STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRAD ALAN DAY,

APPELLANT

APPELLATE CASE NO. 2013-002558

INITIAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by continuing Appellant on community supervision and ruling he could be re-incarcerated for violations of his community supervision until he served ten years in prison where Appellant was sentenced to ten years imprisonment, suspended upon the service of five years, with no probation and where Appellant had already served the maximum five year sentence day for day?[1]

[1] This Court may take judicial notice that a similar issue was raised in State v. Anthony K. Blakney, Appellate Case No. 2012-207286, which is still pending on appeal. An oral argument was held in Blakney on June 2, 2014, the same day this brief was filed.

STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Appellant at the April 30, 2007 term of General Sessions for second degree criminal sexual conduct with a minor. R. * (indictment). Appellant pled guilty on October 29, 2007 before the Honorable Kenneth Goode. Judge Goode sentenced him to ten years imprisonment suspended upon the service of five years. The sentence did not include a probationary term after the service of the five years imprisonment. Appellant was also required to register as a sex offender. Tr. 5, ll. 16-23; R. * (sentencing sheet).

Appellant was released from incarceration on April 29, 2011 and placed on community supervision. Tr. 6, ll. 1-2. On November 21, 2013, Appellant appeared before the Honorable R. Markley Dennis, Jr. for a third community supervision violation hearing. David Mauldin represented Appellant. Matthew Buchanan represented the Department of Probation, Parole, and Pardon Services. Tr. 1.

Despite Appellant's argument that he had served the maximum five year sentence imposed by Judge Goode and should no longer be on community supervision, Judge Dennis continued Appellant on community supervision and added the condition that he attend substance abuse counseling. Tr. 6, l. 23 – 7, l. 1; Tr. 19, l. 16 – 20, l. 1; R. * (continuation order). Judge Dennis also ruled Appellant could be re-incarcerated for subsequent violations of his community supervision until he served ten years in prison. Tr. 7, l. 18 – 8, l. 1.

Appellant appeals this ruling.

ARGUMENT

The court erred by continuing Appellant on community supervision and ruling he could be re-incarcerated for violations of his community supervision until he served ten years in prison where Appellant was sentenced to ten years imprisonment, suspended upon the service of five years, with no probation and where Appellant had already served the maximum five year sentence day for day.

Relevant Facts

Appellant was sentenced by Judge Goode to ten years imprisonment suspended upon the service of five years for second degree criminal sexual conduct, with **no probation** to follow the five year term of incarceration. Tr. 5, ll. 16-23; R. * (sentencing sheet).

Appellant appeared before Judge Dennis for a third community supervision violation hearing on November 21, 2013. Tr. 1. Defense counsel argued at this hearing that Judge Goode had sentenced Appellant to a maximum of five years imprisonment - - "ten years suspended to five years and registry as a sex offender. I note to the Court that **the sentence did not include a probationary term subsequent to the five-year incarceration term.**" Tr. 5, ll. 18-25 (emphasis added).

Defense counsel explained to Judge Dennis that Appellant was released from prison on April 29, 2011 after serving one thousand five hundred twenty-nine days (four years and sixty-nine days) "on the original incarceration sentence." On February 10, 2012, Appellant had a community supervision violation hearing, was found to be in violation, and sentenced to ninety days imprisonment. On June 22, 2012, Appellant had a second community supervision violation hearing, was again found to be in violation, and sentenced to one year

imprisonment. At each of these hearings, Appellant was continued on community supervision after he served the revoked sentence.[2] Tr. 6, ll. 1-10.

Defense counsel told Judge Dennis he was uncertain how many days Appellant actually served on the ninety day revocation, but that he was certain Appellant had served three hundred and sixty-one days on the one year revocation. Defense counsel said, "And the total would be 1980 days with the 90-day revocation. And even without the 90-day revocation, the sentence [total days Appellant served] would be 1890 days." Tr. 6, ll. 11-18.

