STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Steven H. John, Circuit Court Judge

Appellate Case No. 2012-209447

THE STATE, ...RESPONDENT

v.

UBALDO GARCIA, JR., ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court properly denied Appellant's request for credit against his sentence for the time he served under house arrest and GPS monitoring where: (1) an amendment to the South Carolina Code which allows credit for "any time spent under monitored house arrest" occurred after Appellant was sentenced; (2) Appellant was not entitled to such credit under the pre-amendment version of the Code; and (3) Appellant's right to due process was not violated by the imposition of GPS monitoring?

STATEMENT OF THE CASE

Appellant was indicted at the April, 2010 term of the grand jury for Horry County for trafficking in cocaine – more than 400 grams. (Indictment number 2010-GS-26-1601). He was represented by William I. Diggs, Esquire. The State was represented by Bradley Coy Richardson of the Fifteenth Circuit Solicitor's Office. On December 14, 2011, Appellant pled guilty to the lesser included offense of trafficking in cocaine – 28 to 100 grams. He was sentenced by the Honorable Steven H. John to ten years' imprisonment. (December 14, 2011, Tr.p.1; p.14, lines 1-25; Indictment & Sentencing Sheet). Defendant subsequently filed a motion to reconsider his sentence. (Motion to Reconsider Sentence dated December 23, 2011, and filed December 28, 2011). On February 29, 2012, Judge John convened a hearing on Appellant's motion. Appellant was again represented by Mr. Diggs, and the State was represented by Assistant Solicitor Nancy Cote. After hearing arguments, Judge John issued an order denying Appellant's motion. (Order Denying Motion to Reconsider Sentence dated February 29, 2012, and filed March 1, 2012). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

After Appellant was arrested for trafficking in cocaine, he had a surety bond set at $150,000. His attorney, Mr. Diggs, subsequently moved for a bond reduction, and on October 16, 2009, the Honorable Larry B. Hyman, Jr., issued a consent order reducing bond to: "a $45,000 surety bond with the condition that the defendant be placed on home detention w/ GPS monitoring except for purposes of going to and from work and/or school, for medical treatment, and to attend church services." Mr. Diggs and an assistant solicitor indicated their agreement to the terms and conditions of the bond by signing the consent order. (Consent Order Modifying Bond dated and filed October 16, 2009).

At the guilty plea proceeding, the solicitor recited the facts of the case and Appellant said those facts were true and correct. (December 14, 2011, Tr.p.6, line 12-p.8, line 23). After asking Appellant a series of questions, the court found there had been a substantial factual basis for the plea and found that Appellant's decision to plead guilty was made freely, voluntarily, knowingly and intelligently with the advice of competent counsel. The court accepted the plea and asked to hear from Appellant's counsel. (December 14, 2011, Tr.p.9, lines 2-9). Mr. Diggs stated: "The incident occurred over two years ago. He has been on monitor and house detention since that time, and eventually, when the Court imposes a sentence, we are going to ask the Court to consider giving him credit for that, a period of time he has been on the monitor." (December 14, 2011, Tr.p.9, lines 10-17). After imposing a ten-year sentence, the court ordered: "Defendant is given credit for any jail time that he has actually served. I do not believe it is proper to extend credit for time spent on GPS monitoring." (December 14, 2011, Tr.p.14, lines 16-18).

In his motion to reconsider, Appellant argued that he: "should be given credit for the time served under house arrest and electronic monitoring, to wit: from the time of arrest on September 28, 2009 until the date of his sentencing, December 14, 2011." (Motion to Reconsider Sentence dated December 23, 2011, and filed December 28, 2011). At the February 29, 2012 motion hearing, Appellant advised the court that although he had done some research, he was unable to discover any cases to specifically support his request for credit. He argued, however, that having GPS monitoring in addition to house arrest created a slightly different circumstance than was addressed in the case law. Appellant argued that the limits on his travel associated with house arrest along with the GPS monitoring were sufficiently severe and restrictive to meet the definition of "confinement" for purposes of awarding credit under the relevant statutes. (February 29, 2012, Tr.p.5 line 11-p.6, line 11). The solicitor noted that Appellant had not actually maintained compliance with all the conditions of home detention and had even had a revocation at some point. She also argued that regardless of compliance, Appellant was not entitled to credit for time served on home detention under the existing case law of this state. (February 29, 2012, Tr.p.7, line 18-p.8, line 2).

At the conclusion of the hearing, the court referenced an opinion from this Court, State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004), for the proposition that a person is only entitled to credit for time served in a penal institution, and not for house arrest. The court found the GPS monitoring which was attached to the house arrest did not create any exception to this rule and again declined Appellant's request for credit for time served on house arrest and GPS monitoring. (February 29, 2012, Tr.p.10, lines 3-24). After hearing arguments, the court issued an order formally denying Appellant's

motion to reconsider. The court: "denied the request for credit for time served while [Appellant] was on home detention. *State v. Higgins*, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004)." (Order Denying Motion to Reconsider Sentence dated February 29, 2012, and filed March 1, 2012).

