

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Brooks P. Goldsmith, Circuit Court Judge

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

APPENDIX

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent/Appellant,

v.

Anthony K. Blakney, Appellant/Respondent.

Appellate Case No. 2012-207286

Appellate Case No. 2012-212966

Appeals From Richland County
G. Thomas Cooper Jr., Circuit Court Judge
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 5266
Heard June 2, 2014 – Filed August 20, 2014

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Chief Appellate Defender Robert M. Dudek, of
Columbia, for Appellant/Respondent.

Tommy Evans Jr., South Carolina Department of
Probation, Parole and Pardon Services, of Columbia, for
Respondent/Appellant.

GEATHERS, J.: These consolidated appeals involve two sentencing determinations related to violations of a two-year community supervision program (CSP) administered by Respondent/Appellant, the South Carolina Department of Probation, Parole and Pardon Services (Department). Appellant/Respondent, Anthony K. Blakney, seeks review of the sentence imposed by the circuit court for

his April 2011 CSP violations. The circuit court (hereinafter, "the first CSP judge") revoked Blakney's community supervision, gave him credit for prison time served,¹ and required him to begin a new two-year CSP. Blakney argues he was no longer subject to community supervision because he had satisfied the terms of the original sentence for his first degree burglary conviction, which was fifteen years, suspended on the service of thirty months. Blakney contends once he served an aggregate amount of thirty months in prison for his burglary conviction and subsequent CSP violations, he could no longer be imprisoned for successive CSP revocations or be required to participate in a CSP.

The Department appeals an order issued by the circuit court ("the second CSP judge") after a revocation hearing relating to CSP violations allegedly committed by Blakney in April 2012. The second CSP judge did not consider the alleged violations. Rather, he concluded Blakney had satisfied the terms of his burglary sentence when he completed thirty months of imprisonment and, thus, Blakney was no longer subject to community supervision. We affirm the first CSP judge's ruling, reverse the second CSP judge's order, and remand for a new hearing on the violations allegedly committed by Blakney in April 2012.

FACTS/PROCEDURAL HISTORY

In 2008, Blakney was convicted of first degree burglary, a "no parole offense."² On November 6, 2008, the sentencing judge imposed on Blakney the following sentence:

¹ Blakney was arrested for his April 2011 CSP violations in May 2011, and the first CSP judge sentenced him in January 2012.

² S.C. Code Ann. § 24-13-100 (2007) ("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." (emphasis added)); S.C. Code Ann. § 16-1-10(D) (Supp. 2013) (listing first degree burglary as exempt from classification under subsections (A) and (B) of section 16-1-10); S.C. Code Ann. § 16-11-311(B) (2003) (setting forth the maximum sentence for first degree burglary as life imprisonment). Section 24-21-560(A) of the South Carolina Code (2007) requires an individual convicted of a "no parole offense" to complete a CSP operated by the Department after his release from prison.

[T]he Defendant is committed to the . . . **State Department of Corrections** . . . for a determinate term of 15 . . . years . . . and/or to pay a fine of \$ _____; provided that upon the service of 30 . . . months . . . and/or payment of \$ _____; plus costs and assessments as applicable[]; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

(emphases in original).³ The Sentence Sheet indicates the sentencing judge gave Blakney credit for time served—Blakney had been in prison since March 23, 2008.

On April 30, 2010, Blakney was released from prison and placed on two years of community supervision.⁴ On November 3, 2010, Blakney was arrested for violating the terms of his CSP. After a revocation hearing on February 25, 2011, the first CSP judge revoked Blakney's community supervision but gave him credit

³ At oral argument in this appeal, counsel for the Department offered a possible explanation for the sentencing judge's failure to impose a term of probation: In *State v. Dawkins*, 352 S.C. 162, 166-67, 573 S.E.2d 783, 785 (2002), our supreme court held that a term of probation runs concurrently with a mandatory CSP term for a sentence deriving from a "no parole offense." Section 24-21-560(E) of the South Carolina Code provides that a defendant who successfully completes a CSP has satisfied his sentence and must be discharged from his sentence. Therefore, a defendant's completion of his CSP term discharges any residual probation, *Dawkins*, 352 S.C. at 167, 573 S.E.2d at 785, and, thus, circuit judges may have found it futile to add a term of probation to sentences for no parole offenses.

⁴ A CSP may last up to two continuous years. S.C. Code Ann. § 24-21-560(B). Further, section 24-13-150(A) (2007) requires the individual to serve "at least eighty-five percent of the actual term of imprisonment imposed" in order to be eligible for a CSP. The statute also states: "This percentage . . . is to be applied to the actual term of imprisonment imposed, not including any portion of the sentence [that] has been suspended." Here, the Department of Corrections apparently determined that Blakney had served eighty-five percent of the unsuspended portion of his sentence, i.e., eighty-five percent of thirty months.

for time served, which was three months and fifteen days, and released him. At this point, Blakney began a new two-year CSP.⁵

On May 13, 2011, Blakney was arrested for additional CSP violations. On December 9, 2011, the first CSP judge conducted another revocation hearing. At this hearing, counsel for Blakney argued that Blakney should not be sanctioned for CSP violations because he had already completed the unsuspended portion of his sentence, i.e., thirty months of imprisonment. In response, the Department argued that, under *State v. Picklesimer*,⁶ the limit for the aggregate amount of service upon successive CSP revocations is the term of the original sentence, i.e., in Blakney's case, the full fifteen years. Counsel for Blakney asserted that this case is distinguishable from *Picklesimer* because the sentencing judge had not imposed a term of probation as part of Blakney's sentence.

The first CSP judge took the issue under advisement. After a hearing on January 19, 2012, the first CSP judge revoked Blakney's community supervision, gave him credit for time served, and released him to begin a new two-year CSP. Blakney's appeal followed.

On April 27, 2012, Blakney was arrested once again for CSP violations. After conducting a revocation hearing on August 17, 2012, the second CSP judge issued an order finding Blakney had satisfied the terms of the original sentence for his burglary conviction and was no longer subject to community supervision.⁷ The Department's appeal followed. Although the second CSP judge's order effectively nullified the first CSP judge's ruling requiring Blakney to begin a new CSP, Blakney did not withdraw his appeal of the first CSP judge's ruling. After the Department appealed the second CSP judge's order, its appeal was consolidated with Blakney's appeal.

⁵ Once an individual's community supervision is revoked, he must begin the required CSP term anew. See S.C. Code Ann. § 24-21-560(D) (Supp. 2013) ("If a prisoner's community supervision is revoked . . . and the court imposes a period of incarceration for the revocation, the prisoner also must complete a community supervision program of up to two years as determined by the department pursuant to subsection (B) when he is released from incarceration.").

⁶ 388 S.C. 264, 268-69, 695 S.E.2d 845, 848 (2010).

⁷ During the revocation hearing, the second CSP judge indicated there was no need to place Blakney's CSP violations on the record because "he shouldn't be here."

ISSUE ON APPEAL

Has Blakney satisfied the terms of his original sentence such that he is no longer subject to community supervision?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.*

LAW/ANALYSIS

Section 24-21-560(D) of the South Carolina Code states, in pertinent part:

If a prisoner's community supervision is revoked by the court and the court imposes a period of incarceration for the revocation, *the prisoner also must complete a community supervision program of up to two years as determined by the department pursuant to subsection (B)* when he is released from incarceration.

A prisoner who is sentenced for successive revocations of the community supervision program may be required to serve terms of incarceration for successive revocations, as provided in Section 24-21-560(C), and may be required to serve additional periods of community supervision for successive revocations, as provided in Section 24-21-560(D). *The maximum aggregate amount of time a prisoner may be required to serve when sentenced for successive [CSP] 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.

(emphases added).

In *State v. McGrier*, 378 S.C. 320, 331, 663 S.E.2d 15, 21 (2008), our supreme court held that revocations for successive CSP violations "should not extend or exceed the term of incarceration that was originally ordered for the underlying offense." The court explained that section 24-21-560(D) limits "the total amount of time an inmate could be incarcerated after a CSP revocation to . . . the length of the remaining balance of the sentence for the 'no parole offense.'" *Id.* at 332, 663 S.E.2d at 21.

