon *successful* completion of community supervision.**

The community supervision program (CSP) is a statutorily-mandated term of supervision that commences upon the release of an inmate from incarceration for a class A, B, or C felony or an enumerated offense that carries twenty years or more. S.C. Code § 24-13-100 and S.C. Code § 24-21-560.

Respondent Department of Probation, Parole and Pardon Services oversees CSP, imposing terms and conditions set forth by the agency's director upon its participants. § 24-21-560(B).

Revocations of CSP can be no longer than one year. §24-21-560(C). A prisoner who successfully completes CSP is considered to have satisfied his sentence. §24-21-560(E).

The length of time on CSP cannot exceed the total sentence. § 24-21-560(D) and *State v. Picklesimer*, 388 S.C. 264, 268, 695 S.E.2d 845, 848 (2010). When the sentencing court imposes a split sentence wherein a portion of the sentence is active incarceration and the remainder of the sentence is suspended, the total sentence includes both the suspended and unsuspended portions of the sentence. *Id.* at 268. Even when the original sentence includes a term of probation, successful completion of CSP satisfies the sentence and mandates the offender's discharge. *Id.* See also *State v. Dawkins*, 352 S.C. 162, 573 S.E.2d 783 (2002).

Appellant argues that his sentence should have been considered satisfied after reaching the end of his CSP without any revocations despite the fact that he did not pay his ordered restitution in full before the expiration. He relies on *Picklesimer* in his assertion that his sentence should be considered to be satisfied pursuant to Section 24-21-560(E). "We now hold 'successful completion' of CSP connotes the completion of a maximum of two continuous years of CSP, as mandated by section 24-21-560(B), without any violations or revocations, or a determination by the Department that a defendant has fulfilled his CSP responsibilities prior to two years' service in the program." *Id.* at 270.

This definition of "successful completion" clearly requires there to be no violations or revocations. Appellant argues that because he was not revoked during his CSP, he finished successfully. However, our Supreme Court stated that successful completion also requires no violations. Those terms are not interchangeable. Simple logic states that there cannot be a revocation without a violation. See Section 24-21-560(C), "If the department determines that a prisoner has violated a term of the community supervision program *and the community supervision*

should be revoked, a probation agent must initiate a proceeding in General Sessions Court.” (Emphasis added).

As contemplated by the statute, a violation of CSP such as nonpayment of court-ordered restitution does not necessarily result in an attempted revocation, but an action contrary to the ordered conditions of supervision would be a violation nonetheless. Indeed, a court may not revoke supervision for violations solely for nonpayment of financial obligations unless the violations are willful. *Bartlet v. State*, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986). “Probation may not be revoked *solely* on the ground the probationer failed to pay fines or fees or to make restitution.” (emphasis in original) (Citing *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064 (1983)).

Appellant’s argument attempts to sidestep the fact that he had violated his CSP by failing to pay his restitution in full. Instead, he claims that because he reached the end of his CSP without a *revocation*, he should be rewarded by no longer being on any supervision despite failing to pay his restitution in full by the end of his term of CSP.

Appellant may argue that because he cannot be revoked for non-willful failure to pay his restitution, he should not be considered to be in violation of his supervision either. *Bearden* refutes this argument, however. “A defendant’s poverty in no way immunizes him from punishment.” *Id.* at 669. Just because a defendant is facing financial hardships does not mean the State should throw up its hands and abandon efforts to make victims whole.

Similarly, the phrase “successful completion” becomes a misnomer when a person on CSP reaches the end of the two years with unpaid restitution. Respondent would argue that it is an absurdity to call such a result “successful.”

As the Honorable Clifton Newman stated in his order, “The term ‘successfully’ is not to be ignored. The Supreme Court in *Dawkins* chose to emphasize that word when it said,

‘Accordingly, Dawkins’ sentence, including probation, is discharged upon *successful* completion of the CSP.’ *Id.* at 167, 573 S.E.2d at 785 (emphasis in original).”

Respondent would submit that this analysis is appropriate and correct. Because Dawkins clearly successfully completed his CSP, the Court held that Dawkins’ sentence, and any residual probation, was completed upon the successful completion of CSP.

Without full payment of restitution, however, Defendant’s CSP cannot be considered *successfully* completed. Yet, unless he had been willfully refusing to pay his restitution, Appellant could not be revoked. This creates a scenario not contemplated by the Court in *Picklesimer* and *Dawkins*. While a revocation would require a new term of CSP upon Appellant’s release, a revocation without a showing of willfulness is “contrary to the fundamental fairness required by the Fourteenth Amendment.” *Bearden* at 673.

Appellant, of course, argues that the only solution to this dilemma is that the State is constrained to see his entire sentence discharged even though the original sentence has not been served in full.¹ Despite the payment of restitution as a condition of supervision ordered at sentencing, ostensibly lowering the amount of active incarceration the defendant would otherwise be required to serve, Appellant argues that defendants should be able to sidestep that order by reaching the end of CSP without a revocation and not paying restitution.