ARGUMENT

The trial court properly denied Appellant's request for credit against his sentence for the time he served under house arrest and GPS monitoring where: (1) an amendment to the South Carolina Code which allows credit for "any time spent under monitored house arrest" occurred after Appellant was sentenced; (2) Appellant was not entitled to such credit under the pre-amendment version of the Code; and (3) Appellant's right to due process was not violated by the imposition of GPS monitoring.

Appellant argues the trial judge erred in denying his request for credit against his sentence for the time he served under house arrest and GPS electronic monitoring prior to his guilty plea. First, Appellant contends he should have been given credit pursuant to a 2013 amendment to section 24-13-40 of the South Carolina Code that allows credit for "any time spent under monitored house arrest." Second, Appellant contends he should have been given credit pursuant to the pre-amendment version of section 24-13-40 because the GPS liberty restriction placed upon him during the home detention "elevated his status to that of a prisoner confined in a penal facility." Finally, in an argument seemingly unrelated to his request for credit for time served, Appellant contends the pretrial imposition of GPS monitoring as a condition of bail, without a hearing, violated his right to due process. The State submits each of Appellant's contentions is without merit.

S.C. Code § 24-13-40: Post-2013 Amendment

Except for minor amendments made in 2010 which are not relevant to the discussion here, on the date of the offense (September 30, 2009), the date of Appellant's guilty plea (December 14, 2011), and the date the trial judge heard arguments on Appellant's motion to reconsider (February 29, 2012), the South Carolina Code provided:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the date of the commencement of the service of the sentence. 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. 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 not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

S.C. Code Ann. § 24-13-40 (Supp. 2011) (emphasis added). In State v. Higgins, this Court found the legislature only intended to allow credit for time served in a penal institution, and therefore found no error in the trial court's refusal to afford credit to Higgins for the time he served on house arrest while he was released on bond. 357 S.C. 382, 386, 593 S.E.2d 180, 182 (Ct. App. 2004). On June 7, 2013, the legislature amended section 24-13-40 by adding language to the relevant sentence as follows: "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 (Supp. 2013) (amended by Act No. 34, eff. June 7, 2013).

Appellant argues this amendment to § 24-13-40 means Higgins can no longer be controlling on the issue of whether to bestow time served credit on home detention

pretrial detainees. Indeed, he claims allowing credit for time served on home detention is a "new statutory mandate." (Brief of Appellant, p.9). The State disagrees, at least insofar as the application of Higgins to this appeal, and submits Appellant's argument should be denied and dismissed on several grounds. First, this argument is not preserved for appellate review because it was neither raised to nor ruled upon by the trial court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). Indeed, it could not have been raised to the trial court because the amendment occurred after Appellant was convicted and sentenced. At the time of Appellant's plea and sentence, Higgins controlled the trial court's decision to deny credit for time served on house arrest, and that decision should be affirmed.

Second, although not raised in his brief and therefore not before the Court, to the extent this Court construes Appellant's argument to be a claim that the amendment to section 24-13-40 should be retroactive, the State disagrees. South Carolina case law makes it clear that amendments to statutes are not retroactive unless the Legislature says they are. "Generally, 'statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision in the enactment or clear legislative intent to the contrary.'" Wiesart v. Stewart, 379 S.C. 300, 303, 665 S.E.2d 187, 188 (Ct. App. 2008). "Statutes that are remedial or procedural in nature, however, operate retroactively. A statute is remedial and applies retroactively when it creates new remedies for existing rights or enlarges rights of persons under disability." Id. In Wiesart, this Court found the 1996 amendment to § 23-3-430 was procedural in nature because it created a requirement that the trial court make a specific finding on the record

regarding whether a person convicted of indecent exposure should register as a sex offender, rather than creating a new right. Id.

In Edwards v. State Law Enforcement Div., 395 S.C. 571, 720 S.E.2d 462 (2011), the Supreme Court examined how to determine whether a statutory amendment is to be applied retroactively. "It is a well-settled rule of statutory construction that absent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature." Id. at 579, 720 S.E.2d at 466. After finding no explicit provision by the General Assembly that the amendment in question was to apply retroactively, the Court turned its focus to whether it was remedial or procedural. Following the Court's logic in Edwards, finding no explicit provision that the amendment is to apply retroactively, this Court must determine whether it is remedial or procedural. A statute is remedial when it creates new remedies for existing rights or enlarges rights of persons under disability, and is procedural if it sets out a mode of procedure for a court to follow, or "prescribes a method of enforcing rights." Wiesart, 379 S.C. at 303, 665 S.E.2d at 188; Edwards, 395 S.C. at 580, 720 S.E.2d at 466. Here, the amendment does not create a new remedy for an existing right, nor does it set out a mode of procedure for courts to follow. Rather, by providing that house arrest time may be used to calculate time served, the amendment creates a new obligation or imposes a new duty. Id. In Edwards, the Court found the amendments to the sex offender registry statute to provide that if a sex offender received a pardon for which he was required to register, he must reregister and may not be removed from the registry except in certain enumerated circumstances did "not create a new right, but instead impose[d] an obligation which did not exist prior to the

amendments." Edwards, 395 S.C. at 579, 720 S.E.2d at 466. Similarly, the amendment in this case imposed an obligation by making house arrest part of time-served calculation. Therefore, it should be construed prospectively, not retroactively. Accordingly, the amendment does not apply to Appellant.