Subsequently, in *Picklesimer*, our supreme court applied section 24-21-560(D) to a ten-year sentence that had been suspended on the service of five years' imprisonment and five years' probation. 388 S.C. at 265, 695 S.E.2d at 846. The court held the "original sentence," as referenced in section 24-21-560(D), included "both the suspended and unsuspended portions of a circuit court's sentence." *Id.* at 268, 695 S.E.2d at 848. The court explained "it is, in fact, the total sentence handed down by the court." *Id.*

Here, the thirty months served by Blakney 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. *See id.* at 270, 695 S.E.2d at 848-49 ("[U]nder no circumstances shall a defendant be incarcerated, or forced to participate in mandatory CSP or residual probation, stemming from the same conviction, outside of the time given by the trial judge in the original sentence[.]"). In other words, to satisfy his burglary sentence, Blakney must either *successfully complete* a CSP or continue in a CSP due to violation revocations until the end of the fifteen-year sentence.⁸ *See* S.C. Code Ann. § 24-21-560(E) ("A prisoner who successfully

⁸ In determining the date that the defendant's original sentence expired, the *Picklesimer* court gave credit to the defendant for not only the time he served in prison but also the time he participated in a CSP. *See Picklesimer*, 388 S.C. at 268 n.3, 695 S.E.2d at 848 n.3 ("[O]ur holding sets only an outside time limit on a defendant's aggregate amount of incarceration and/or CSP participation."); *id.* at 265 n.1, 695 S.E.2d at 846 n.1 (noting the defendant's original ten-year sentence had begun on June 1, 2000); *id.* at 269 n.4, 695 S.E.2d at 848 n.4 (recognizing that the term of the defendant's original sentence had expired on June 1, 2010); *id.* at 270, 695 S.E.2d at 849 (explaining that the defendant would be eligible for incarceration due to CSP revocations "until the outside time limit of his original sentence, June 1, 2010, or until he successfully completed his CSP").

completes a community supervision program pursuant to this section has satisfied his sentence and must be discharged from his sentence."); *Picklesimer*, 388 S.C. at 270, 695 S.E.2d at 848 ("'[S]uccessful 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."); *id.* at 271, 695 S.E.2d at 849 ("[A] defendant will either successfully complete his CSP, or continue in CSP due to violation revocations until the end of the original sentence, at which time the sentence will have been fulfilled.").

The second CSP judge found Blakney's circumstances were distinguishable from the circumstances in *Picklesimer*. The second CSP judge reasoned that, unlike the sentence imposed in *Picklesimer*, Blakney's sentence for his burglary conviction did not include a term of probation. However, the existence of a term of probation for the prisoner in *Picklesimer* did not make its holding any less applicable to CSP revocations that do not involve a term of probation. The identification of the "original sentence" employs the same uncomplicated analysis in both situations. We read *Picklesimer's* interpretation of section 24-21-560(D) as applying to all CSP revocations, whether or not the individual subject to a CSP is also subject to a term of regular probation.

The dissent expresses concern over the fact that Blakney's original fifteen-year sentence was erroneously suspended.⁹ However, this erroneous suspension does

⁹ See S.C. Code Ann. § 24-21-410 (2007) ("After conviction or plea for any offense, *except a crime punishable by death or life imprisonment*, the judge of a court of record with criminal jurisdiction at the time of sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation." (emphasis added)); S.C. Code Ann. § 16-11-311(B) ("Burglary in the first degree is a felony *punishable by life imprisonment*. For purposes of this section, "life" means until death. The court, in its discretion, may sentence the defendant to a term of *not less than fifteen years*." (emphases added)); *State v. Jacobs*, 393 S.C. 584, 589, 713 S.E.2d 621, 624 (2011) ("We find that section 24-21-410 of the South Carolina [C]ode does not give courts the authority to suspend sentences for crimes punishable by death or life imprisonment, and this includes crimes that include lesser sentences than death or life imprisonment.").

not affect our application of section 24-21-560(D), as interpreted in *McGrier* and *Picklesimer*, to the present case. See *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). First, the suspension of Blakney's sentence is the law of the case, as the State has never sought to correct this error. Cf. *State v. Lee*, 350 S.C. 125, 132-33, 564 S.E.2d 372, 376 (Ct. App. 2002) (holding, in a probation revocation case, that any lack of authority on the part of the sentencing judge to impose a particular sentence on the underlying conviction did not affect the circuit court's subject matter jurisdiction to later proceed with the revocation because the defendant did not challenge the underlying sentence in a motion to reconsider, on direct appeal, or as a defense to the probation revocation proceedings, and, therefore, the underlying sentence was the law of the case). Accordingly, this court does not have the authority to correct the error, and, notwithstanding the dissent's statement to the contrary, it is necessary to reference *Picklesimer's* definition of "original sentence" in applying section 24-21-560(D) to the present case. See *Commander Health Care Facilities, Inc. v. S.C. Dep't of Health & Envtl. Control*, 370 S.C. 296, 303, 634 S.E.2d 664, 667 (Ct. App. 2006) (indicating that an issue that is procedurally barred should not be raised sua sponte by an appellate court (citing *State v. Cutro*, 332 S.C. 100, 107, 504 S.E.2d 324, 327 (1998) (Toal, J., dissenting))); see also *Lewis v. Local 382*, 335 S.C. 562, 569 n.11, 518 S.E.2d 583, 586 n.11 (1999) ("This Court will not generally raise issues sua sponte."); *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 424 (1999) (concluding that a defendant's challenge to the trial court's sentencing authority did not involve a question of subject matter jurisdiction, and, thus, it could not be raised for the first time on appeal); *Smith v. Phillips*, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) (concluding that this court erred in sua sponte raising an issue concerning the propriety of a jury verdict in a nuisance claim finding liability but no damages).

Further, even if (1) Blakney's sentence had not been suspended, or (2) the suspension of his sentence were allowed by our criminal statutes, fifteen years would still serve as the limit on the aggregate amount of time Blakney may be required to serve in prison or participate in a CSP. See *Picklesimer*, 388 S.C. at 268, 695 S.E.2d at 848 (holding that the term "original sentence," as referenced in section 24-21-560(D), is the total sentence handed down by the court); *id.* at 268-69, 695 S.E.2d at 848 (stating that to interpret "original sentence" as only the unsuspended portion "would be to virtually eliminate the suspended portion of any sentence"); *McGrier*, 378 S.C. at 322, 663 S.E.2d at 16 (applying section 24-21-560(D) to a sentence that had not been suspended). Therefore, while the State, currently represented by the Department, is barred from arguing that Blakney's fifteen-year sentence was improperly suspended (*see supra; infra dissent*), it is not

barred from taking the position that, *in any event*, for purposes of section 24-21-560(D), as interpreted in *McGrier* and *Picklesimer*, the original sentence was fifteen years. In the Department's appellate brief, it took both of these positions.

As to the dissent's statement that the State should honor the representations the Solicitor made to Blakney in plea negotiations, it is not for this court in this case to speculate on the actual representations made by the Solicitor to Blakney, who was represented by counsel when he signed the Sentence Sheet. Further, we disagree with the dissent's suggestion that Blakney should receive special treatment because when he pled guilty he may not have been aware of the aggregate amount of time he could be required to serve in prison or participate in a CSP after successive CSP revocations. *See McGrier*, 378 S.C. at 331, 663 S.E.2d at 21 (stating that community supervision is a collateral consequence of a conviction for a "no-parole offense" and citing *Jackson v. State*, 349 S.C. 62, 64, 562 S.E.2d 475, 475 (2002)); *Jackson*, 349 S.C. at 63-64, 562 S.E.2d at 475-76 (rejecting a post-conviction relief applicant's argument that his guilty plea was involuntary because his trial counsel failed to inform him about mandatory participation in a CSP in advising him whether to plead guilty); *id.* at 64, 562 S.E.2d at 476 (holding that counsel was not ineffective for failing to inform his client about mandatory CSP participation in advising him whether to plead guilty because participation in a CSP is a collateral consequence of sentencing).

Finally, the dissent suggests that if the court interprets Blakney's original sentence as being fifteen years, he will have to serve eighty-five percent of fifteen years in prison. This is not the case. Section 24-13-150(A) requires a "no parole" inmate to serve "at least eighty-five percent of the actual term of imprisonment imposed" in order to be eligible for community supervision. The statute further states: "This percentage . . . is to be applied to the actual term of imprisonment imposed, not including any portion of the sentence [that] has been suspended." Here, Blakney's fifteen-year sentence was suspended upon the service of thirty months, which is the law of the case (*see supra*). Therefore, section 24-13-150(A) does not require Blakney to go back and serve eighty-five percent of the full fifteen years before he is eligible to participate in a CSP. In any event, the *maximum* time Blakney may be required to serve in prison or participate in a CSP is the term of his original sentence, fifteen years. Of course, Blakney can make all of this go away by simply complying with the terms of his CSP for no more than *two* years. *See* S.C. Code Ann. § 24-21-560(E) ("A prisoner who successfully completes a community supervision program pursuant to this section has satisfied his sentence and must be discharged from his sentence.").

