

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

UBALDO GARCIA,

APPELLANT

APPELLATE CASE NO. 2012-209447

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in denying appellant's request for time served credit after having submitted to house arrest **and** GPS electronic monitoring because S.C. Code Ann §24-13-40 **as amended** allows such credit for "any time spent under monitored house arrest," and because the GPS liberty restrictions placed upon appellant during home detention elevated his status to that of a prisoner confined in a penal facility who was eligible for time served credit under Higgins¹ and a GPS due process hearing.

¹ State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (S.C. Ct. App. 2004)

STATEMENT OF THE CASE

Appellant Ubaldo Garcia pled guilty to trafficking in cocaine (28 to 100 grams), first offense, during the February 2012 term of the Horry County General Sessions Court before Judge Steven H. John. Appellant was represented by William I. Diggs at the plea proceeding. Judge John sentenced appellant to imprisonment for a period of ten years.

On February 9, 2012, a sentencing reconsideration hearing was convened at the Horry County General Sessions Court before Judge John. Appellant was present at the hearing and represented by William I. Diggs. At the hearing, a motion for time served credit was entered based on appellant's time spent on house arrest and GPS monitoring simultaneously as conditions of bail prior to the plea proceeding. Judge John denied appellant's request for time served credit.

The notice of appeal and letter containing the time served credit issue as the ground for appeal per Rule 203(d)(1)(B)(iv), SCACR, were both timely filed. This brief follows.

ARGUMENT

The trial judge erred in denying appellant's request for time served credit after having submitted to house arrest and GPS electronic monitoring because S.C. Code Ann. § 24-13-40 as amended allows such credit for "any time spent under monitored house arrest," and because the GPS liberty restrictions placed upon appellant during home detention elevated his status to that of a prisoner confined in a penal facility who was eligible for time served credit under *Higgins*² and a GPS due process hearing.

On September 30, 2009, appellant was stopped by police for driving sixty-five-miles per hour in a fifty-five-mile per hour zone on Highway 378 in Horry County, South Carolina. Upon smelling an odor of marijuana coming from the vehicle per the stop, a police search of appellant's vehicle resulted in a finding of three-quarters of a kilo of cocaine. Appellant was arrested at the scene and later charged with trafficking in cocaine. R. 8, l. 14 – R. 9, l. 8.

Subsequently, appellant pled guilty to trafficking in cocaine and was sentenced to ten years imprisonment. R. 4, l. 1-R. 11, l. 9. Thereafter, appellant appeared before the plea judge requesting credit for time served³ while on home detention and GPS monitoring as bail conditions pending adjudication on his trafficking charge. Counsel's argument regarding the time served credit matter follows:

Your Honor, we looked at a lot of the case law on this issue about home detention and the GPS. [T]he GPS and the house detention issue is slightly separate issues, but both applicable in this case. Mr. Garcia was on house arrest and he was on GPS monitoring, and that's a little bit different from any of the factual scenarios that we find in the case law out of the State of South Carolina regarding credit, or the issue of being given credit for

² State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (S.C. Ct. App. 2004)

³ Appellant was on house arrest and GPS monitoring from September 28, 2009 to December 11, 2011 as a condition of being released after being granted bail.

those situations. Admittedly house arrest hasn't warranted credit for – you know, as a time-served circumstance in our State, but I would submit that house arrest with the GPS monitoring, the limitations on his traveling, that imposed in this case, the typical ones of not being able to travel, other than to go to church and/or to meet with his attorney sufficiently restrictive, sufficiently severe, that it warrants the definition of confinement, and we would ask the Court to, under the circumstances of this case, find that Mr. Garcia was a defendant who was detained, under the circumstances of this case, restriction on his movement sufficient to allow him credit for time served under those circumstances.... house arrest and the GPS monitoring warrant finding that he would be entitled to be given credit for the time that he served under those conditions. R. 26, l. 11- R. 27, l. 11.

The plea judge denied appellant's request for time served credits while on house arrest and GPS monitoring via the prohibition announced in Higgins. R. 30, l. 12-R. 31, l. 24.

In Higgins, the Court held that time served credit could only be awarded to a "prisoner" who is "serving time in prison," and that "prisoners" are those who are actually confined to a penal institution; and that as a result, pre-trial house confinement status could not be deemed the equivalent of a prisoner confined in prison. Thus, one under house arrest would not qualify as one confined in a penal facility within the meaning of Higgins; and therefore, under the Higgins rationale, a pre-trial house detainee would not receive the benefit of time served credit for time spent on home detention prior to trial. Also, S.C. Code Ann. §24-13-40 mandates that prisoners receive "full credit against the sentence must be given for time served prior to trial and sentencing."

