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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable William C McMaster, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT DANIEL MISTRETТА,

APPELLANT

APPELLATE CASE NO. 2025-001473

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

I.

Because this case presents a “matter of significant public interest” this Court should exercise its authority to consider the concededly unpreserved constitutional challenge to S.C. Code Ann. § 24-13-40(3).

The state asserts that the issues presented in Appellant’s brief are unpreserved for this Court’s review because they were not raised to the trial court with sufficient specificity. BOR 9. Appellant does not contest the accuracy of this assertion. However, the Supreme Court has recognized an apparent public importance exception to the error preservation rules. This case is a prime candidate for such an exception.

“There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.” *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) (*quoting* JEAN HOEFER TOAL, ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2d ed. 2002)).

The error preservation rules, however, are *procedural* rules and not *jurisdictional* rules. Therefore, this Court has some authority to set them aside when justice so requires. One recognized exception to the error preservation rules is that this Court may consider unpreserved arguments “when they concern a matter of significant public interest.” *State v. Langford*, 400 S.C. 421, 432, 735 S.E.2d 471, 477 (2012) (internal quotation marks omitted).¹ In *Langford*, our Supreme Court analyzed a constitutional challenge to S.C. Code Ann. § 1-7-320, which required

¹ Even though error preservation is not a jurisdictional rule, it should be noted that “public importance” is viewed as an exception to even jurisdictional rules such as standing or mootness. *See, e.g., Sloan v. Dept. of Transp.*, 365 S.C. 299, 304, 618 S.E.2d 876, 878 (2005); *Sloan v. Greenville Cnty.*, 361 S.C. 568, 570, 606 S.E.2d 464, 466 (2004).

that the circuit solicitor set the docket for general sessions court. *Id.* at 435, 735 S.E.2d at 478. That argument was not made by either the state or the appellant in the trial court or to the Supreme Court. *Id.* at 432, 735 S.E.2d at 477. In fact, the only party to make the argument was the South Carolina Public Defender Association as *amicus curiae*. *Id.* Nevertheless, our Supreme Court not only considered the merits of the *amicus*' arguments, the Court agreed with them and struck down the statute. *See generally id.* This is because the Court recognized that it had “previously...considered arguments raised only by an amicus when they concern a matter of significant public interest.” *Id.*

Likewise, in *Ex Parte Brown*, 393 S.C. 214, 711 S.E.2d 899 (2011), the Supreme Court considered whether the Takings Clause of the Fifth Amendment was implicated when an attorney is appointed by the court to represent an indigent litigant. No party to that case raised the Takings Clause issue; rather, that issue was raised by the South Carolina Bar Association as *amicus curiae*. *Id.* at 220, 711 S.E.2d at 902. Even though the Takings Clause issue was indisputably unpreserved under South Carolina's error preservation rules, our Supreme Court addressed the issue on the merits anyway and ultimately agreed with the Bar's arguments.

This case presents a constitutional challenge to a statute, one that impacts countless criminal cases in this state. If Appellant is correct, and the Statute is unconstitutional, numerous sentences will require recalculation, and that number only grows by the day. Further, there are several other pending cases with issues similar to this one.² If this Court or the Supreme Court rules against the state in any one of the significant and growing number of cases such as this one,

² *See, e.g., State v. Ri'Shon Keltarian Gilliam*, Appellate Case No. 2024-001400 (Ct. App.); *State v. Sammy Rowdy Parker*, Appellate Case No. 2024-002186 (Ct. App.); *State v. Kourtland Flowers-Harris*, Appellate Case No. 2025-001475 (S. Ct.); *State v. Johnathan Lee Gray*, App. Case No. 2024-001751 (Ct. App.); *State v. Terrance Abrams*, Appellate Case No. 2024-001821 (Ct. App.); *State v. Lintel Lazzil Kirkland*, Appellate Case No. 2025-000620 (Ct. App.).

Appellant will likely be entitled to the relief he now seeks. It would be antithetical to judicial economy to decline to hear this case on procedural grounds.

Accordingly, this Court should reach the merits of Appellant's arguments.

II.

S.C. Code Ann. § 24-13-40(3) is Unconstitutional.

Denying time-served credit to those arrested—not convicted—of crimes is unconstitutional under both the unconstitutional conditions doctrine and the Due Process Clauses of the federal and state constitutions. The state resists these assertions in two main ways. First, it argues that the Statute does not place an unconstitutional condition on the right to a jury trial because it does not force a defendant to plead guilty. Second, it argues that there is no fundamental right to time-served credit, and the Statute survives rational basis review. Both arguments are unavailing.

A. The Statute violates the unconstitutional conditions doctrine.

The state asserts that there is no fundamental right to “credit for presentence jail time where presentence jail time is not part of the sentence imposed.” BOR 20. The state is incorrect. However, even if the state were correct, and there was no constitutional right in any circumstance to time-served credit, the Statute would still violate the unconstitutional conditions doctrine.

