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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County
The Honorable Walton J. Mcleod, IV, Circuit Court Judge

THE STATE,

Respondent,

vs.

ANDRES FERNANDO POSSO,

Petitioner.

APPELLATE CASE NO 2024-000422

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

S.R. HUBBARD III
Solicitor, Eleventh Judicial Circuit

205 East Main St.
Lexington, SC 29072
(803) 785-8352

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the plea court abused its discretion by refusing to give Posso credit for time served on monitored house arrest.

STATEMENT OF THE CASE

A Lexington County grand jury indicted Petitioner Andres Posso for two counts of Criminal Sexual Conduct with a Minor in the 2nd degree and seven counts of Criminal Sexual Conduct with a Minor in the 3rd degree. He pled guilty pursuant to North Carolina v. Alford to two counts of CSC with a Minor 3rd degree on May 12, 2022, before the Honorable Walton J. McLeod, IV, Circuit Court Judge. The remaining charges were dismissed. The State recommended a cap of 8 years' incarceration. Judge McLeod sentenced Posso to concurrent 8-year sentences. Judge McLeod gave Posso credit for time served at the detention center prior to his plea, but did not give him credit for time spent on monitored house arrest. Judge McLeod denied Posso's motion to reconsider. Posso appealed, and the court of appeals affirmed his sentence in an unpublished opinion State v. Posso, Opinion No. 2024-UP-060 (S.C. Ct. App. filed Feb. 21, 2024). Posso filed a petition for certiorari with this Court on March 15, 2024, and the State filed a return. This Court granted certiorari on October 30, 2024.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Jacobs, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011). A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law. Id.

ARGUMENT

The plea court did not abuse its discretion by refusing to give Posso credit for time served on monitored house arrest.

The South Carolina Code provides: "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." S.C. Code Ann. § 24-13-40 (emphasis added). The statute, by its terms, gives trial courts the discretion to give—or not to give— credit for time spent on monitored house arrest prior to trial. See State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006) (explaining statute providing court "may" revoke probation vested court with discretion).

Posso argues the plea court relied on outdated law in refusing to give him credit for time served on monitored house arrest while his case was pending. In its order denying relief, the plea court cited State v. Higgins, a case where the court of appeals affirmed a trial court's refusal to give credit for time served based on an older version of the statute which did not include a provision for time served on monitored house arrest. State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004). The court explained credit for time served under the old statute was limited to time spent in a penal institution. Posso argues the trial court's citation to Higgins shows it believed it could not give credit for time served on monitored house arrest.

If the trial court believed it could not give credit for time served on monitored house arrest, that would indeed be error of law and an abuse of discretion. See State v. Hawes, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) ("A failure to exercise discretion amounts to an abuse of that discretion."). However, this Court should not reverse on that basis for two reasons.

First, this was not the argument made by Posso below. In his brief to the court of appeals, Posso argued the trial court erred by "failing to impose credit for time served . . . ." He did not argue the trial court failed to consider whether it had the authority to give credit for time served on house arrest, and did not reference the trial court's citation to Higgins in its order denying Posso's motion to reconsider. These are distinct arguments. In his petition for rehearing, Posso did argue the plea court used the "incorrect law" by citing to Higgins in its written order. However, a party may not raise an issue for the first time in a petition for rehearing. Rule 208(b)(1)(B), SCACR (providing "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal" in court of appeals brief); see also Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) (explaining appellate court may address issues which are "reasonably clear" from appellant's arguments, but the court should not have to "grope in the dark" to ascertain precise argument and it is "untimely and improper" to raise an argument for the first time in a petition for rehearing (citing Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001))). Because Posso did not make the same specific argument in his brief to the court of appeals that he advances now, the argument is not preserved for review. See Linda Mc Co. v. Shore, 390 S.C. 543, 558, 703 S.E.2d 499, 506 (2010) (explaining an argument not presented to intermediate court may not be raised to supreme court).

Second, the record does not demonstrate that the trial court believed it did not have the authority to give credit for time served on monitored house arrest. Neither party argued this position at the plea hearing. Defense counsel explicitly argued the trial court had the discretion to do so, citing the statute. The only evidence to support Posso's interpretation of the trial court's ruling is the court's citation to Higgins in its order denying the motion to reconsider its sentence.

It is unclear why the court cited Higgins. Perhaps the court merely intended to point out that it was not required to give credit. This would be consistent with the court's ruling that Posso was not "entitled" to credit. As the court of appeals noted, the plea court stated in its order that it reviewed the statute, which clearly vests the trial court with discretion to give credit for time served on monitored house arrest. The statute's terms are so clear that the court could not have read it and concluded that it could not give credit for time served on monitored house arrest. Thus, while the citation to Higgins was inapposite, this alone does not demonstrate that the trial court believed Higgins was dispositive or that it could not give credit for time served on monitored house arrest.

For the foregoing reasons, this Court should affirm Posso's sentence. If the Court finds the trial court did not exercise its discretion by considering whether to credit Posso with time served on monitored house arrest, the Court should remand the case for consideration of that issue.

CONCLUSION

For all of the foregoing reasons, the sentence of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

S.R. HUBBARD III
Solicitor, Eleventh Judicial Circuit

BY: _____
JOSHUA A. EDWARDS

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