Defense counsel explained, "Now, a five-year sentence, multiplying 365 times five, would be 1825 days. And in either of those numbers I gave the Court, Mr. Day [Appellant] has exceeded an incarceration term for that five years." He argued, "[O]ur position is that the ten years was suspended upon the service of five years and that Mr. Day has actually served that five years and, therefore, satisfied that sentence." Tr. 6, l. 19 – 7, l. 1.

Defense counsel distinguished State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010), from Appellant's case. He argued, "[T]he Picklesimer case was ten years suspended to five years and five years probation. And we think there's a factual distinction in this case in that there was not a probationary term to be served after the five years." Tr. 9, ll. 6-10.

Defense counsel acknowledged that the Department of Probation, Parole, and Pardon Services was relying on the following language found in Picklesimer to support its position that Appellant had not satisfied his sentence and was still subject to community

---

[2] Appellant has since had a fourth community supervision violation hearing. This hearing was held in Lexington County on January 31, 2014 before the Honorable Donald B. Hocker. In an order filed February 7, 2014, Judge Hocker likewise ruled Appellant had not satisfied his sentence and is still required to participate in the community supervision program. Judge Hocker also found Appellant in violation of his community supervision and sentenced him to another one year in prison. Appellant has also appealed this ruling. R * (notice of appeal and order).

supervision: "We now definitely state that the 'original sentence,' as referenced in section 24-21-560(D), includes both the suspended and unsuspended portions of a circuit court's sentence; it is, in fact, the total sentence handed down by the court." Tr. 10, l. 23 – 11, l. 5; See Picklesimer, 388 S.C. at 268, 695 S.E.2d at 848.

However, defense counsel argued, "the statute actually says that the original term of incarceration does not include any portion of the suspended sentence." Tr. 12, ll. 3-5. Therefore, defense counsel maintained Appellant was not required under the statute to serve the suspended portion of his sentence and had satisfied his sentence by serving the five year unsuspended portion day for day. Consequently, Appellant could not be continued on community supervision or be re-incarcerated for any alleged violations.

Judge Dennis denied Appellant's motion. He said, "I could revoke him [Appellant] in one-year increments up to the amount of his actual sentence, the sentence that was imposed, which, in that case, in taking what you said, he's served five, but in Judge Goode's mind for the community supervision, he still would have the balance of that and the five that he hadn't served because he could serve him up to ten because that was the sentence." Tr. 7, l. 18 – 8, l. 1. However, Judge Dennis later admitted, "I don't know what [Judge Goode] knew" and it was "presumptuous of me" to assume what Judge Goode intended. Tr. 9, ll. 17-22.

Additionally, Judge Dennis noted, "They [the appellate courts] may change this law, but they'll have to do it there because right now it makes perfect sense to me based on just my knowledge of what I've done over the years." Tr. 13, ll. 12-13.

The court ultimately continued Appellant on community supervision and added the condition that he attend substance abuse counseling. Tr. 19, l. 16 – 20, l. 1; R. * (continuation order).

Discussion

Judge Dennis erred by continuing Appellant on community supervision and by ruling that Appellant had not satisfied the original sentence imposed by Judge Goode on October 29, 2007 since Appellant had already served the five year unsuspended portion of his sentence day for day and was **not sentenced to probation**. Judge Dennis' ruling was erroneous because once Appellant served the five year unsuspended portion of his sentence, the suspended portion of his sentence was discharged, leaving no additional revocable time to serve on community supervision violations. Furthermore, under the plain language of § 24-21-560(D), Appellant is not required to serve the suspended portion of his sentence.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Id. (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992)) (internal quotation marks omitted). Additionally, "[p]enal statutes are strictly construed against the State and in favor of the defendant." State v. Morgan, 352 S.C. 359, 365, 574 S.E.2d 203 (Ct. App. 2002) (citing State v. Fowler, 322 S.C. 157, 470 S.E.2d 393 (Ct. App. 1996)).

Section 24-21-560(D) reads in relevant part:

> The maximum aggregate amount of time a prisoner may be required to serve when sentenced for successive revocations may not exceed an amount of time equal to the length of incarceration imposed limited by the amount of time remaining on the original "no parole offense." The prisoner must not be incarcerated for a period longer than the original sentence. **The original term of incarceration does not include any portion of a suspended sentence.**

(emphasis added).