Even if the Constitution does not grant a “right” to a specific government benefit, the government may not deprive a person of that benefit “on a basis that infringes on his constitutionally protected interests.” *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). For example, a poor person has no constitutional right to subsidized healthcare, but should the government provide such a right, it cannot then premise that right on a residency requirement, because that would penalize indigents for exercising the constitutional right of interstate travel. *See generally, Memorial Hosp. v. Maricopa Cnty.*, 415 U.S. 250 (1974). “Even if the government may withhold [a] benefit altogether,” it may not grant a benefit “on the condition

that the beneficiary surrender a constitutional right.” *See, e.g., State v. Nguyen*, 285 Kan. 418, 427, 172 P.3d 1165, 1173 (2007). The Statute at issue here presents twice-arrested³ defendants with a choice. They can either exercise their absolute constitutional right to a jury trial—which would require them to spend months or years incarcerated,⁴ time for which they will never receive credit—or they can plead guilty early and begin serving their sentences. Even if there were “no connection between the entitlement to credit and the manner in which the charges are disposed,” BOR 13, but there is an obvious connection between the length of a defendant’s incarceration and whether they will forego their right to be tried by a jury. Simply, in the absence of the Statute, Appellant would be released from prison 694 days earlier.

Further, the state asserts that even if the Statute “created additional *incentive* to plead guilty, this would not make the statute unique or unconstitutional.” BOR 14 (emphasis in original). This assertion is simply incorrect: a statute⁵ that created an incentive to plead guilty would be both “unique” and “unconstitutional.” For example, a previous version of the Federal

³ The state has taken the position in another case that the Statute does not require a criminal *conviction* for a court to find that a person has “committed...a crime” while out on bond. *See* Final Brief of Appellant at 6-7 in *State v. Ri’Shon Gilliam*, Appellate Case No. 2024-001400 (Ct. App.). The state’s assertion in this case, that the Statute is “aimed at a narrow class of defendants: those who commit subsequent crimes while out on bond...” is dampened significantly by the knowledge that the state also wishes to eliminate the presumption of innocence in order to revoke credit for time served.

⁴ The state asserts that a defendant in this position “could...file a motion for speedy trial” or “seek reconsideration of their bond order.” BOR 13. These are not serious alternatives. South Carolina has no speedy trial act. Whether a motion for speedy trial will ever be enforced is left up to a malleable, prophylactic test, *see Barker v. Wingo*, 407 U.S. 514, 530 (1972), and the trial court’s decisions in that area are reviewed on appeal only for abuse of discretion. *State v. Reaves*, 414 S.C. 118, 132, 777 S.E.2d 213, 220 (2015). As for bond reconsideration, once bond is denied (or set too high) by a circuit court judge, a defendant must wait a minimum of six months before requesting reconsideration. S.C. Code Ann. § 17-15-55(A)(2). Under the Statute at issue in this case, the defendant will not be credited for these six months.

⁵ The state is probably correct in its assertion that pleading guilty often results in a reduction of sentence, but this misses the point. A solicitor’s plea offer is quite different than statutory edict.

Kidnapping Act, likely due to a drafting error, created a sentencing regime where the maximum penalty for the crime if a defendant pleaded guilty was life imprisonment, but the maximum penalty for the crime after trial was death. *United States v. Jackson*, 390 U.S. 570, 571 (1968). The United States Supreme Court held the sentencing regime unconstitutional because the “inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.” *Id.* at 581 (footnote omitted). Therefore, even though the death penalty was a constitutional punishment for the crime, and the process by which it was imposed was constitutional, the Court invalidated the provision because it unnecessarily chilled the exercise of fundamental rights. *Id.* at 591. By *requiring* a choice between pleading guilty and spending more time incarcerated, the Statute here has the same effect.

Accordingly, the Statute places an unconstitutional condition on the right to a jury trial. The plea court must be reversed.

B. The Statute violates the Due Process Clause.

The Statute infringes on a citizen’s fundamental right to liberty itself. The General Assembly could have employed less restrictive alternatives—such as the many employed in the Bond Reform Act—that would have accomplished the same legislative goals. In fact, the Statute does not further the General Assembly’s goals at all. Therefore, the Statute violates the Due Process Clauses of the federal and state constitutions.

