STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT/APPELLANT,

V.

ANTHONY K. BLAKNEY,

APPELLANT/RESPONDENT

Appellate Case No. 2012-207286

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Whether the court correctly ruled that respondent satisfied the terms of his original sentence upon the service of the entire thirty months suspended sentence, leaving no additional revocable time to serve on community supervision violation, particularly since his sentence did not include a term of probation, and this was the intent of the trial judge?

STATEMENT OF THE CASE

Respondent was sentenced by the Honorable Michelle Childs to fifteen years imprisonment suspended upon the service of thirty months for burglary in the first degree. There was no term of probation included after the service of the thirty months imprisonment. R. *. (sentencing sheet).

Respondent first appeared for a community supervision violation hearing on December 9, 2011 before the Honorable G. Thomas Cooper, Jr. Constantine Pournaras represented respondent. Benjamin Aplin represented the Department of Probation. A ruling was deferred. Supp. Tr. 1.

Judge Cooper revoked respondent's probation at a subsequent hearing held on January 19, 2012. Supp. Tr. 1. 12, ll. 13-18. That ruling is the subject of respondent's cross-appeal, and the initial brief of appellant was filed simultaneously with the brief of respondent from the state's appeal of Judge Goldsmith's ruling below.

Respondent appeared for another community supervision revocation hearing before Judge Goldsmith on August 17, 2012. Judge Goldsmith issued an order ruling respondent had satisfied the terms of his incarceration and community supervision. R. p. * That order is the subject of this state's appeal. This brief of respondent follows.

STATEMENT OF FACTS

As stated above, respondent was sentenced by the Honorable Michelle Childs to fifteen years imprisonment suspended upon the service of thirty months for burglary in the first degree, with **no probation** to follow. R. *.

Defense counsel argued to Judge Cooper that Judge Childs had sentenced respondent to thirty months imprisonment -- "15 years suspended upon 30 active months. Judge Childs did not include a probationary period to follow." Supp. Tr. 4, ll. 15-18.

Defense counsel noted respondent had served eighty-five percent of his 30 month sentence at the Department of Corrections and he was put on community supervision after that "but our contention is that he has [now] exceeded that thirty months that was ordered by Judge Childs." Supp. Tr. 5, ll. 1-9. "Again, probation is applying Pickelsimer, [State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010)] but we believe that the court in that case did not consider sentences suspended upon lesser sentences, which I believe is quite common. I'm arguing that the judge did not intend a supervisory period past that active sentence [30 months imprisonment].. Supp. Tr. 5, ll. 10-15.

Counsel agreed with Judge Cooper that Judge Childs understood since it was a no-parole sentence that she anticipated there would be community supervision. However, the maximum term of incarceration could not exceed the thirty months where no further term of supervision – probation -- was ordered by Judge Childs. Supp. Tr. 6, l. 4 – 7, l. 19.

Counsel Aplin said he understood respondent's position to be "if Judge Childs had given him fifteen years suspended to thirty months and five years probation. Then you would agree Picklesimer [State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010)] applies. He could be revoked up to the full fifteen years."

Defense counsel confirmed that was his position. Supp. Tr. 7, l. 21 – 8, l. 5. At the conclusion of the hearing Judge Cooper took the matter under advisement until a further hearing could be held. Supp. Tr. 14, ll. 2-7.

On January 19, 2012, Judge Cooper held that additional hearing. Supp. Tr. 1, p. 1. Defense counsel argued that the fifteen year sentence suspended upon the service of thirty months "was satisfied upon the service of his thirty months, *which he completed after his last revocation on community supervision.*" Supp. Tr. 1, p. 6, ll. 6-25. (emphasis added). Counsel argued "he could not have served the thirty months in his first-term incarceration because the community supervision released him by statute after 85 percent." Respondent had now "maxed out the remaining 15 percent." Respondent had not been placed on probation and he had therefore satisfied the terms of his "straight thirty month sentence." Supp. Tr. 1, p. 5, l. 13 – 6, l. 22.

