THE STATE OF SOUTH CAROINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

THE STATE, ...RESPONDENT

v.

BRAD ALAN DAY, ...APPELLANT

FINAL BRIEF OF RESPONDENT

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1. **Has the Court erred in determining that the Appellant has not satisfied his sentence upon his second violation of community supervision, and can continue to have his supervision revoked pursuant to Picklesimer?**

STATEMENT OF THE CASE

The Respondent has no objection to the statement of the case presented by the Appellant.

ARGUMENT

The Court did not err in revoking community supervision since the Appellant had not yet completed his sentence.

The Appellant was convicted of criminal sexual conduct with a minor in the second degree (CSC 2nd w/minor). He was sentenced to a ten (10) year period of incarceration suspended upon the service of five (5) years. (R.p.44-p.46). At the time of his conviction, CSC 2nd w/minor carried a maximum sentence of twenty (20) years which classifies it as a C-Felony.[1] Pursuant to South Carolina law all C-Felonies are "no parole" offenses. The South Carolina Code of Laws specifically state:

> Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, a prisoner convicted of a no parole offense as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, including a prisoner serving time in a local facility pursuant to a designated facility agreement authorized by Section 24-3-20, is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the prisoner has served at least eighty-five percent of the actual term of imprisonment imposed.

S.C. Code Ann. §24-13-150 (Supp. 2013).

Pursuant to South Carolina law the Appellant was required to serve eight-five (85%) percent of his sentence, or forty-two (42) months. Upon release from incarceration the Appellant was required to serve a two year period of community supervision.[2] The Appellant twice violated community supervision requiring him to appear before a Circuit Court Judge. Due to this being his third

[1] For purposes of definition under South Carolina law a no parole offense means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more. S.C. Code Ann. §24-21-100 (Supp. 2001).

[2] Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, any sentence for a no parole offense as defined in Section 24-13-100 must include any term of incarceration and completion of a community supervision program operated by the Department of Probation, Parole and Pardon Services. S.C. Code Ann. §24-21-560 (Supp. 2011).

violation, the Appellant argued that he has completed his sentence; therefore, there exist no additional time that could be subject to a revocation.

The Respondent argues the Appellant is responsible for either successfully completing community supervision, or serving the remaining portion of his original ten (10) year sentence. He continues to be eligible for community supervision, and possibly incarceration upon a violation.

The Appellant was convicted of the offense of CSC 2nd w/minor. He argues that if the sentencing judge wanted him to do ten years he would have received a ten year sentence, or be sentenced to probation. There exist no mandatory minimum for the offense of CSC 2nd w/minor; therefore, if the Court wanted him to serve only five years he would have sentenced him as such. The Appellant received a sentence of ten years suspended to five years incarceration. It could be possible that the Court failed to sentence the Appellant to probation because, a person's probationary sentence is discharged once he has successfully completed community supervision. See, State v. Dawkins, 352 S.C. 162, 573 S.E.2d 783 (2002). The Appellant would either successfully complete community supervision, or his ten year sentence. In either instance he would never be responsible for serving a period of probation. It is unnecessary to sentence a person convicted of a "no parole" offense to a period of probation, because it will never be served.

The Appellant argues that according to State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010), since he was never placed on probation, the five year portion is the only part he is responsible for serving. In Picklesimer, the Appellant was on probation; however, the Picklesimer decision never mentions a mandatory probationary sentence must exist for the aggregate sentence to apply. According to Picklesimer, an original sentence is defined as, the total aggregate suspended and unsuspended portions of a circuit courts sentence. Picklesimer, at 268.

The Appellant received a ten year sentence that was suspended upon the service of five years. (R.p.46).According to Picklesimer his total sentence was ten years, so he is responsible for serving that portion until he either successfully completes community supervision, or the total ten year sentence.

2. The Statute allows the Appellant to remain on community supervision until it is successfully completed or he completes his full original sentence.

The Appellant argues that the language in the statute only allows for revocations up until the completion of the unsuspended five year portion of his sentence. The South Carolina Code of Laws specifically state:

> The maximum aggregate amount of time a prisoner maybe 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 the 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.

S.C. Code Ann. §24-21-560(D)(Supp. 2013).

The Appellant argues that this statute does not allow for the suspended portion to be included within the revocation period, we disagree.

If the Court looks at the entire statute, it states that successive revocations may not exceed an amount of time remaining on the original, "no parole offense." The Appellant's sentence for his no parole offense is ten years. So he cannot receive continuous violations pass the ten year period, because he cannot be incarcerated beyond the amount of his original sentence. In Picklesmier, the Court ruled that the total sentence handed down by the Court includes both the suspended and unsuspended portions of the original sentence. Id., at 268.

The Appellant argues that the original term of incarceration does not include the unsuspended portion of his sentence. The original term of incarceration and the original sentence

are not the same. The statute clearly states that that the term of incarceration cannot go beyond the time remaining on the original sentence. The original term of incarceration, does not include the suspended portion of the sentence. The original period of incarceration or in this case the five year portion, would be excluded from any violation because it has already been served. The statute and Picklesimer state that the length of incarceration is limited by the amount of the time remaining on the original "no parole offense." The total sentence includes the suspended and unsuspended portion, or in this case ten years. So the Appellant had a little over five years remaining on his sentence that was revocable upon his release from incarceration.

The Appellant was originally sentence to a ten year period of incarceration suspended to the service of five years, this makes his total sentence 3, 650 days. According to the Appellant's brief, at the time he appeared before the Court he had served a total of 1, 980 days. Therefore, he had 1, 670 days or about 4½ years remaining on his sentence when he appeared before Judge Dennis. Since he had not completed his original sentence, Judge Dennis was correct in denying the Appellant's motion, and revoking a year upon finding the Appellant in violation. The Respondent will request this Court to affirm the decision of the lower court.

CONCLUSION

The lower Court committed no error in determining that the Appellant violated community supervision, and thereby, revoking one year. Therefore, the Respondent respectfully request this Honorable Court affirm the decision of the lower court.

Respectfully submitted,

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July 22, 2014

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.

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July 22, 2014