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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRES F. POSSO,

APPELLANT

APPELLATE CASE NO. 2022-001396

FINAL BRIEF OF APPELLANT

WANDA H. CARTER
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in failing to impose credit for time served while on house arrest to appellant's sentence.

STATEMENT OF THE CASE

Appellant Andres F. Posso pled guilty per North Carolina v. Alford¹ to two counts of third degree criminal sexual conduct with a minor during the May 2022 term of the Lexington County General Sessions Court before Judge Walton J. McLeod, IV. Appellant was sentenced to two concurrent eight-year prison terms. Attorney Jason Chehoski represented appellant at the plea proceeding and Assistant Solicitor Leanna McNenamin appeared on behalf of the state.

Appellant appealed his convictions and sentences. This brief follows.

¹ North Carolina v. Alford, 400 U.S. 25 (1970).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Nesbitt, 411 S.C. 194, 768 S.E.2d 67(2015), quoting State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621(2011).

ARGUMENT

The trial judge erred in failing to impose credit for time served while on house arrest to appellant's sentence.

At sentencing, defense counsel requested time served credit during his 617 days spent on monitored GPS house arrest. R. 21, lines 1-6. The colloquy regarding the matter follows:

Defense Counsel: Your Honor, we spoke in chambers about the time that Mr. Posso has served. He is entitled to 343 days that he spent in Lexington County from September 25th, 2019 to September 2nd, 2020. Your Honor, under 24-13-430 it's also under your discretion he can be given 617 days for the time that he spent on monitored house arrest. On May 20th, 2020, Judge Addy issued the order setting bond and I believe both conditions that he was placed on house arrest and he was, the house arrest was monitored by GPS. So, your Honor, that would be a total that we're asking for of 960 days time served. R. 21, lines 1-11.

Defense Counsel: Your Honor, upon his release I think we can be rest assured that he will abide by the terms just as he's abided by the terms of his bond for the last 600 plus days. I ask the Court to fashion a sentence at less than the maximum of the cap and to give him credit, as I said, for the 960 days that he was in custody and on house arrest, your honor. I ask that these sentences run concurrent and I ask for mercy from the Court. Thank You. R. 25, 1.20-p.26, 1.3.

Solicitor: Just briefly, the State is opposed to credit for the ankle monitor, the time on the house arrest with the ankle monitor. Of course, for any time he did in the detention center he would have credit time served there. That's all from the state, Your Honor.

Defense Counsel: Just again to point out, under 24-13-430 the relevant part it says in every case imputing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing. Again, I believe that refers to the 343 days and may be given so I believe this says specifically will be in the Court's discretion for any time spent under monitored house arrest. The only reason I bring up monitored house arrest, Your Honor, the order issued by Judge Addy in subsection 2 says that he shall remain on house arrest at his mother's residence in Gaston. There were many amendments to

this because just to make sure we complied with all of it, but house arrest shall be monitored by GPS. So he is eligible for the additional 617 days that he was on house arrest, Your Honor.

The Court: He's eligible in the sense that he has not had any bond violations that would certainly cast a shadow over that order issued.

Defense Counsel: And, Your Honor, it's just, I think, that there – I think it's not only just house arrest but monitored house arrest. He was on monitor and so I think that he's not, while he's not entitled to it, he's eligible for it at the Court's discretion. R. 26, 1.12-p.27, 1.16.

The Court: I did not give credit for the GPS monitoring, however, you can file a motion to reconsider and brief it more thoroughly. Right now, I have that before me. I recognize that's what you want. If you want to discuss it further, that's totally fine, but I'm not doing it today, I did give him credit for 343 days in the Lexington County Detention Center, and on both charges, the criminal sexual conduct with a minor in the third degree, I've given concurrent sentences of eight years. That's all. R. 30, lines 5-14.

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:

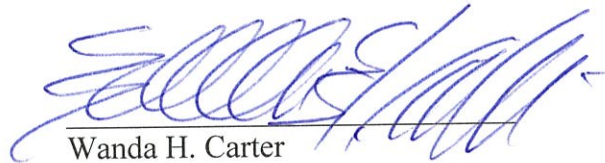
The computation of the time served...must be calculated from the date of the imposition of the sentence.....[and] full credit against the

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, the trial judge here erred in failing to give appellant credit for time served while he was on house arrest. Appellant notes that despite the statute regarding the inapplicability of house arrest to violent offenders under S.C. Code Ann. § 24-13-1530, house arrest was granted to and served by appellant, and credit for that time should have been given and not denied.

CONCLUSION

Based on the foregoing argument, counsel for appellant requests a new sentencing proceeding in the case.



Wanda H. Carter
Deputy Chief Appellate Defender

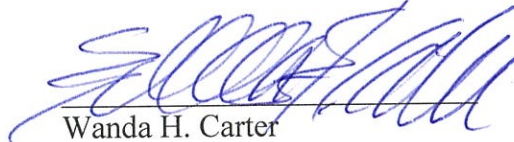
ATTORNEY FOR APPELLANT

This 15th day of August, 2023.

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."

August 15, 2023



Wanda H. Carter
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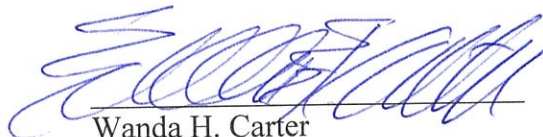
ANDRES F. POSSO,

APPELLANT

APPELLATE CASE NO. 2022-001396

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 15th day of March, 2023.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

From: [Leverett, Scott](#)
To: [SC - EDWARDS JOSHUA](#)
Cc: [SC - MUELLER VIRGINIA](#); [Carter, Wanda](#)
Subject: Andres F. Posso - Record on Appeal - Appellate Case No. 2022-001396
Date: Tuesday, August 15, 2023 11:00:00 AM
Attachments: [Andres Posso - Record on Appeal - Appellate Case No. 2022-001396.pdf](#)
[Andres F. Posso - Final Brief of Appellant - Appellate Case No. 2022-001396.pdf](#)

Dear Mr. Edwards,

Attached please find a copy of the Record on Appeal and Final Brief of Appellant in the above referenced case that is being filed today, August 15, 2023, with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Wanda Carter
Appellate Defense