Based on the foregoing, we affirm the first CSP judge's ruling, reverse the second CSP judge's order, and remand for a new hearing on the violations allegedly committed by Blakney in April 2012.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT, J., concurs.

FEW, C.J., dissenting: The State and Blakney requested, and the trial court imposed, a sentence we now know was impermissible under law. *See State v. Jacobs*, 393 S.C. 584, 588-89, 713 S.E.2d 621, 623-24 (2011) (holding a sentencing court has no power to suspend the minimum fifteen year sentence for burglary in the first degree because it carries a maximum sentence of life in prison). The law does not provide this court a clear resolution for the dispute that has arisen as to the execution of that sentence. The majority has thoroughly explained its proposed resolution, and I agree with the majority's interpretation of the sentencing statutes. However, I would not resolve this appeal by interpreting the sentencing statutes. Instead, I 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 has done in this appeal, the sentence may not be suspended. I would hold the State is estopped from taking the position it takes on appeal because it took precisely the opposite position when it asked the sentencing court to suspend the minimum of fifteen years. *See Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 597, 748 S.E.2d 781, 788 (2013) ("Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with . . . one the litigant has previously asserted in the same or related proceeding." (citation omitted)). I would affirm the second CSP judge's order, and find it unnecessary to rule on the appeal from the first CSP judge's order. I respectfully dissent.

Blakney pled guilty on November 6, 2008. At the sentencing hearing, the State recommended Blakney receive a sentence of no more than five years. In doing so, the State asked the sentencing court to suspend the minimum sentence of fifteen years.¹⁰ *See* S.C. Code Ann. § 16-11-311(B) (2003) ("Burglary in the first degree

¹⁰ Interestingly, fourteen months later, the same Solicitor's office that prosecuted Blakney took the opposite position at the plea hearing in *Jacobs*. *See* 393 S.C. at 586, 713 S.E.2d at 622 ("In January 2010, . . . [t]he circuit judge deferred sentencing . . . and requested the parties submit memoranda in

is a felony punishable by . . . a term of not less than fifteen years.""). In its appellate brief, the State wrote:

The [State] argues that [Blakney] was not given a thirty month sentence but a fifteen year sentence. For a person to be sentenced to burglary 1st you cannot receive less than fifteen years. The court is obligated to impose the sentence established by the General Assembly. It is clear by the statute the General Assembly did not wish a criminal defendant to receive a sentence less than fifteen years for the offense of burglary 1st.

At oral argument, the State clarified its position on four separate occasions:

I think the sentence is illegal, your honor.

With all due respect, the sentence is fifteen years.

He would have to serve the eighty-five percent of fifteen years.

I'm taking the position the sentence is fifteen years.

The State is represented on appeal by the general counsel for the Department of Probation, Parole, and Pardon Services, who attempts to escape the inconsistency in the State's positions by arguing the State was represented by a different lawyer—the Solicitor—at the plea hearing. The argument fails. The State's lawyer told the sentencing court it had the power to suspend the minimum sentence, and now the State's lawyer tells this court there is no such power. I would hold the State is bound to accept the sentence it asked for.

support of their positions regarding the suspension issue.""). The Solicitor in *Jacobs* filed a memorandum arguing, "The State respectfully submits that it is not within the power of a judge to suspend a burglary first[-]degree sentence and that doing so is contrary to the laws of the State of South Carolina." Similarly, the Attorney General argued in its brief on appeal in *Jacobs*, "The trial judge properly determined Appellant's sentence for burglary in the first degree . . . cannot be suspended under the plain and unambiguous language of S.C. Code Ann. § 24-21-410."

Apart from the State's inconsistent positions, I would concur in the result reached by the majority. However, I do not agree that *State v. Picklesimer*, 388 S.C. 264, 695 S.E.2d 845 (2010), applies to this case. In *Picklesimer*, the plea court sentenced the defendant to ten years in prison for criminal sexual conduct with a minor in the second degree, and then suspended the sentence to five years. 388 S.C. at 265, 695 S.E.2d at 846. Section 24-21-410 of the South Carolina Code (Supp. 2013) provides the sentencing court the power to suspend sentences when the crime is not "punishable by death or life imprisonment." *See also State v. Thomas*, 372 S.C. 466, 468, 642 S.E.2d 724, 725 (2007) (explaining the power conferred upon the sentencing court under section 24-21-410 "does not extend to offenses where the legislature has specifically mandated that no part of a sentence may be suspended"). Thus, the suspended sentence in *Picklesimer* was proper because the crime did not carry life in prison and the applicable statute did not prohibit a suspended sentence. *See S.C. Code Ann. § 16-3-655(D)(3)* (Supp. 2013) ("A person convicted of [criminal sexual conduct with a minor in the second degree] . . . must be imprisoned for not more than twenty years in the discretion of the court.").

In *Blakney's* case, however, the suspended sentence was not proper because the plea court had no power to suspend the sentence. *See Jacobs*, 393 S.C. at 588-89, 713 S.E.2d at 623-24. In my opinion, the suspension of a sentence is not effective when the law forbids the suspension. *See generally Talley v. State*, 371 S.C. 535, 546 n.6, 640 S.E.2d 878, 883 n.6 (2007) (Pleicones, J., dissenting) (stating "if in fact the original sentence were unlawful" because a magistrate court had no power to impose probation, "then the suspension would be a nullity and Respondent would be required to serve the original . . . sentence.").¹¹ Therefore, despite the language on the sentencing sheet purporting to suspend the sentence, the sentence given was fifteen years, no portion of which was suspended. Because there was no

¹¹ The *Talley* majority did not reach the point Justice Pleicones addressed in this statement because it was able to resolve the Sixth Amendment right to counsel issue before it by interpreting a *completely suspended* sentence as leaving "absolutely no possibility the defendant will ever be incarcerated for the underlying conviction." 371 S.C. at 545, 640 S.E.2d at 883. Moreover, the magistrate court in *Talley* had the power to suspend the sentence, but the sentence was unlawful because the magistrate court had no authority to impose probation. 371 S.C. at 544, 640 S.E.2d at 882. Our supreme court has not held that a trial court's *partial* suspension of a sentence is effective even when the court has no power to suspend the sentence.

suspended sentence, it is unnecessary for this court to consider the effect of *Picklesimer*.

My conclusion that Blakney received a fifteen year sentence with no suspension raises a concern as to whether he entered a voluntary plea. The majority's holding that he must serve all fifteen years before he is no longer subject to revocation of his community supervision raises the same concern. The State recommended the plea court sentence Blakney to a maximum of five years in prison. Under *Jacobs* and section 24-21-410, Blakney faced a minimum of fifteen years. The plea court could not have given Blakney correct information about the sentence he faced if the court believed it could suspend his sentence to five years. However, this concern must be addressed in a post-conviction relief (PCR) action. See *Roscoe v. State*, 345 S.C. 16, 21, 546 S.E.2d 417, 419 (2001) (requiring a PCR applicant to demonstrate that but for the erroneous statement from the plea court about the penalty he faced, he would have gone to trial); *Dover v. State*, 304 S.C. 433, 435, 405 S.E.2d 391, 392 (1991) (finding a guilty plea involuntary in part because the defendant did not understand the sentence he faced).

I do not intend to suggest the State did anything improper in arguing to the sentencing court it had the power to suspend a minimum sentence for burglary in the first degree. In fairness to the Solicitor, the 2008 plea occurred when many lawyers and circuit judges interpreted section 16-11-311 to permit suspending the minimum sentence. It was not until 2011 when the supreme court decided *Jacobs* that it became clear the minimum could not be suspended. In fairness to the general counsel for the Department, he is correct under *Jacobs*—Blakney did receive a fifteen year sentence. In fairness to Blakney, however, he should get what was promised—a sentence of no more than five years.

The fact the State did not seek to correct the trial court's error is of no consequence. The State is not aggrieved by the error—Blakney is. In fact, the State now embraces the error and seeks to benefit from it by claiming Blakney's sentence is fifteen years. The issue before us, however, is not a matter of "correcting" the error. This appeal requires us in the first instance to interpret the sentence. In doing so, 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.

