RECEIVED

Dec 20 2024

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRES F. POSSO,

APPELLANT

APPELLATE CASE NO. 2024-000422

BRIEF OF PETITIONER

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

[1] 357 S.C. 382, 595 S.E.2d 180 (Ct. App. 2004).

TABLE OF AUTHORITIES

Cases

Statutes

ISSUE PRESENTED

The Court of Appeals erred in upholding the plea judge's denial of petitioner's request for house arrest time served credit because incorrect law was used (State v. Higgins[1] rather than S.C. Code Ann. § 24-13-10) to rule in the matter.

[1]357 S.C. 382, 595 S.E.2d 180 (Ct. App. 2004).

STATEMENT

Petitioner Andres F. Posso pled guilty per North Carolina v. Alford[2] 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. Petitioner was sentenced to two concurrent eight-year prison terms. Attorney Jason Chehoski represented petitioner at the plea proceeding and Assistant Solicitor Leanna McNenamin appeared on behalf of the state.

Petitioner appealed, but his convictions and sentences were affirmed by the South Carolina Court of Appeals. See State v. Posso, Unpublished Opinion No. 2024-UP-060 (Ct App. February 21, 2024). App. 1. A Petition for Rehearing was filed on March 5, 2024. App. 4. On March 11, 2024, the Petition for Rehearing was denied by the South Carolina Court of Appeals. App. 17. On March 15, 2024, a Petition for Writ of Certiorari to review the South Carolina Court of Appeals' holding in the case was filed with this Court. A Return to the Petition was filed on April 15, 2024. On October 30, 2024, this Court granted the Petition. This Brief of Petitioner follows.

---

[2] North Carolina v. Alford, 400 U.S. 25 (1970).

STANDARD OF REVIEW

A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support. In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). In criminal cases, the appellate court sits to review errors of law only. State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009) (quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "'bound by the trial court's factual findings unless they are clearly erroneous.'" Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." State v. Slocumb, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015).

ARGUMENT

The Court of Appeals erred in upholding the plea judge's denial of petitioner's request for house arrest time served credit because incorrect law was used (State v. Higgins[3] rather than S.C. Code Ann. § 24-13-10) to rule in the matter.

Petitioner pled nolo contendere to two counts of third degree criminal sexual conduct with a minor in the case. At the sentencing phase, defense counsel requested time served credit spent 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, l.20-p.26, l.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

[3] 357 S.C. 382, 595 S.E.2d 180 (Ct. App. 2004).

> 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, l.12-p.27, l.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.

The plea judge's Order denying petitioner's time served credit request follows:

> "In State v. Higgins, the South Carolina Court of Appeals held that the South Carolina Legislature only intended to allow credit for time served in a penal institution and affirmed a trial court's refusal to afford credit the defendant for the time served on house arrest while he was released on bond...after considering the arguments of counsel and the applicable statutes and case law, this Court holds the defendant is not entitled to time served credit for the 617 days he spent on house arrest while released on bond.

The Court of Appeals issued the following holding in the matter:

> We acknowledge the plea court's improper reliance on *State v. Higgins* in declining to credit Posso for time served on monitored house arrest. *See* 357 S.C. 382, 386, 593 S.E.2d 180, 182 (Ct. App. 2004) (affirming the trial court's refusal to credit *Higgins* for time spent on house arrest based on a previous version of section 24-13-10, which allowed credit only "for time served in a penal institution"). This court's holding in *Higgins* was superseded in 2013 by the current version of the statute. *See* § 24-13-40 ("In every case in computing the time served by a prisoner, 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."). However, in looking at the record as a whole, we believe the court properly exercised its discretion. *See State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("[T]he authority to change a sentence rests solely and exclusively in the hands of the sentencing [court] within the exercise of [its] discretion."); *id.* ("It should be stated on what basis the discretion was exercised."). The plea court stated in its order denying Posso's motion to reconsider his sentence that it read the applicable statutes and considered counsel's arguments. At the plea hearing, Posso conceded that it was within the court's discretion to determine the amount of credit to be given, as he was *eligible* to receive credit for time served on monitored house arrest, though not *entitled* to it. Further, the plea court's order mirrored this phrasing, finding Posso was not "entitled" to the monitored house arrest credit, and although it cited *Higgins* in the preceding paragraph, the plea court did not find Posso was not *eligible* for the credit. Accordingly, when viewing the record as a whole, we hold the plea court did not err or abuse its discretion in declining to credit Posso with time served on monitored house arrest. *See Pogue*, 430 S.C. at 386, 844 S.E.2d at 398 ("A sentence will not be overturned absent an abuse of discretion . . . ." (quoting *In re M.B.H.*, 387 S.C. at 326, 692 S.E.2d at 542)).

Clearly, petitioner's request for time served credit while on house arrest was erroneously ruled upon by the plea judge because the plea judge applied the incorrect case law (State v. Higgins, supra, rather than S.C. Code Ann. 13-24-10) in the matter. A judge is required to charge the current and correct law of South Carolina. State v. Buckner, 341 S.C. 241, 534 S.E.2d 15 (2000).

S.C. Code Ann § 24-13-40 reads as follows:

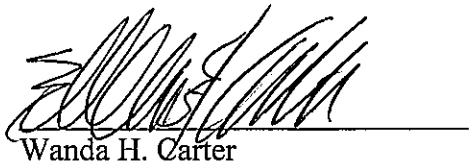
> In every case in computing the time served by a prisoner, full credit against the sentence shall be given for time served prior to trial and sentencing. *Provided, however,* that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned 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 the extent that 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 for individuals serving time during home detention. Therefore, the plea judge's use of incorrect law to deny petitioner's request for time served credit meant that the ruling to deny credit was made in error.

CONCLUSION

The Court of Appeals erred in upholding the trial judge's denial of house arrest time served credit to petitioner in the case.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of December, 2024.