ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Brooks P. Goldsmith, Circuit Court Judge

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S.C. Supreme Court

Opinion No. 5266 (S.C. Ct. App. filed 8/20/2014)

08-GS-40-02974

THE STATE,

RESPONDENT,

V.

ANTHONY K. BLAKNEY,

PETITIONER

APPELLATE CASE NO. 2014-002517

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on October 23, 2014.

QUESTION PRESENTED

The Court of Appeals erred by concluding petitioner had not satisfied the terms of his original sentence upon the service of the entire thirty month suspended sentence for first-degree burglary. The state did not object to this sentence, and in fact consented to it. The sentence thus left no additional revocable time for petitioner to serve on the community supervision violation when he was revoked. The sentence did not include a term of probation, and this was the intent of the trial judge.

STATEMENT OF THE CASE

Procedural History

Petitioner was sentenced by the Honorable Michelle Childs to fifteen years imprisonment, suspended upon the service of thirty months for burglary in the first degree on November 6, 2008. Judge Childs pronounced *no* term of probation to be served after the service of the thirty months imprisonment. R. 46.

Petitioner first appeared for a community supervision violation hearing on December 9, 2011 before the Honorable G. Thomas Cooper, Jr. Constantine Pournaras represented petitioner. Benjamin Aplin represented the Department of Probation. Judge Cooper deferred ruling. R 1.

Judge Cooper revoked petitioner's probation at a subsequent hearing held on January 19, 2012. R 27, ll. 13-18. That ruling was the subject of this appeal by petitioner.

Petitioner appeared for another community supervision revocation hearing before Judge Brooks Goldsmith on August 17, 2012. Judge Goldsmith issued an order ruling petitioner had satisfied the terms of his 30 months incarceration, and therefore community supervision. R. 44. That order was the subject of the state's appeal.

The Court of Appeals consolidated both appeals upon the motion of the state, and with the consent of petitioner, and oral argument was heard on June 2, 2014. The majority of the Court of Appeals affirmed in part and reversed in part. See State v. Blakney, 410 S.C. 244, 763 S.E.2d 622 (2004); App 1-14.

The Court majority affirmed Judge Cooper's order that petitioner had not satisfied the terms of his sentence, and his ruling that petitioner could be revoked again for a violation of community supervision. The majority reversed Judge Goldsmith's order wherein he ruled that petitioner had satisfied the terms of his original 30 month prison term, and that could not be incarcerated again for

an alleged violation of community supervision. The majority concluded the 30 months served by petitioner was the "unsuspended portion only. The total sentence for Blakney's burglary conviction was fifteen years. Therefore, the aggregate amount of time Blakney is required to serve in prison or participate in a CSP may not exceed fifteen years." App. 6.

The Chief Judge dissented, noting the state had not objected to the imposition of the suspended thirty-month prison term for first degree burglary -- and indeed consented to it -- at the time it was imposed by Judge Childs in 2008. The Chief Judge reasoned the thirty-month prison term for first degree burglary was improper but noted that the state waived any objection to that sentence by its failure to object and its consent to that sentence at the time it was imposed. The dissent further reasoned that in fairness the state could not now seek to incarcerate petitioner for a violation of community supervision after he had served the sentence the trial court meant for him to serve. App. 10-14.

Petitioner sought rehearing. App. 15-19.. Rehearing was denied. App.20. This petition for a writ of certiorari follows.

ARGUMENT

The Court of Appeals erred by concluding petitioner had not satisfied the terms of his original sentence upon the service of the entire thirty month suspended sentence for first-degree burglary. The state did not object to this sentence, and in fact consented to it. The sentence thus left no additional revocable time for petitioner to serve on the community supervision violation when he was revoked. The sentence did not include a term of probation, and this was the intent of the trial judge.

The state did not object to the trial judge's sentence of thirty months imprisonment with no probation to follow. In fact, as was discussed at length during oral argument before the Court of Appeals, the state not only did not object to the sentence. It knew Judge Childs did not want a statutory provision forbidding the suspension of the fifteen-year sentence. The Court imposed this thirty month prison term with no probation to follow, and the state consented to the sentence as part of plea negotiations.