As the majority aptly points out, and as I acknowledge, my proposed resolution of this appeal does not fit perfectly with the situation the parties and the sentencing court created. However, the resolution I propose honors a fundamental cornerstone of the administration of criminal justice: participants in the system—defendants in

particular—are entitled to expect that the State will stand behind its sentencing recommendations. 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. That is precisely what the State has done in this case. The Department of Probation, Parole, and Pardon Services and the Department of Corrections should at least recognize the inconsistency of the positions the State has taken in this case, honor the representations the Solicitor made to Blakney in plea negotiations, and interpret the sentence in such a way that he faces only a one-year revocation if he violates community supervision—not eighty-five percent of fifteen years. *See* S.C. Code Ann. § 24-21-560(C) (2007) (providing "the court may revoke the prisoner's community supervision and impose a sentence of up to one year for violation of the community supervision program").



THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT/APPELLANT,

V.

ANTHONY K. BLAKNEY,

APPELLANT/RESPONDENT

APPELLATE CASE NO. 2012-207286
APPELLATE CASE NO. 2012-212966

Appeals from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 5266

PETITION FOR REHEARING

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SEP 04 2014

SC Court of Appeals

Pursuant to Rule 221(a), SCACR, appellant/respondent (hereinafter "appellant") requests rehearing because the majority of this Court may have overlooked the fact that even if it disagreed with the ruling of Judge Goldsmith, the state should be estopped from arguing the sentencing judge did not have the power to suspend the fifteen year sentence to thirty months with no probation where the state not only did not appeal that sentence, but it agreed with its imposition at the time it was imposed. The majority should respectfully adopt the dissenting opinion of the Chief Judge in this regard. There must be finality in sentencing, and allowing the state to challenge a suspended

sentence it where it agreed to it six years ago was fundamentally unfair. As the dissent wrote, Blakney is the aggrieved party, and not the state. The opinion of the majority sends the message that the state does not have to play by the same procedural rules, and it is not even bound by the positions it takes at the time of a guilty plea. This is respectfully most disturbing.

Appellant also urges that this Court should reconsider its opinion, and find that Judge Goldsmith correctly ruled that respondent satisfied the terms of his original sentence upon the service of the entire thirty months suspended sentence. This left no additional revocable time to serve on community supervision violation, particularly since his sentence did not include a term of probation. Again, this was the intent of the trial judge and the state agreed to it.

Defense counsel correctly 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 dissent also wrote that Picklesimer had no application to this case. However, since the majority did not agree the state was estopped from now challenging the sentence the dissent concluded that "Blakney received a fifteen year sentence with no suspension . . . since the "plea court had no power to suspend the sentence." State v. Anthony K. Blakney, Op. No. 5266, Shearouse's Adv. Sh. #33 at 154. The majority counters yet agrees with the dissent, finding the state is not estopped, that Blakney faces 15 years in prison. State v. Anthony K. Blakney, Op. No. 5266, Shearouse's Adv. Sh. #33 at 150. This, of course, ignores the fact that the judge intended for Blakney to serve a 30 month sentence (as a worst case scenario) for his crime, and the solicitor knew this sentence was the law of the case unless he appealed it. Yet, as the majority opinion stands today that unappealed sentence is not the law of the case.

Here, Judge Childs *had to intend* for appellant 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 respondent would serve 85% of his 30 months in the Department of Corrections and that community supervision would follow. However, if appellant 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 appellant could serve 15 years imprisonment where she suspended that sentence on the service of 30 months with no probation to follow. The ship has -- rather, it should have -- sailed on the propriety of the suspended 30 month sentence since the state agreed to it, and did not appeal.

The 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."

Appellant asks that this Court to reconsider its holding, and hold that Judge Goldsmith correctly found that Blakney satisfied the terms of his original sentence upon the service of thirty 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 [30 months] allowed under his original sentence, Blakney can no longer be supervised by the Department of Probation, Parole, and Pardon Services . . ." R. 45.

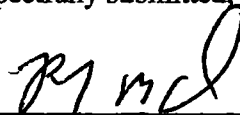
This dissent does not fault the state for agreeing to the suspended sentence in this case because there was evidence it was not uncommon in certain counties at the time. Appellant obviously does not have any problem with that statement but as the dissent also noted appellant is

now the aggrieved party. That is true because the state refuses to accept the fact that appellant has served his **full sentence** of thirty months imprisonment as envisioned by the **judge, the state, and appellant**, and yet the state seeks to re-incarcerate appellant many years later based on a **technicality**. As the tension between the majority and the dissent shows in this case: the application of the statutes and case law regarding community supervision is difficult, and the precedents of the Supreme Court in this area bolsters that conclusion.

In the final analysis appellant has served his full sentence of 30 months that Judge Childs imposed, and intended for him to serve as the penalty for his crime. Fundamental fairness dictates that appellant not be re-incarcerated years later where the state agreed to that sentence, and did not appeal it. All of the equities are with an appellant unschooled in the law who accepted a plea offer for a thirty month prison sentence in return for his crime.

Judge Goldsmith correctly found appellant has served his time. The fact that present attorneys for PPP -- years later -- always appeal when they do not agree with a ruling is not of any solace to anyone other than the state which slept on its rights and his now rewarded with an undeserved victory. Perhaps of equal importance the present opinion sends the message that the state enjoys a special status over the average citizen and that it is not bound by its agreements, and does have to appeal when aggrieved given that it is the state. Rehearing should most respectfully be granted.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 4th day of September, 2014.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT/APELLANT,

V.

ANTHONY K. BLAKNEY,

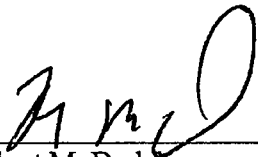
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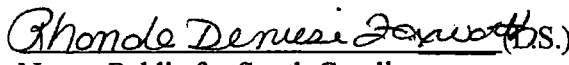
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Tommy Evans, Jr., Esquire, at South Carolina Department of Probation, Parole & Pardon Services, P.O. Box 50666, Columbia, SC 29250, on this 4th day of September, 2014.


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

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


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

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SEP 04 2014

SC Court of Appeals

The South Carolina Court of Appeals

The State, Respondent/Appellant,

v.

Anthony K. Blakney, Appellant/Respondent.

Appellate Case No. 2012-207286

Appellate Case No. 2012-212966

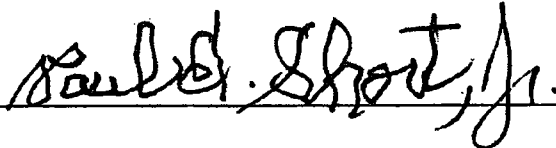
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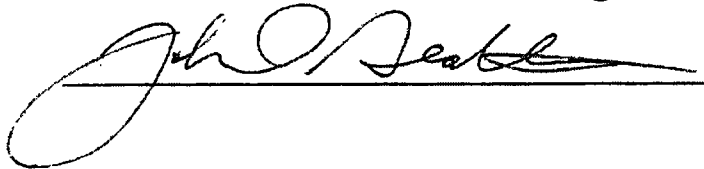
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APPELLATE DEFENSE

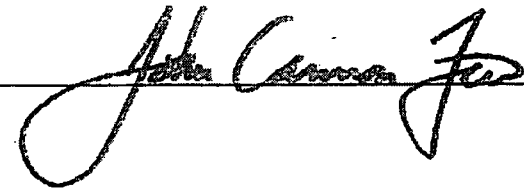
ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ J.


_____ J.

I would grant the petition.


_____ C.J.

Columbia, South Carolina

cc:

Robert Michael Dudek, Esquire

Tommy Evans, Jr., Esquire

FILED

October 23, 2014
VCL

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT/APPELLANT,

V.

ANTHONY K. BLAKNEY,

APPELLANT/RESPONDENT

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)	GENERAL SESSIONS
)	
County of Richland)	2008-GS-40-02974
)	
THE STATE,)	
)	
)	
vs.)	TRANSCRIPT OF RECORD
)	
ANTHONY BLAKNEY,)	
)	
DEFENDANT,)	

December 9, 2011
Columbia, South Carolina

BEFORE:

THE HONORABLE G. THOMAS COOPER, JR., JUDGE.

APPEARANCES:

BENJAMIN APLIN, PROBATION
Attorney for the State

CONSTANTINE POURNARAS, ASSISTANT PUBLIC DEFENDER
Attorney for the Defendant

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 ANTHONY BLAKNEY, after being duly sworn,
2 testified as follows:

3 THE COURT: There is no violation report?

4 PROBATION AGENT: I'm sorry, Your Honor.

5 (Pause).