However, in May 8, 2013, S.C. Code Ann. §24-13-40, was amended to read as follows:

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.

Undoubtedly, this amended statute meant that Higgins could no longer be controlling on the issue of whether to bestow time served credit on home detention pretrial detainees. In other words,

our legislature recognized that there are obviously situations where individuals on monitored home detention would qualify similarly as “prisoners” deserving credit for time served during that home detention period. In the case at bar, the additional condition of GPS surveillance attached to house arrest for appellant meant that he was eligible for time served credit under the newly amended statute.

However, notwithstanding the recently amended time served credit statute, appellant nonetheless 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. Many courts have addressed the liberty restraints connected to GPS electronic monitoring and the continual surveillance that GPS monitoring brings as infringements on one’s right to be free from government interference and move about freely at will and without restrictions. See State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013), citing to United States v. Merritt, 612 F. Supp. 2d 1074 (2009); State v. Stines, 200 N.C. App. 193, 683 S.E.2d 411 (2009); United States v. Smedley, 611 F. Supp. 2d 971 (2009). See also United States v. Arzberger, 592 F. Supp. 2d 590 (2008). Commonwealth v. Carry, 454 Mass. 559, 911 N.E.2d 187 (2009). Therefore, any home detention coupled with GPS monitoring and its liberty restrictions would elevate such a house arrest to a level similar to the restrictions placed upon prisoners in penal institutions, and would thus warrant time served credit.

Also, since GPS monitoring works to deprive a person of their liberty, courts must assure that such monitoring does not violate due process, which is established by way of a hearing. State v. Stines, 200 N.C. App. 193, 683 S.E.2d 411 (2009). For example, in Dykes, the Court rejected as

unconstitutional an automatic non-reviewable placement of GPS monitoring for those convicted of first degree criminal sexual conduct or lewd act if they violated probation. In Smedley, the Court ruled that imposing home detention with electronic monitoring as a condition of release violated due process as the deprivation of the defendant's liberty interest was at stake and there was no mechanism to challenge the GPS monitoring as a condition for the purpose of bail. Compare similar holdings in United States v. Merritt, 612 F. Supp. 2nd 1074 (2009); United States v. Arzberger, 592 F. Supp. 2nd 590 (2008), where the courts denied attempts by the government to impose GPS electronic monitoring as an added factor to curfews as a condition of bail without due process hearings for the defendants to contest connecting GPS monitoring to their curfews, where the very nature of such monitoring meant that the same would restrict their ability to move about at will and deny them guaranteed constitutional liberty interests. Both Merritt and Arzberger involved Adams Walsh Amendments which were similar to S.C. Code Ann. § 23-3-540(H) which allowed automatic GPS monitoring placements sans any opportunity for review. Hence, the placement of GPS monitoring on appellant sans a hearing violated due process.

Here, the added factor of GPS electronic monitoring that was placed upon appellant as a condition of bail combined with his service time on house arrest prior to his adjudication on the charge against him placed liberty restraints on him that raised him to a sphere beyond house arrest. The restrictions on appellant's movements and constant monitoring of his movements during home detention catapulted him to the level of a prisoner confined in a penal facility who was deserving of time served credit in the case.

Therefore, not only does the new statutory mandate allow for time served credit to be given in monitored home detention cases; but notwithstanding the new statutory mandate, any GPS monitoring of a house arrest pre-trial detainee as a condition of bail should result in the grant of

credit for time served due to the liberty restrictions of GPS monitoring and a GPS due process hearing as well. In the case at bar, appellant was qualified to receive time served credit while under house arrest and GPS monitoring under the amended statute referred to above; but more importantly, appellant was also qualified to receive time served credit as the GPS factor added to his house arrest curtailed his liberty and in the end established him as one on par with a prisoner in penal confinement who would qualify for time served credit.

Thus the trial judge erred in denying appellant's motion for time served credit during his term on home detention and simultaneous GPS monitoring while out on bail.

CONCLUSION

Based on the foregoing argument, appellant requests that this Court reverse the trial judge's denial of his motion for time served credit and remand for a new sentencing proceeding in the case.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of March, 2014.

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Steven H. John, Circuit Court Judge

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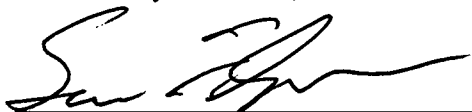
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of March, 2014.

Susan B. Hackett for
Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of March, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022