Counsel Aplin argued: "We're treating it no different than if the original sentencing judge had said *fifteen suspended to thirty months and five years' probation* or four years' probation or one year or no probation." Supp. Tr. 1, p. 8, ll. 9-18. (emphasis added). Counsel Aplin argued the original sentence was fifteen years and that was how much time respondent could serve "through successive revocations . . . [15 years imprisonment]" Supp. Tr. 1, p. 7, l. 17 – 8, l. 23. Judge Cooper ruled:

> It's a very interesting question, and it's an interesting argument. But in my opinion, I'm going to agree with the Department, and I'm going to continue to impose the community supervision until your client complies with it. If he doesn't comply with it, *then has got a long row to hoe ahead of him.*

Supp. Tr. 1, p. 12, ll. 13-18. (emphasis added). Respondent filed a notice of intent to appeal Judge Cooper's ruling and that appeal is pending as a cross-appeal to this case.

Respondent appeared again on a community service violation on August 17, 2012 before the Honorable Brooks P. Goldsmith. Constantine Pournaras again represented respondent. Benjamin Aplin again represented the Department of Probation, Pardon and Parole. Tr. 1.

Defense counsel Aplin told the judge that respondent was sentenced to fifteen years imprisonment suspended "to thirty months with no probation or anything to follow." Defense counsel Aplin then gave this procedural history:

> He came out on community supervision April 30th of 2010 and was charged with some violations, and he appeared in front of Judge Cooper back December 9th of 2011 for a violation hearing. At that point Mr. Pournaras was representing him, and the argument was raised about whether he should even be on community supervision under the Picklesimer case that came out from the Supreme Court shortly before that time frame.
>
> Judge Cooper heard some arguments and then asked for some memorandum from the parties. Mr. Pournaras submitted a memo, and we reconvened the hearing January 19th of 2012. At that point Judge Cooper listened to further arguments and agreed with the State's position that he was indeed still supposed to be on community supervision. And this is the part where I don't know if I have the exact detail, but I think he revoked him for time served.

Mr. Pournaras: Yes

Mr. Aplin: Okay. Which meant he - - -

The Court: Came back.

Mr. Aplin: - - - came back on community supervision for a new two-year period that started the date and would expire in 2014. He is now before you on additional community supervision violation charges. And because that case was decided and is on appeal now -

> - Mr. Pournaras timely filed a notice of appeal. It is pending with the Court of Appeals.

Tr. 2, l. 16 – 3, l. 15.

Defense counsel again argued that State v. Picklesimer involved a non-parole offense with a split "suspended and unsuspended portion including probation. This case we have here *does not have a probationary sentence, and it's an unusual sentence* and not a lot of judges suspend actives upon lesser actives. I'm assuming in this case it was because it was a burglary first which has a mandatory minimum of 15 which at the time judges were routinely suspending, at least in this county, to lesser active offenses." Counsel argued the only condition Judge Childs place upon respondent was the service of thirty months imprisonment and then community "supervision was triggered by a statute once he completed approximately 85 percent of that 30 months." Tr. 6, ll. 15-22. (emphasis added)

Judge Goldsmith issued an order dated September 7, 2012. This order noted that Judge Cooper on January 19, 2012 found respondent "in violation of his community supervision, revoked time served, and placed [Blakney] on two (2) years of community supervision. Blakney was arrested April 27, 2012, for violation of community supervision." R. *. The judge wrote:

> THIS COURT FURTHER FINDS that Blakney satisfied the terms of his original sentence upon the service of thirty (30) months during his second revocation upon which the suspended portion of his sentence was discharged, leaving no additional revocable time to serve on community supervision violations. Having served the maximum revocable time allowed under his original sentence, Blakney can no longer be supervised by the Department of Probation, Parole and Pardon Services for indictment 2008-GS40-02974. It is therefore unnecessary to address the current violations.

R. *.

ARGUMENT

The court correctly ruled that respondent satisfied the terms of his original sentence upon the service of the entire thirty months suspended sentence, leaving no additional revocable time to serve on community supervision violation, particularly since his sentence did not include a term of probation. Further, this was the intent of the trial judge.

It is the state's position that if respondent had been sentenced to 50 years imprisonment suspended on ten years imprisonment and no probation to follow that if he violated his community supervision he could continuously be returned to prison until he had served 50 years imprisonment or two continuous years of community supervision without a violation.