6 May it please the Court, Your Honor, basically, we're
7 just here, Mr. Aplin is here.

8 Mr. Pournaras had some concerns with the time of the
9 revocation, so we're basically here for that purpose.

10 MR. POURNARAS: We had a matter of law, but depending
11 on your ruling, we will go forward with the violation,
12 Your Honor.

13 THE COURT: All right, sir.

14 Mr. Pournaras, tell me what the issue is. I'm
15 briefly reading. He was convicted on a burglary first
16 charge April 30th of last year?

17 MR. POURNARAS: That's correct, Your Honor.

18 No, no, no. That was when his -- oh, of 2010. I
19 believe that's when he began supervision.

20 THE COURT: Well, then what's his sentencing sheet
21 date?

22 MR. POURNARAS: The sentencing sheet date is...

23 THE COURT: It's down at the bottom.

24 MR. POURNARAS: There we go, November 6th, 2008. I
25 have a copy of that if you'd like.

1 THE COURT: Let me see it.

2 MR. POURNARAS: Yes, Your Honor.

3 THE COURT: Well, all right. So we're 13 years from
4 that date, right?

5 MR. POURNARAS: Our contention is that if the
6 sentence was 15 years on the service of 30, because that
7 was Judge Childs' ruling, she did not --

8 THE COURT: Thirty months.

9 MR. POURNARAS: Thirty months, correct, 30 months.

10 THE COURT: Judge Childs didn't do it in 2008.

11 MR. POURNARAS: Yes, Your Honor.

12 THE COURT: I'm sorry. She did.

13 Wait a minute.

14 (Pause).

15 MR. POURNARAS: With the State's recommendation of a
16 cap of five. The sentence was 30 months -- 15 years
17 suspended upon 30 months active. Judge Childs did not
18 include a probationary period to follow.

19 Probation's position is that the Pickelsimer ruling
20 applies in that he can be revoked for a maximum of the
21 original sentence, which is the balance of the 30 and the
22 15.

23 Our contention is this is a novel issue; that the
24 court when they decided Pickelsimer was considering split
25 sentences with probation to follow on no-parole offenses.

1 Our position is that Mr. Blakney had 15 years
2 suspended simply upon 30 months active. He did serve
3 85 percent of that at the Department of Corrections. He
4 was released --

5 THE COURT: This is a no-parole offense.

6 MR. POURNARAS: Correct. It is a no-parole offense,
7 so statutorily, he was put on community supervision, but
8 our contention is that he has exceeded that 30 months that
9 was ordered by Judge Childs.

10 Again, probation is applying Pickelsimer, but we
11 believe that the court in that case did not consider
12 sentences suspended upon lesser sentences, which I believe
13 is quite common.

14 I'm arguing that the judge charge did not intend a
15 supervisory period past that active sentence.

16 THE COURT: Well, she must have known that because it
17 was a no-parole offense, that it would include community
18 supervision.

19 MR. POURNARAS: Correct, Your Honor.

20 THE COURT: She must have anticipated that.

21 MR. POURNARAS: But the court did not clarify this
22 particular issue about reaching to the original sentence
23 until Pickelsimer, and I still contend that the
24 Pickelsimer court did not consider sentences like these.

25 I believe that 15 years suspended upon --

1 THE COURT: Well, are you saying that in a sentence
2 like this --

3 MR. POURNARAS: Yes, Your Honor.

4 THE COURT: -- community -- community supervision
5 should not apply?

6 MR. POURNARAS: Absolutely it should apply, but the
7 maximum incarceration, I believe in a sentence like this,
8 would be the active sentence that the judge --

9 THE COURT: He has already done the active sentence.

10 MR. POURNARAS: Correct. It's probation's
11 contention --

12 THE COURT: So what -- what is the sanction for a
13 violation of community supervision if he can't be
14 sentenced to anything?

15 MR. POURNARAS: I believe he has. The violation
16 would be that he finish out the active portion of that
17 sentence.

18 THE COURT: Well, he certainly ought to be able to
19 finish out, at a minimum, the balance of the community
20 supervision.

21 MR. POURNARAS: Which he has.

22 THE COURT: The two years?

23 MR. POURNARAS: Yeah, the 30 months. He has finished
24 that. He has been incarcerated in that case.

25 THE COURT: That's not what I meant. You're saying

1 the Department is applying the 30 months to the active
2 sentence?

3 MR. POURNARAS: Well, the Department's position is
4 that -- being that he's on community supervision, the only
5 way he can be off community supervision is either by
6 completing two successful years of supervision --

7 THE COURT: Right.

8 MR. POURNARAS: -- which would then discharge any
9 further obligation or that he have spent a total
10 incarceration of 15 years in order to be relieved from
11 community supervision.

12 My position is that the maximum incarceration for him
13 would be the 30 months because --

14 THE COURT: He's already done it.

15 MR. POURNARAS: -- he has already done it, and I
16 don't believe that Pickelsimer applies --

17 THE COURT: So there is no, no sanction for violation
18 of community supervision.

19 MR. POURNARAS: That's my position.

20 THE COURT: All right. Mr. Aplin?

21 MR. APLIN: Thank you, Your Honor. I'm just going to
22 hand you a copy of Pickelsimer if you'd like to have that
23 just for reference.

24 Not to speak for Mr. Pournaras, but to try to I think
25 clarify my understanding of the distinction he's making,

1 take hypothetically if Judge Childs had given him 15 years
2 suspended to 30 months and five years' probation. Then
3 you would agree Pickelsimer applies. He could be revoked
4 up to the full 15 years.

5 MR. POURNARAS: Absolutely.

6 MR. APLIN: You know, give him credit for the 30
7 months time he had been serving, but because Judge Childs
8 just said, "15 years suspended to 30 months" without
9 anything, any probation to follow --

10 THE COURT: There's nothing.

11 MR. APLIN: -- that it's somehow different.

12 THE COURT: Nothing hanging over his head.

13 MR. APLIN: Right. Whereas, and that's -- their
14 position is that because it was just a suspended sentence,
15 a sentence suspended to a shorter period of incarceration,
16 no probation to follow, that Pickelsimer really doesn't
17 apply to the facts of the case.

18 The Department's position is that Pickelsimer says
19 the original sentence is what matters, and it's the
20 suspended and the unsuspended portion is your starting
21 point, and then you go on the community supervision.

22 Whether there was probation to follow or not, you're
23 still at that same starting point and that you could be
24 revoked up to a total of service time of 15 years, which
25 is the original sentence.

1 THE COURT: Is this his first violation of community
2 service?

3 MR. APLIN: It is not. He actually -- I was looking
4 at the paperwork correctly, and I apologize. I kind of
5 came into this at the last minute.

6 He was revoked in February of this year. He got a
7 six-month revocation. It was in front of you actually, I
8 believe.

9 THE CLERK: No, the other.

10 MR. APLIN: I'm sorry. It's the other.

11 THE CLERK: Other Judge Cooper.

12 MR. APLIN: It's the other Judge Cooper, my
13 apologies.

14 THE COURT: So he's back at his --

15 MR. APLIN: And he came back out again on community
16 supervision after he --

17 THE COURT: He's back to two years?

18 MR. POURNARAS: Back to --

19 MR. APLIN: Another two-year program, right, started
20 over, and that started in April of this year, I believe.

21 So, again, our position is he has now done, I think,
22 over the 30 months that was originally given, but he still
23 has the remainder of that.

24 THE COURT: But he couldn't -- according to
25 Mr. Pournaras, he couldn't have been revoked on community

1 supervision the last time.

2 MR. APLIN: No. I think he agrees he could have been
3 revoked the first time --

4 MR. POURNARAS: Right.

5 MR. APLIN: -- because he did 85 percent of the 30
6 months --

7 THE COURT: All right. Okay.

8 MR. APLIN: Then he came out --

9 THE COURT: And he had 15 percent --

10 MR. APLIN: -- and he had 15 percent left. I believe
11 he agrees that that amount would always be available for
12 revocation.

13 THE COURT: I understand. I understand.

14 MR. POURNARAS: And Mr. Aplin's distinction between
15 our two positions is correct. I just believe that the
16 court, in ruling on Pickelsimer, did not consider these
17 types of sentencing that judges commonly hand down where
18 there is a sentence --

19 THE COURT: No.

20 MR. APLIN: -- arbitrarily suspended on a lesser.

21 THE COURT: Let me correct you. They don't commonly
22 hand down that type of a sentence.

23 MR. POURNARAS: And I apologize if I stand corrected,
24 but in this case, I -- I don't want to speak for Judge
25 Childs, but I believe that 15 for a burglary first is the

1 mandatory minimum, which prior to a recent ruling, judges
2 did suspend that upon a lesser active sentence, sometimes
3 to include supervision, sometimes not.