Appellant’s argument also ignores the language of the statute itself. *Picklesimer* may define what it means to successfully complete CSP, but to dogmatically utilize only the Supreme Court’s

¹ Appellant suggests that Administrative Monitoring pursuant to S.C. Code § 24-21-100 is the optimal solution, because it is mandated to go into effect at the end of supervision when there are unpaid financial obligations. While Administrative Monitoring does exist, Respondent would emphasize that the Department’s ability to enforce the continued payment of restitution becomes far lessened, and the monitoring program does not alleviate the absurdity of calling the CSP “successful” without full payment of the ordered restitution.

explanation ignores the language of the underlying statute. The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible.” *State v. Baucom*, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000) (citations omitted). By clearly stating the term of CSP must be completed *successfully*, the General Assembly distinguished a defendant who simply reaches the end of supervision with a glaring omission like the nonpayment of restitution to an innocent victim.

In light of the absurdity of treating a CSP that comes to its end with unpaid restitution as a successful completion, Respondent submits the solution approved by the lower court, of allowing the previously-ordered probation to begin upon the expiration of an unsuccessful term of CSP. Appellant cannot claim that he was surprised that he would have to complete probation; the Honorable Judge Robert E. Hood imposed probation at his sentencing. Although release to CSP is mandated as a result of the criminal offense instead of probation, and that probation would not be served if the CSP is successfully completed, the fact that the sentencing judge ordered a term of probation with restitution as a specific condition should not be ignored. The intent of the sentencing judge should also be weighed in this analysis. Though it may sometimes come as a surprise to some judges to learn that their ordered term of probation was cut short by the defendant’s successful completion of CSP, at least there is comfort to know that the defendant met all conditions of a “more stringent, closely monitored form of supervision than normal probation.” *Dawkins* at 167, 573 S.E.2d at 785. Were a defendant discharged from his sentence with a specifically-ordered condition not met – especially one impacting a victim’s constitutional right to be made whole² – few sentencing judges would be inclined to agree that the defendant had been successful.

² S.C. Const. I, §24(A)(9).

There is a practical reality to be considered as well. By statute, CSP is limited to a maximum of two years, while probation may be ordered up to five years. S.C. Code § 24-21-440. The additional three years of supervision affords defendants a much greater length of time in which to pay restitution.

Appellant was ordered to pay \$9,400 restitution by the sentencing court. R.* Over the course of twenty-four months, Appellant would have had to pay \$391.67 each month to have a zero balance by the end of his two-year term of CSP. In contrast, Appellant would have had to pay only \$235 per month³ on probation. An obligation to pay nearly \$400 each month can be too much for someone just released from incarceration.

Finally, if the defendant does eventually pay the full amount of restitution after the activated term of probation begins, the Department is then fully capable of requesting the remainder of probation to be terminated early, per S.C. Code §24-23-130. Similarly, the defendant could request early termination on his own motion. *Johnson v. S.C. Dep't of Probation, Parole and Pardon Services*, 372 S.C. 279, 641 S.E.2d 895 (2007). The court also could have ordered, as it did in Appellant's case, for the probation to end upon payment of his financial obligations, meaning that he would be only required to be on probation for as long as it takes to pay his restitution in full.

Conclusion

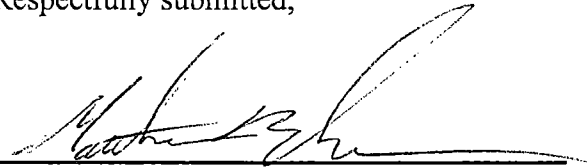
Appellant relies on the definition in *Picklesimer* in his argument that his sentence should have been satisfied even though nonpayment of his restitution constitutes a **violation** of CSP.

³ When restitution is ordered as a part of probation, a collection fee of twenty percent must be added. S. C. Code § 24-21-490(B). Also, absent of a payment schedule ordered by the court, the Department must set up a monthly payment plan that will result in full payment by eighty percent of the term of probation. S.C. Code § 17-25-322(C). The \$235 per month figure reflects the ordered restitution plus twenty percent divided by forty-eight months.

Respondent respectfully submits that it would be an absurd result to say that someone has successfully completed CSP when they have not met their obligations to pay restitution in full.

For the foregoing reasons, Respondent respectfully requests that this Court agree that Appellant's previously-ordered term of probation was appropriately activated when his CSP ended unsuccessfully but without a revocation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Matthew C. Buchanan', written over a horizontal line.

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Columbia, South Carolina
February 20, 2024

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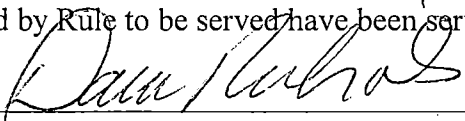
DAVID M. LAMBERT,.....APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within *Initial Brief of Respondent and Designation of Matter* dated February 20, 2024, on Appellant the 20th day of February, 2024, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Makenzie Thomas, Esquire
Constantine Pournaras, Esquire
Richland County Public Defender's Office
1701 Main Street, #103
Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served.


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February 20, 2024

The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

Re: **SCDPPPS v. David Lambert**
23-001547

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Respondent and Designation of Matter, along with proof of service in the above referenced case.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew C. Buchanan", written over a horizontal line.

Matthew C. Buchanan
General Counsel

MCB:dn

Enclosures

cc: Makenzie Thomas, Esquire
Constantine Pournaras, Esquire

State of South Carolina

Department of Probation, Parole, and Pardon Services

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