Petitioner submits the dissent correctly noted that the state was not an aggrieved party in this appeal, and was correct in concluding that it would "hold the State may not argue to a sentencing court that the court has the power to suspend a sentence, and after the court accepts the State's argument and suspends the sentence, turn around and argue, as it does in this appeal, the sentence may not be suspended. " App. 10.

The dissent also took issue with the state's present position that because it was now represented by a different lawyer it could assert inconsistent positions on the propriety of the sentence imposed by Judge Childs. App. 11. "[I] would hold the State to the position it took at the sentencing hearing, and find that Blakney can no longer be incarcerated on community supervision for this crime." App. 13.

The dissent noted that the state abiding by its sentencing recommendations was "a fundamental cornerstone of the administration of justice." App. 13. "While the sentencing court is never required to follow a recommendation, when it does so, the State should not be permitted to later claim what it and the court meant was the defendant must receive a *minimum* of three times what it recommended as the maximum." App. 13. (emphasis of the dissent).

Defense counsel argued that State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010) dealt with a situation where the defendant was sentenced to imprisonment for ten years which was suspended on the service of five years imprisonment *and five years probation*. The argument was, and remains, that Judge Childs must have intended for petitioner to serve no more than 30 months in jail since she imposed a sentence of 15 years suspended on 30 months with no probation to follow. Defense counsel agreed that Judge Childs envisioned that since petitioner would serve 85% of his 30 months in the Department of Corrections and that community supervision would follow. However, if petitioner did not successfully complete his community supervision, the maximum sentence he could serve in prison would be the 15% of 30 months he had remaining. The judge could not have intended that petitioner could serve 15 years imprisonment where she suspended that sentence on the service of 30 months with no probation to follow.

There was discussion in this case that the sentence was "unusual," and about what Judge Childs knew, and what she intended. This Court held in State v. DeAngelis, 257 S.C. 44, 50, 183 S.E.2d 906, 909 (1971) that where there was a question of whether the judge meant to have a sentence served concurrently or consecutive -- meaning the amount of time the judge intended the defendant to serve -- "the intent of the judge is controlling."

In Picklesimer, a probation added case, this Court held that the "original sentence" as referenced in § 24-21-560(D), included both the suspended and unsuspended portions of the circuit

court's sentence. This Court stated it is "the total sentence handed down by the court." State v. Picklesimer, 388 S.C. at 268, 695 S.E.2d at 848 This Court in Picklesimer wrote:

> We now hold "successful completion" of CSP connotes the completion of a maximum of two continuous years of CSP, as mandated by section 24-21-560(B), without any violations or revocations, **or** a determination by the Department that a defendant has fulfilled his CSP responsibilities prior to two years' service in the program.

State v. Picklesimer, 388 S.C. at 270, 695 S.E.2d at 848 (2010). (emphasis added)

Here, Judge Goldsmith correctly found that petitioner Blakney satisfied the terms of his original sentence upon the service of 30 months during the second revocation: "[U]pon which the suspended portion of his sentence was discharged, leaving no additional revocable time to serve on community supervision violations. Having served the maximum revocable time allowed under his original sentence, Blakney can no longer be supervised by the Department of Probation, Parole, and Pardon Services . . ." The Court therefore found it unnecessary to address the current violations. R. 44-45.

Judge Goldsmith distinguished Picklesimer since petitioner was not sentenced here to a suspended sentence with a term of probation to follow. App. 45. The majority here reversed Judge Goldsmith's ruling, holding that petitioner's sentencing exposure was fifteen years. Responding to the dissent's call that fundamental fairness dictated petitioner get the benefit of his plea bargain had in 2008, the majority wrote that the fact Judge Childs had suspended petitioner's sentence was "the law of the case" and it held the Court did not have the power to correct it where the **defendant** did not previously challenge it in a motion to reconsider, on direct appeal, or as a defense in a probation revocation hearing. App. 8-9.