As defense counsel argued below, the emphasized language above clearly states that a defendant may not be incarcerated on successive community supervision revocations for a period longer than the original sentence and the original sentence "**does not include any portion of a suspended sentence.**" Therefore, Appellant's original sentence under the statute was the unsuspended five years, which Appellant had already served day for day during his original period of incarceration and his two previous revocations. Because Appellant had satisfied the sentenced imposed by Judge Goode, he could not be continued on community supervision nor could he be re-incarcerated for any alleged violations of community supervision.

As seen, defense counsel distinguished this case from State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845. In Picklesimer, our Supreme Court held "that the 'original sentence' as referenced in § 24-21-560(D), includes both the suspended and unsuspended portions of the circuit court's sentence . . ." 388 S.C. at 268, 695 S.E.2d at 848. However, Picklesimer dealt with a situation where the defendant was sentenced to ten years imprisonment suspended upon the service of five years imprisonment **and five years probation**. Appellant, on the other hand, was not sentenced to serve a probationary term after he served the five year unsuspended sentence. Because of this distinction, the specific holding in

Picklesimer does not apply in this case and defense counsel's argument that Appellant had satisfied the sentenced imposed by Judge Goode by serving the entire five year unsuspended portion of his sentence was correct. Again, once Appellant served the five year unsuspended portion of his sentence, the suspended portion of his sentence was discharged, leaving no additional revocable time to serve on community supervision violations.

Despite what Judge Dennis maintained below, Judge Goode could not have intended Appellant to serve more than the unsuspended five years in prison since he imposed a sentence of ten years suspended to five years imprisonment **with no probation to follow**. If Judge Goode had intended Appellant to serve more than the five years, he would have imposed a probationary term to follow the five year unsuspended sentence. The remainder of Appellant's five year unsuspended sentence was the sentence he had to serve if he violated his community supervision and Appellant served this remaining time during his two previous revocations.

Our Supreme Court has previously said, "Because the CSP [community supervision program] program is a more stringent program than traditional probation, we believe the Legislature did not intend for this form of supervision to have the effect of increasing an inmate's original sentence for a "no parole offense." State v. McGrier, 378 S.C. 320, 331, 63 S.E.2d 15, 21 (2008) (citing State v. Dawkins, 352 S.C. 162, 167, 573 S.E.2d 783, 785 (2002)). If Appellant had originally served the unsuspended portion of his sentence day for day before being released from prison, the suspended portion of his sentence would have been discharged and he would never have had to serve any additional time beyond the unsuspended five years. Therefore, requiring Appellant to serve the suspended portion of

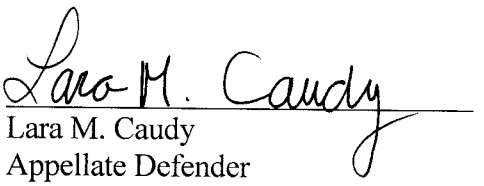
his sentence for successive community supervision violations effectively increases his original sentence. This is not what the Legislature intended. See Id.

Therefore, the court erred by continuing Appellant on community supervision and ruling that Appellant had not satisfied the sentence imposed by Judge Goode on October 29, 2007.

CONCLUSION

By reason of the foregoing argument, the ruling of the circuit court should be reversed.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of June, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRAD ALAN DAY,

APPELLANT

APPELLATE CASE NO. 2013-002558

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment;
(2) Sentencing sheet;
(3) Entire violation hearing transcript dated November 21, 2013;
(4) Continuation order dated November 21, 2013;
(5) February 2014 notice of appeal;
(6) Judge Hocker order filed February 7, 2014.

I certify that this designation contains no matter which is irrelevant to this appeal.

June 2, 2014

Lara M. Caudy

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRAD ALAN DAY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Matthew Buchanan, Esquire, at the South Carolina Department of Probation, Parole & Pardon Services, PO Box 50666, Columbia, SC 29250, this 2nd day of June, 2014.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of June, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.