4 My position is if probation's interpretation is
5 correct, if there is no distinction in a ruling by a
6 judge, if a judge orders probation to follow a no parole
7 or if he does not order probation to follow a no-parole
8 sentence, so long as there is any suspension, probation
9 will treat them as the same.

10 So a ten-year sentence suspended upon two years will
11 be treated exactly the same as a ten-year suspended upon
12 two-year sentence with five probation. They will
13 interpret that in the exact same manner, and that's why I
14 contended judges do rule differently, because they have
15 different intentions.

16 Probation's position, which I believe has not been
17 considered by a higher court yet, would eradicate any
18 distinction between those two sentences.

19 MR. APLIN: And, Your Honor, if I could, just to
20 follow up, and I agree, that is what we're saying. It
21 wouldn't make any difference, but if you take the flip
22 side of the argument, what Mr. Pournaras is arguing is
23 that a sentence of 15 years suspended to 30 months would
24 be treated exactly the same as a straight 30-month
25 sentence.

1 The 15 year -- the suspended portion is to have no
2 effect. He can only do the 30 month active portion, and
3 that would be it.

4 So I think either way you look at it, this is kind of
5 an odd sentence for how are you going to interpret it, but
6 I think that Pickelsimer, when you take the opinion that
7 we do have, would seem to leave the result that you treat
8 them the way the Department is trying to treat these
9 sentences.

10 THE COURT: All right. Interesting question.

11 (Pause).

12 Let me check my calendar. What I'm going to do is
13 take it under advisement. He's in?

14 (There was no response).

15 What is his bond? Does he have a bond?

16 MR. POURNARAS: He has been incarcerated since...

17 THE COURT: May 13th.

18 MR. POURNARAS: Yes, Your Honor. I believe the bond
19 is set at 25,000, I believe.

20 THE COURT: How much? Now, wait a minute. I thought
21 Mr. Aplin told me he was -- he was revoked on these two.
22 Is that when he got his community supervision violation?

23 MR. POURNARAS: This is when he was violated most
24 recently.

25 MR. APLIN: And, Your Honor, he was revoked in

1 February, satisfied that time, got back out in April on
2 the new community supervision program and was arrested in
3 May --

4 THE COURT: Okay.

5 MR. APLIN: -- and has been in jail since May 13th.

6 THE COURT: Okay.

7 MR. POURNARAS: This has been heard once before with
8 Judge Barber, but he wanted to give Mr. Aplin a chance to
9 be here to argue the matter of law.

10 THE COURT: All right. Well, about this point in
11 time, I'm going to revoke his bond, and I'm going to
12 basically continue it for a period of -- until January.

13 MR. POURNARAS: Your Honor, would you -- would you
14 consider him being on supervised release considering that
15 he has already served seven months of what would be
16 essentially a one-year maximum revocation?

17 THE COURT: He had -- well, he had seven months to
18 post his bond, too.

19 MR. POURNARAS: Correct, but he was unable to do
20 that.

21 THE COURT: Well, that's not...

22 I'll set it the 13th.

23 MR. APLIN: January 13th?

24 THE COURT: Yes. The...

25 MR. APLIN: As far as I know, that should be fine,

1 Your Honor.

2 THE COURT: All right. Reset it. I'm going to
3 revoke his bond, continue it until January 13th. It will
4 give me a chance to take a look at it. If you wish to
5 submit any argument, brief, on this matter, please do so.

6 MR. POURNARAS: Thank you, Your Honor.

7 MR. APLIN: Thank you, Your Honor.

8 THE COURT: If you're going to submit any written
9 brief, do it by -- let's say by the 3rd of January.

10 MR. POURNARAS: Thank you, Your Honor.

11 MR. APLIN: Thank you.

12 (Whereupon, the proceedings were concluded.)

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STATE OF SOUTH CAROLINA)	GENERAL SESSIONS
)	
County of Richland)	2008-GS-40-02974
)	
THE STATE,)	
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)	
vs.)	TRANSCRIPT OF RECORD
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ANTHONY BLAKNEY,)	
)	
DEFENDANT,)	

January 19, 2012
Columbia, South Carolina

BEFORE:

THE HONORABLE G. THOMAS COOPER, JR., JUDGE.

APPEARANCES:

BENJAMIN APLIN, ESQ.
Attorney for the Department of Probation

CONSTANTINE POURNARIS, ASSISTANT PUBLIC DEFENDER
Attorney for the Defendant

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 THE COURT: In December, did I determine that he is
2 in violation, a willful violation, of his community
3 service supervision? Is that the termination that has
4 been made?

5 MR. POURNARAS: No, Your Honor. I believe you heard
6 just the matter of law, and you took it under advisement.
7 We were going to move to the revocation phase based on how
8 you decide on that.

9 THE COURT: All right. Well, let me -- if that's the
10 way you want to do it, that's fine.

11 Mr. Pournaras, let me let you -- I'm not sure. Did
12 you make your argument on the record?

13 MR. POURNARAS: Yes, Your Honor.

14 THE COURT: Okay. Well, you're going to have to do
15 it again.

16 MR. POURNARAS: Okay. That's not a problem.

17 Procedurally, Mr. Blankney was sentenced on
18 March 23rd, 2008 to a burglary in the first degree. Judge
19 Childs, her sentence at that time was a 15-year sentence
20 provided upon the service of 30 months.

21 THE COURT: What? That's what it is.

22 MR. POURNARAS: Right. The issue --

23 THE COURT: That's a --

24 MR. POURNARAS: The issue we have today is that --

25 THE COURT: That's a terrible sentence.

1 MR. POURNARAS: Pardon me?

2 THE COURT: That's a terrible sentence. So we're
3 dealing with something that is an anomaly?

4 MR. POURNARAS: Yes, sir.

5 THE COURT: You agree with that?

6 MR. POURNARAS: It is an anomaly, but I believe that
7 there are other similar situations to Mr. Blankney.

8 There is an issue now because probation's
9 interpretation is that his community supervision can
10 continuously be revoked until he either completes two
11 years of supervision or he has been incarcerated for the
12 full term of 15 years. We would disagree with that
13 position.

14 Basically, Picklesimer involves split sentences with
15 probation to follow. That doesn't exist in this case.
16 Our understanding was Picklesimer did two things: It
17 defined what the original sentence is, which we don't
18 disagree that the original sentence is the whole 15 years,
19 and it also held that he cannot be incarcerated for a term
20 to exceed 15 years.

21 We don't disagree with that either, but our
22 contention is that the balance -- 15 years minus 30
23 months, we believe that suspended balance was satisfied
24 upon the service of his 30 months, which he completed
25 after his last revocation on community supervision.

1 THE COURT: I saw that.

2 MR. POURNARAS: And our point is based on the fact
3 that if you interpret Picklesimer as probation does, there
4 is no difference between a sentence, 15 provided upon 30
5 months, or 15 provided upon 30 months, balance suspended
6 to probation.

7 They will treat both of those sentences the exact
8 same way despite the fact that the sentencing judge did
9 not include a probationary period to follow that original
10 unsuspended portion.

11 THE COURT: Well, a probationary sentence is not
12 necessary for the invocation of community service.

13 MR. POURNARAS: That is correct, but our position is
14 that the balance is suspended solely upon the service of
15 the 30 months.

16 Now, he could not have served the 30 months in his
17 first-term incarceration because community supervision
18 released him by statute after 85 percent.

19 THE COURT: Eight-five percent, right.

20 MR. POURNARAS: Correct.

21 THE COURT: So he has now maxed out the remaining
22 15 percent.

23 MR. POURNARAS: Yes, Your Honor, and I'm not
24 disagreeing with probation's understanding of Picklesimer.
25 I just don't feel that it applies in this case because in

1 Picklesimer, they held that he could reach the entire
2 original sentence because they affirmed a previous holding
3 in Dawkins which stated that probationary sentences and
4 community supervision on an overall offense run
5 simultaneously and currently so that they did not foresee
6 a possibility of satisfying the suspended portion without
7 satisfying the community supervision because it was
8 suspended to probation.