Here, of course, petitioner pled guilty because of the plea negotiations that resulted in his thirty-month sentence with no probation to follow, and it would have been absurd for him to move to reconsider or appeal that sentence as improper.

The dissent agreed with Judge Goldsmith, and found that Picklesimer did control this case because it did not involve a suspended sentence with probation. However, the dissent argued that the suspended sentence in this case was improper because the trial judge did not have the authority to impose a suspended sentence where it was prohibited by statute. App. 10-12.

The dissent emphasized that it was not criticizing the solicitor for recommending this 30 months sentence in 2008 "when many lawyers and circuit judges interpreted section 16-11-311 to permit suspending the minimum sentence. " In the final analysis, the dissent concluded that petitioner should not be the person to suffer the consequences of the state's current position that his 2008 plea bargain should not be honored. App. 13.

Judge Childs sentenced petitioner to fifteen years incarceration, suspended upon the service of thirty months, with no probation to follow. Petitioner maintained and continues to assert that the thirty months was petitioner's sentence that he had to serve if he violated community supervision, and he served those thirty months in jail.

Judge Childs imposed the fifteen year sentence because that was the minimum sentence. However, she suspended that sentence upon 30 months imprisonment. That did not mean that petitioner could violate his community supervision with impunity. It only meant that the maximum sentence he could serve was 30 months, just the same as if the judge had sentenced him to 30 months in prison for another crime without a mandatory minimum, with no probation ordered to follow. Thus, Judge Goldsmith correctly ruled petitioner could no longer be incarcerated after he served 30 months in prison. The majority erred by holding otherwise.

This Court held in State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011), that despite the fact that judges were imposing suspended sentences for burglary in the first degree, and that the state was not appealing those sentences, that a judge could not suspend a sentence imposed for the crime of first degree burglary. That is not the issue in this case. The issue is whether petitioner's plea bargain in 2008 wherein he received a fifteen-year sentence, suspended upon 30 months with no probation should be honored where petitioner has served his 30 months in prison, and that was the intent of the trial judge.

"Once a sentence has been served, even if it is an illegal sentence or an invalid sentence, the trial court loses jurisdiction and violates the Double Jeopardy Clause by reasserting jurisdiction and resentencing the defendant to an increased sentence." Tucker v. State, 78 So.3d 36, 38 (Fla. 3rd DCA. 2012), *citing* Maybin v. State, 884 So.2d 1174, 1175 (Fla. 2d DCA 2004).

This is an important case warranting this Court granting certiorari because it involves the state not honoring its plea negotiations, and later challenging them as illegal when that later became a convenient argument for the Department of Probation, Parole, and Pardon Services when Judge Goldsmith upheld the intent of Judge Childs in imposing this sentence. That is an issue, and this case also involves a dissent in the Court of Appeals. See Rule 242 (b)(1) &(2), SCACR.

Finality in guilty pleas is important for our criminal justice system to operate efficiently and fairly to all involved. "[D]ouble jeopardy is offended when altered sentence is more onerous and 'disrupts the defendant's legitimate expectations of finality.'" Hagley v. State, 140 So.3d 678, 679 (Fla. 5th DCA 2014) *citing* Dunbar v. State, 89 So.3d 901, 905 Fla. 2012). The dissent correctly found that petitioner and not the state was the aggrieved party in this case since all petitioner was seeking is that he not be incarcerated again for community supervision violations beyond the thirty month sentence Judge Childs originally imposed with no probation to follow.

In the final analysis, that state also gains much from honoring its plea negotiations, and a sentence such as the one imposed by Judge Childs in this case was considered advantageous to both sides at the time it was imposed. Since this case involves a fundamental principle of our criminal justice system pertaining to honoring plea bargains, certiorari is respectfully warranted to resolve this matter.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 4th day of December, 2014

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Tommy Evans, Jr., Esquire of the South Carolina Department of Probation, Parole & Pardon Services, P.O. Box 50666, Columbia, SC 29250, and the S.C. Court of Appeals this 26th day of November, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of December, 2014.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021