The state resists this conclusion in several ways. *First*, the state asserts that the denial of time-served credit is not punitive, and thus, Appellant’s due process argument should be “rejected out of hand.” BOR 19. This assertion is misguided. For one, the denial of time-served credit is punitive. The purpose of the Statute is to protect the community or discourage the

commission of crimes by those already out on bond. BOR 23 (“The statute is designed to deter habitual criminals from committing repeat offenses while out on bond.”). Therefore, the Statute was specifically enacted for the purposes of “deterrence” which constitutes two of the “three purposes of *punishment*.” See *Owens v. Stirling*, 443 S.C. 246, 268, 904 S.E.2d 580, 591 (2024) (emphasis added) (noting the “three purposes of punishment” are “(1) reform or rehabilitation, (2) general deterrence, and (3) specific deterrence”). Further, by granting time-served credit in most cases, the Statute itself recognizes that pre-sentence incarceration is sufficiently equivalent to post-sentence incarceration as to justify a day-for-day credit on the sentence. The mere existence of a “time-served sentence,” which is imposed several times per day in this state’s criminal courts, necessarily implies that pre-trial detention is, at least sometimes, punitive.⁶

However, even if the denial of time-served credit was not punitive, that would not defeat the due process problems with the Statute “out of hand.” BOR 19. The Statute impairs Appellant’s fundamental right to liberty. *Tant v. S.C. Dept. of Corr.*, 408 S.C. 334, 341, 759 S.E.2d 398, 401 (2014) (“There can be no doubt the length of an inmate’s incarceration implicates a constitutional liberty interest.”). The Due Process Clause is implicated when a statute impairs a “person’s interest in freedom from bodily restraint.” *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002). The Clause is not limited to a *punitive* bodily restraint. Commitment under the Sexually Violent Predator Act is not punitive; however, our Supreme Court still analyzed a challenge to it under strict scrutiny because it implicates the freedom to be free from bodily restraint. *Id.*

⁶ The state seems to concede that if the Statute’s revocation of time-served credit is punitive then the Statute must be unconstitutional. BOR 18 (“This is because the constitution does not allow bond to be punitive.”).

Second, the state mischaracterizes Appellant’s arguments as asserting “a fundamental right to credit for presentence jail time where presentence jail time is not part of the sentence imposed.” BOR 20. Appellant does not assert a specific right to credit for time served, he asserts that the Statute implicates his right to “liberty” under the Due Process Clause.⁷ By revoking time-served credit to which Appellant would otherwise be entitled, the Statute affects “the length of [his] incarceration” which “implicates a constitutional liberty interest.” *Tant*, 408 S.C. at 341, 759 S.E.2d at 401.

Third, the state asserts that the Statute survives strict scrutiny review because the General Assembly’s legislative goals are compelling, and the Statute “is aimed at a narrow class of defendants: those who commit subsequent crimes while out on bond or otherwise have bond revoked.” BOR 24. Again, this misapprehends the point. “To survive strict scrutiny the [statute] must meet a compelling state interest and be narrowly tailored to *effectuate that interest*.” *Luckabaugh*, 351 S.C. at 140-41, 568 S.E.2d at 347 (emphasis added). But the Statute does nothing to further the General Assembly’s goals. Revoking the time-served credit of any defendant arrested twice does not protect the community. In fact, the state itself asserts that “the denial of credit *does not increase* the length of any defendant’s sentence. Rather, it merely leaves the imposed sentence intact.” BOR 18 (emphasis in original). A defendant suffering the harsh conditions of confinement in either a county jail or prison might question this hair-splitting math.

⁷ The state asserts that Appellant has not provided a “careful description of the asserted fundamental liberty interest.” BOR 21 (internal quotation marks omitted) (*quoting Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999)). It is true that courts applying the Due Process Clause have required “careful descriptions” of the asserted liberty interest. *Id.* at 739. However, this is because courts have “long been ‘reluctant’ to recognize rights that are not mentioned in the Constitution.” *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215, 240 (2022). The liberty interest implicated here, however, *is* mentioned in the Constitution. Freedom from bodily restraint is at the very core of “liberty” as that word is used in the Fourteenth Amendment, the Fifth Amendment, and the preamble. If Appellant has failed to provide a “careful description” of the liberty interest he seeks to vindicate, so did the framers of the Constitution.

The state, therefore, simultaneously argues that revoking time-served credit is not punitive and does not add to a defendant's sentence but protects the community. The state also simultaneously argues that the Statute protects the community, but it is apparently untethered to whether the defendant will be released on bond. BOR 13. The totality of these assertions cannot coexist as a matter of logic. If the Statute does not punish a defendant, add to his sentence, or make any difference whether he is granted bond, then the Statute does not protect the community at all. Either the General Assembly passed an utterly meaningless statute, or the revocation of time-served credit must either be punitive or lengthen a defendant's sentence. Smart money is on the latter.

For these reasons, the revocation of time-served credit constitutes punishment for a subsequent arrest. The Statute has the effect of lengthening a jail sentence, which implicates the fundamental liberty component of the Due Process Clause. And the Statute does nothing to further the General Assembly's objectives. Accordingly, the Statute violates the Due Process Clauses of the federal and state constitutions. The plea court's order must be reversed.

CONCLUSION

For the foregoing reasons, this Court should reach the merits of Appellant's arguments and reverse.



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ATTORNEY FOR APPELLANT

This 6th day of March, 2026.