9 In this case, we argue that he did satisfy the
10 condition of that suspended portion. It may seem
11 arbitrary that it was suspended upon active service, but
12 that is the only condition upon which it was suspended,
13 the service of 30 months, which he did meet.

14 And I don't believe that --

15 THE COURT: It would have been a lot easier to have
16 given him -- even though it was contrary to the statute --

17 MR. POURNARAS: Correct.

18 THE COURT: -- a 30-month sentence.

19 MR. POURNARAS: Correct.

20 THE COURT: Just a straight 30-month sentence.

21 MR. POURNARAS: I agree with you.

22 THE COURT: We probably wouldn't be here.

23 All right. Mr. Aplin, what's the Department's
24 position?

25 MR. APLIN: Your Honor, and I apologize. I don't

1 have another copy of Picklesimer. I think I handed one up
2 on December 9th when we were here, but essentially --

3 THE COURT: Would you like it?

4 MR. APLIN: You've got it, okay.

5 THE COURT: Would you like it?

6 MR. APLIN: Oh, no. I just wanted to make sure you
7 had a copy of it.

8 Essentially, we're just relying on what appears to be
9 the correct interpretation under Picklesimer as to how you
10 handle this type of sentence.

11 When I say this type of sentence, I understand what
12 Mr. Pournaras is saying. This isn't exactly the same as
13 the sentence in Picklesimer because here --

14 THE COURT: There is nothing.

15 MR. APLIN: There is nothing.

16 THE COURT: Nothing.

17 MR. APLIN: No probation attached. It was just 15
18 years suspended to 30 months. I don't think that is the
19 dispositive issue, though.

20 The point being is under Picklesimer, the original
21 sentence is the 15-year sentence, and that's what's
22 controlling over how much time could be served through
23 successive revocations that there still are the
24 requirements under Dawkins and under Picklesimer and under
25 the statutes that the person has to either successfully

1 complete the community supervision program or they face
2 revocation time up to the original sentence.

3 In this case, the original sentence was 15 years. I
4 don't think there is any dispute that to this point he has
5 not completed successfully a community supervision
6 program. If he did, he would be done. We would have no
7 argument.

8 THE COURT: All right.

9 MR. APLIN: And I understand also what Mr. Pournaras
10 is saying is that this is no different. We're treating it
11 no different than if the original sentencing judge had
12 said 15 suspended to 30 months and five years' probation
13 or four years' probation or one year or no probation.

14 It's all going to be treated the same way, but on the
15 flip side of that, I think the argument that he is making
16 is that you would treat the sentence of 15 years suspended
17 to 30 months exactly the same as a straight 30-month
18 sentence.

19 THE COURT: Is that --

20 MR. APLIN: And I think that makes less sense than
21 following what Picklesimer lays out in actually treating
22 the 15 years as the incarcerated time that could be
23 imposed for successive revocations.

24 THE COURT: So 15 years appears to just have been an
25 attempt to comply with the statute?

1 MR. APLIN: That's exactly right.

2 THE COURT: The sentencing statute.

3 MR. APLIN: Right.

4 THE COURT: Of -- I don't -- I don't see why -- I
5 mean, isn't the CSP -- doesn't the CSP statute provide for
6 the mandatory service following a violent offense of
7 eighty--- a no-parole offense?

8 MR. APLIN: It does. It requires service in that
9 program of some period of time, yes.

10 THE COURT: Well, then how -- does Picklesimer or
11 Grier or -- indicate that -- it seemed -- it always seemed
12 to me that the original sentence was the maximum that
13 individual could serve for failure to comply with a
14 community provision.

15 There is no penalty. If I take Mr. Pournaras'
16 argument, there is no penalty for failure to comply with
17 community supervision.

18 MR. APLIN: Well, under his argument, I think the
19 penalty has already been imposed, was the remaining
20 15 percent of the --

21 THE COURT: Not on this case.

22 MR. APLIN: But even on this case --

23 THE COURT: Even on the last case.

24 MR. APLIN: Well, the 30 months -- on his last case,
25 the last time he was revoked, which has already been pled.

1 At this point, his argument is that he is done. There is
2 no time left. He shouldn't have been --

3 THE COURT: He couldn't even be on community
4 supervision now.

5 MR. APLIN: Exactly. That's my understanding is the
6 argument, right. And our position is that as long as
7 there is time left on the 15 years, he continues to come
8 out on community supervision and either successfully
9 completes the program or is back in front of the court for
10 violations.

11 MR. POURNARAS: If I may briefly reply to that, Your
12 Honor.

13 THE COURT: Absolutely.

14 MR. POURNARAS: One of the final portions of
15 Picklesimer, it seems as if the court was asked to address
16 that particular scenario where somebody could max out the
17 revocable time prior to service of the entire original
18 sentence.

19 They declined to answer that because in the case of
20 Picklesimer, they felt that that was not a possibility
21 based upon the fact that probation cannot be satisfied
22 independently of community supervision, because they did
23 not see it possible to satisfy the conditions of the
24 suspension on probation without simultaneously satisfying
25 the conditions of community supervision.

1 But I argue that, you know, probation's position
2 ignores the possibility of satisfying the conditions of
3 the suspension independently of its community supervision,
4 and I understand that this is an odd sentence.

5 It does appear to be rather arbitrary to suspend a
6 sentence to nothing more than a lesser sentence, but I
7 still contend that he did satisfy that sole condition so
8 that suspended portion has actually been satisfied.

9 And having been satisfied, I contend that he has been
10 discharged of that suspended portion leaving the only
11 remaining portion to be revoked the 15 percent that he did
12 not at the time serve but has at this point now served.

13 So it's our position that by being incarcerated for
14 30 months, he satisfied the condition of the suspension,
15 discharging that, and has also at the same time exceeded
16 the maximum remaining revocable period on community
17 supervision.

18 THE COURT: All right.

19 MR. POURNARAS: And I don't believe that the court
20 even contemplated such a sentence in their holding.

21 THE COURT: Certainly they did not. It's the most
22 bizarre sentence I may have ever seen.

23 This is Pauling's, Hans Pauling's case?

24 MR. POURNARAS: He was the defense attorney in this
25 case. Ms. Weiss was the prosecutor.

1 THE COURT: Yeah, I saw that. And even on the
2 sentencing sheet, it looks like there was a recommendation
3 of a cap of five years, which is still contrary to the
4 statute, but there was some -- there was some case law at
5 the time which indicated that unless the mandatory
6 language was in the statute, that the court could go
7 beyond the minimum sentence, and that was apparently what
8 happened.

9 Mr. Pournaras, I think you're going to have to take
10 it up. I mean, it's an interesting question. I don't
11 think that I'm in the position to just eliminate the
12 requirement for community supervision.

13 It's a very interesting question, and it's an
14 interesting argument. But in my opinion, I'm going to
15 agree with the Department, and I'm going to continue to
16 impose the community supervision until your client
17 complies with it. If he doesn't comply with it, then has
18 got a long row to hoe ahead of him.

19 MR. POURNARAS: I understand that.

20 THE COURT: All right.

21 MR. POURNARAS: As far as the revocation period,
22 being that he has been incarcerated for approximately
23 seven months, eight months, Your Honor, I believe since
24 May 13th, I would ask that you revoke him time served
25 rather than the full year and allow him to continue on

1 supervision.

2 THE COURT: What's his violation? Let me go back to
3 that.

4 PROBATION AGENT: May it please the court.

5 THE COURT: Well, he's got -- okay. Go ahead. Is it
6 financial, primarily?

7 PROBATION AGENT: No. No, sir. He failed to report
8 on April 21st, 2011 or any time thereafter, having last
9 reported on April 14th, 2011; failed to pay his electronic
10 monitoring fee by being in arrears, failed to pay his drug
11 testing fee by being in arrears, failed to comply with
12 electronic monitoring, having left the residence on April
13 18th, 2011 at 2:11 p.m. and never returning.

14 A home visit was conducted on April 25th, 2011
15 with --

16 THE COURT: Okay. I'm reading it.

17 PROBATION AGENT: Okay. So basically, he absconded.

18 THE COURT: Basically absconded, and he was on
19 electronic monitoring?

20 PROBATION AGENT: Correct. He absconded from the
21 electronic monitoring.

22 THE COURT: All right. I find he willfully violated
23 his community supervision. I'll revoke -- how many days?
24 Since May 13th?

25 MR. POURNARAS: Since May 13th, Your Honor.

1 THE COURT: How ever many days that is.

2 All right.

3 MR. POURNARAS: Thank you, Your Honor.

4 THE COURT: Yes, sir.

5 MR. APLIN: Thank you, Your Honor.

6 (Pause).

