STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT /APPELLANT,

V.

ANTHONY K. BLAKNEY,

APPELLANT/ RESPONDENT

Appellate Case No. 2012-207286

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by ruling appellant could continue to be re-incarcerated until he had served fifteen years in jail for violations of his community supervision where he was sentenced to fifteen years imprisonment, suspended upon the service of thirty months, with no probation after the service of the maximum thirty months?

STATEMENT OF THE CASE

Appellant 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. R. *. (sentencing sheet).

Appellant first appeared for a community supervision violation hearing on December 9, 2011 before the Honorable G. Thomas Cooper, Jr. Constantine Pournaras represented appellant. Benjamin Aplin represented the Department of Probation. Supp. Tr. 1. Judge Cooper revoked appellant's probation at a subsequent hearing held on January 19, 2012. Supp. Tr. 1. 12, ll. 13-18. That ruling is the subject of appellant's present appeal.

Appellant appeared for another community supervision revocation hearing before Judge Goldsmith on August 17, 2012. Judge Goldsmith issued an order ruling appellant had satisfied the terms of his incarceration and community supervision. R. p. * That order is the subject of this state's appeal. Appellant has filed the initial brief of respondent in that case simultaneously with the initial brief of appellant in this cross-appeal case.

ARGUMENT

The court erred by ruling appellant could continue to be re-incarcerated until he had served fifteen years in jail for violations of his community supervision where he was sentenced to fifteen years imprisonment, suspended upon the service of thirty months, with no probation after the service of the maximum thirty months.

Relevant facts

Appellant 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 that term of incarceration. R. *.

Appellant appeared for a community supervision violation hearing on December 9, 2011 before the Honorable G. Thomas Cooper, Jr. Judge Cooper revoked appellant's probation at a subsequent hearing held on January 19, 2012. Supp. Tr. 1. 12, ll. 13-18.

Defense counsel argued tot Judge Cooper that Judge Childs had sentenced appellant 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 argued appellant served eighty-five percent of his sentence -- 30 months -- at the Department of Corrections and he was put on community supervision "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 appellant'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 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 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. " Appellant had now "maxed out the remaining 15 percent." Appellant 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 appellant 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)

Judge Goldsmith (the cross-appeal)

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

Counsel Aplin told the judge that appellant was sentenced to fifteen years imprisonment suspended "to thirty months with no probation or anything to follow."

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 appellant 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.

Judge Goldsmith issued an order dated September 7, 2012. 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. *.

A further argument on the hearing before Judge Goldsmith is contained in the brief of respondent Blakney in this cross-appeal.

Discussion

As seen, Defense counsel 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 appellant 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 appellant would serve 85% of his 30 months in the Department of Corrections and that community supervision would follow.* However, if appellant 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 appellant

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." 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 run a sentence concurrently or consecutive – meaning the amount of time the judge intended the defendant to serve – "the intent of the judge is controlling." Again, 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.

Counsel for PPP argued that its position would be the same if Judge Childs had sentenced appellant to fifteen years imprisonment, suspended on the service of thirty months, and five years probation. The state is totally inflexible on demanding the worst scenario possible for the defendant when interpreting this criminal statute. That is true despite the fact that penal statutes are construed strictly against the state and in favor of the defendant. See Hair v. State, 305 S.C. 77, 406 S.E.2d 332 (1991); State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980). It is the state's position that if appellant 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.

The intent of the sentencing judge aside in Picklesimer, this Court dealt with a suspended sentence including probation too follow. This Court held that the "original sentence" as referenced in § 24-21-560(D), includes 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 appellant Blakney satisfied the terms of his original sentence upon the service of thirty months during the 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 . . ." The Court therefore found it unnecessary to address the current violations. R. p. *.

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

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 appellant's case where no period of probation was imposed. The legislature could not have intended that appellant – where no probation was imposed -- could serve the entire fifteen years where **no term of probation was imposed.**

Judge Childs sentenced appellant to fifteen years incarceration, suspended upon the service of thirty months. The thirty months was appellant'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 appellant 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 appellant could no longer be incarcerated after he served 30 months in prison.

CONCLUSION

By reason of the foregoing argument, the ruling of the revocation court should be reversed.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of August, 2013.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

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

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

August 7th, 2013

Robert M. Dudek
Chief Appellate Defender

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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 Appellant 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 APPELLANT

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.