As seen, defense counsel correctly argued that State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010) dealt with a situation where the defendant was sentenced to imprisonment for ten years which was suspended on the service of five years imprisonment *and five years probation.*

Here, Judge Childs must have intended for respondent to serve no more than 30 months in jail since she imposed a sentence of 15 years suspended on 30 months with no probation to follow. Defense counsel agreed that Judge Childs envisioned that since respondent would serve 85% of his 30 months in the Department of Corrections and that community supervision would follow. However, if respondent did not successfully complete his community supervision, the maximum sentence he could serve in prison would be the 15% of 30 months he had remaining. The judge could not have intended that respondent could serve 15 years imprisonment where she suspended that sentence on the service of 30 months with no probation to follow.

There was discussion in this case that the sentence was "unusual," and about what Judge Childs knew, and what she intended. This Court held in State v. DeAngelis, 257 S.C. 44, 50, 183 S.E.2d 906, 909 (1971) that where there was a question of whether the judge meant to have a sentence served concurrently or consecutive -- meaning the amount of time the judge intended the defendant to serve -- "the intent of the judge is controlling."

Again, the sentencing judge here could not have intended that respondent could serve 15 years imprisonment where she suspended that sentence on the service of 30 months with no probation to follow.

In Picklesimer, a probation added case, this Court held that the "original sentence" as referenced in § 24-21-560(D), included both the suspended and unsuspended portions of the circuit court's sentence. This Court stated it is "the total sentence handed down by the court." State v. Picklesimer, 388 S.C. at 268, 695 S.E.2d at 848 This Court in Picklesimer wrote:

> 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.

State v. Picklesimer, 388 S.C. at 270, 695 S.E.2d at 848 (2010). (emphasis added)

Here, Judge Goldsmith correctly found that respondent Blakney satisfied the terms of his original sentence upon the service of thirty months during the second revocation: "[U]pon which the suspended portion of his sentence was discharged, leaving no additional revocable time to serve on community supervision violations. Having served the maximum revocable time allowed under his original sentence, Blakney can no longer be supervised by

the Department of Probation, Parole, and Pardon Services . . ." The Court therefore found it unnecessary to address the current violations.

The judge correctly distinguished Picklesimer since respondent was not sentenced to a suspended sentence with a term of probation to follow.

To put aside the intent of the trial judge, it is elementary that the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing Charleston County Sch. Dist. V. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992)).

The legislature understands that judges have the discretion to order probation to assure continued supervision once an inmate is released. Community supervision assures that result in respondent's case where no period of probation was imposed. The legislature could not have intended that respondent – where no probation was imposed -- could serve the entire fifteen years where **no term of probation was imposed.**

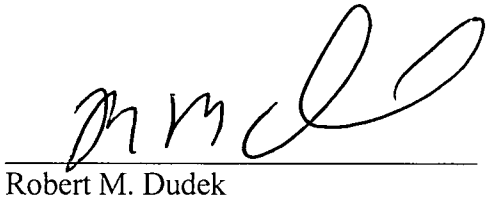
Judge Childs sentenced respondent to fifteen years incarceration, suspended upon the service of thirty months. The thirty months was respondent's sentence that he had to serve if he violated community supervision, and he served those thirty months in jail. Judge Childs imposed the fifteen year sentence because that was the minimum sentence. However, she suspended that sentence upon 30 months imprisonment. That did not mean that respondent could violate his community supervision with impunity. It only meant that

the maximum sentence he could serve as 30 months just the same as if the judge would have sentenced him to 30 months in prison for another crime without a mandatory minimum, and no probation ordered to follow. For that reason, Judge Goldsmith correctly ruled respondent could no longer be incarcerated after he served 30 months in prison.

CONCLUSION

By reason of the foregoing argument, the order of Judge Goldsmith should be affirmed.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

This 7th day of August, 2013.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Respondent proposes the following be included in the Record on Appeal:

(1) Sentencing sheet;
(2) December 9, 2011 revocation transcript;
(3) January 19, 2012 revocation transcript;
(4) August 17, 2012 revocation transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 7th, 2013

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Attorney for Respondent

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Appellate Case No. 2012-207286

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Respondent and Designation of Matter in the above referenced case has been served upon Tommy Evans, Jr., Esquire, at the South Carolina Department of Probation, Parole & Pardon Services, PO Box 50666, Columbia, SC 29250, this 7th day of August, 2013.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 7th day of August, 2013.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.