Finally, even under the terms of the amended statute, the award of credit for time spent on monitored house arrest is discretionary rather than mandatory. Unlike credit for time served prior to trial and sentencing in a penal institution, which "must be given," credit for time spent on monitored house arrest "may be given." S.C. Code Ann. § 24-13-40 (Supp. 2013) ("shall be given" was used in place of "must be given" prior to an amenement in 2010; however, both "shall" and "must" are mandatory provisions). Because the award of the credit sought by Appellant was entirely in the discretion of the trial court, the decision to deny such credit must be affirmed. This is particularly true where the trial judge was given uncontested information that Appellant had violated the conditions of his house arrest. Compare Higgins, 357 S.C. at 383, 593 S.E.2d at 181 (noting there was no evidence Higgins violated the conditions imposed in his release order). For all of the foregoing reasons, the State submits Appellant's first contention is without merit and should be dismissed.

S.C. Code § 24-13-40: Pre-2013 Amendment

Appellant argues he "qualified for time served credit due to the added GPS condition of bail placed upon him while under house arrest because this curtailed his liberty rights, which in turn meant that his home detention coupled with GPS monitoring as condition of bail resulted in a status equivalent to that of a prisoner confined to a penal facility and fit well within the prerequisites to receive time served credit under Higgins."

He claims the GPS monitoring "elevated him," "raised him to a sphere beyond," or "catapulted him" beyond house arrest to the level of a prisoner. (Brief of Appellant, p.7-p.8). The State disagrees.

Higgins clearly held that: (1) the statutory term "time served" as employed in the statute governing computation of credits against a sentence did not include time spent under house arrest; and (2) Higgins was not entitled to credit against his sentence for time spent under house arrest while released on bond. Higgins, 357 S.C. at 382, 593 S.E.2d at 180. Like Higgins, Appellant spent time under house arrest/home detention while released on bond. Thus, pursuant to Higgins, Appellant was not entitled to "time served" credit against his sentence for this time. The imposition of GPS monitoring did absolutely nothing to "elevate" or further intensify the liberty restrictions already imposed by the home detention itself, which prohibited Appellant from leaving his home "except for purposes of going to and from work and/or school, for medical treatment, and to attend church services." Instead, GPS monitoring merely provided a means to monitor and enforce those restrictions. Appellant relies in part on State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) and several cases cited therein in support of his argument; however, Dykes addressed imposition of GPS monitoring independent of home detention or house arrest and therefore is inapplicable to the circumstances of Appellant's case. For these reasons, the State submits Appellant's second contention is without merit and should be dismissed.

Due Process

Appellant argues that "GPS monitoring works to deprive a person of his or her liberty" and therefore, due process demands a hearing before GPS may be imposed as a

condition of bail. He contends his placement on GPS monitoring without a hearing violated his right to due process. The State submits this argument is not preserved for appellate review and is wholly without merit.

Appellant did not raise this "due process" argument during the guilty plea proceeding and the trial court certainly did not rule on any due process claim; therefore, it is not preserved for appellate review. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). In any event, Appellant consented to the conditions of home detention and GPS monitoring in conjunction with a reduction in the amount of his bond. Had he not consented to the GPS monitoring, he would have been given a hearing on his motion to reconsider bond and any modified or newly imposed conditions. Therefore, the State submits Appellant's due process argument is without merit and should be dismissed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
February 7, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Steven H. John, Circuit Court Judge

Appellate Case No. 2012-209447

THE STATE, ...RESPONDENT

v.

UBALDO GARCIA, JR., ...APPELLANT.

DESIGNATION OF MATTER

In addition to the matter designated by Appellant, Respondent proposes the following matter to be included in the Record on Appeal:

(1) Sentencing Sheet
(2) Consent Order Modifying Bond dated and filed October 16, 2009

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers. The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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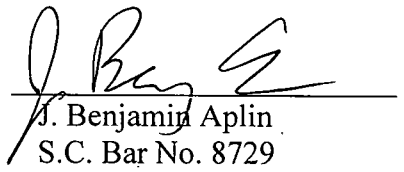
BY: 

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Columbia, South Carolina
February 7, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Steven H. John, Circuit Court Judge

Appellate Case No. 2012-209447

THE STATE, ...RESPONDENT

v.

UBALDO GARCIA, JR., ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter*, both dated February 7, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 7th, day of February, 2014.

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February 7, 2014

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State v. Ubaldo Garcia, Jr.
Appellate Case No. 2012-209447

Dear Ms. Carter:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services