7 MR. POURNARAS: Your Honor, is he to remain on the
8 electronic monitoring upon the release today?

9 THE COURT: Well, I don't know why he was on it to
10 start with.

11 MR. APLIN: Your Honor, it's a Department policy.
12 The -- everybody on community supervision, their first --
13 I think it's at least 90 days, they're on electronic
14 monitoring. That's just what the Department does. We set
15 the conditions of the program by statute.

16 Now, of course, if he --

17 THE COURT: I don't know if he is not to.

18 MR. APLIN: If you made the recommendation not to put
19 him on, we would certainly consider that.

20 THE COURT: Why should I do that? I mean, I don't
21 know anything about this gentleman.

22 MR. POURNARAS: We just ask in light of this may be
23 appealed, Your Honor, to get some finality on this odd
24 situation; that he just be required to report regularly
25 rather than be on electronic monitoring.

1 THE COURT: Where does he live? What does he do?
2 You know, I -- I don't know anything about this gentleman.
3 He may be on his way to Timbuktu. He may be --

4 MR. APLIN: And honestly, Your Honor --

5 THE COURT: -- a danger to the community, I don't
6 know.

7 MR. APLIN: The Department, I mean, would prefer just
8 to be able to treat it the same as we treat everyone else.
9 It's just easier to administer the things and treat it
10 that way.

11 THE COURT: I understand.

12 MR. APLIN: But as I was saying, if you order it that
13 way, we will, of course.

14 THE COURT: I understand. Have you got family?
15 Somebody to pay for it?

16 MR. POURNARAS: Yes, Your Honor. He lives with his
17 family here in Columbia.

18 THE COURT: All right. You just told me something I
19 didn't know. How about it?

20 PROBATION AGENT: He needs to be on electronic
21 monitoring, Your Honor.

22 THE COURT: I knew what she was going to say.

23 Well, his -- let me look. He was not living with his
24 family when this violation occurred.

25 MR. POURNARAS: I don't believe so, but the last time

1 we were here, I did meet with his mother and his sister,
2 and I think that's where he was -- were you not living
3 with her? He tells me that that's where he was living.

4 THE COURT: Well --

5 MR. POURNARAS: I have been in contact with them.
6 They tell me that --

7 THE COURT: All right. It says he was required to be
8 intensively supervised. However, he ceased all contact
9 with the Department. The offender allowed the electricity
10 in his home to be turned off and was evicted. Now, that
11 doesn't sound like living with mama.

12 MR. POURNARAS: I think that's when he moved in with
13 his mother and sister.

14 THE COURT: Well, then he -- he didn't comply --

15 MR. POURNARAS: Of course.

16 THE COURT: -- the last time, and that's why he's
17 here.

18 MR. POURNARAS: Yes, Your Honor.

19 THE COURT: Standard conditions.

20 MR. POURNARAS: Thank you, Your Honor.

21 MR. APLIN: Thank you, Your Honor.

22 PROBATION AGENT: Thank you, Your Honor.

23

24 (Whereupon, the proceedings were concluded.)

25

State of South Carolina

Court of General Sessions

County of Richland

2008-GS-40-02974

The State of South Carolina :

-VS- :

TRANSCRIPT OF RECORD

Anthony Kinard Blakney :

A/K/A Derrick Jenkins :

August 17, 2012

Columbia, South Carolina

B E F O R E:

The Honorable Brooks P. Goldsmith, Judge.

A P P E A R A N C E S:

J. Benjamin Aplin, Esquire
Attorney for the Department of Probation

Constantine Pournaras, Esquire
Attorney for the Defendant

Daphne D. Helms
Circuit Court Reporter

1 **Probation Agent:** Number one, Anthony Blakney A.K.A.
2 Derrick Jenkins. Agent Wallace. Attorney Pournaras.

3 Anthony Blakney, after being duly sworn, testified
4 as follows:

5 **Probation Agent:** Your Honor, we have attorney Ben
6 Aplin here from probation legals also.

7 **The Court:** Who wants to tell me about the case? Mr.
8 Aplin?

9 **Mr. Aplin:** I can start it out. I'll let Mr. Pournaras
10 fill in the details if I miss something, but basically Mr. --
11 is it Blakney or Blakeney?

12 **Mr. Blakney:** Blakney.

13 **Mr. Aplin:** Mr. Blakney, he was sentenced back in
14 November of 2008. His original sentence was 15 years
15 suspended to 30 months with no probation or anything ordered
16 to follow. He came out on community supervision April 30th
17 of 2010 and was charged with some violations, and he appeared
18 in front of Judge Cooper back December 9th of 2011 for a
19 violation hearing. At that point Mr. Pournaras was
20 representing him, and the argument was raised about whether
21 he should even be on community supervision under the
22 Picklesimer case that came out from the Supreme Court shortly
23 before that time frame.

24 Judge Cooper heard some arguments and then asked for
25 some memorandum from the parties. Mr. Pournaras submitted a

April 17, 2012 hearing

3

1 memo, and we reconvened the hearing January 19th of 2012. At
2 that point Judge Cooper listened to further arguments and
3 agreed with the State's position that he was indeed still
4 supposed to be on community supervision. And this is the
5 part where I don't know if I have the exact detail, but I
6 think he revoked him for time served.

7 Mr. Pournaras: Yes.

8 Mr. Aplin: Okay. Which meant he---

9 The Court: Came back.

10 Mr. Aplin: ---came back on community supervision for a
11 new two-year period that started that date and would expire
12 in 2014. He is now before you on additional community
13 supervision violation charges. And because that case was
14 decided and is on appeal now -- Mr. Pournaras timely filed a
15 notice of appeal. It is pending with the Court of Appeals.
16 There are still issues with him getting the transcripts from
17 both of those hearings and Appellate Defense making --
18 writing their brief and arguing it. So it's a pending case.

19 Mr. Pournaras, I think, felt it was necessary to go
20 ahead and to preserve that issue or I guess not waive it for
21 the pending appeal make that argument again before Your Honor
22 about whether he should be on community supervision or not
23 under Picklesimer, and he let me know that was going to
24 happen. So I decided I would participate in the hearing and
25 make the State's argument for the purposes of the record as

1 well.

2 **The Court:** So briefs haven't been filed in the
3 appellate court.

4 **Mr. Pournaras:** No, Your Honor.

5 **Mr. Aplin:** They have not.

6 **Mr. Pournaras:** And speaking to Appellate Defense, they
7 asked me to go forward again. Since this is technically a
8 new issue on a separate violation, they asked me just to go
9 forward again, Your Honor, and if I just could make one
10 correction. Everything Mr. Aplin said is correct. There was
11 one prior revocation to the one that is on appeal that
12 happened in February -- his first revocation hearing was in
13 February of 2011 in front of Judge Cooper again who at the
14 time revoked him three months and 15 days which was 15 days
15 shy of the full 30 months.

16 **The Court:** Okay.

17 **Mr. Pournaras:** Fifteen days. Yeah, that's what it was.
18 So this is his third revocation.

19 **The Court:** So he served more than 30 months.

20 **Mr. Pournaras:** Yes, Your Honor. He served two weeks
21 shy of 30 months at the completion of his first revocation.

22 **The Court:** Right.

23 **Mr. Pournaras:** After his second revocation and this
24 current revocation, he is in excess of 30 months.

25 **The Court:** Do you agree to that, Mr. Aplin?

April 17, 2012 hearing

1 **Mr. Aplin:** I agree to that, Your Honor.

2 **The Court:** And so the State's position is?

3 **Mr. Aplin:** Your Honor, the State's position is that
4 under the Picklesimer case the Supreme Court has clarified
5 some prior case law and said that when a person receives a
6 no-parole sentence that you look at the original sentence
7 which includes both the suspended and unsuspended portions
8 and in this case that would be 15 years and that that sets
9 the maximum amount of time that a person can serve, either
10 incarcerated or supervised under the community supervision
11 program, and so that Mr. Blakney has essentially a 15-year
12 term that he could end up having to do if he never
13 successfully completes the community supervision program and
14 that at this point, yes, he's gone over 30 months, but he's
15 still well under the 15-year original sentence.

16 **Mr. Pournaras:** If I may briefly reply to that. I agree
17 with his interpretation of Picklesimer, but I would like to
18 note that Picklesimer specifically addressed that situation
19 in reference to a no-parole offense that is split, a
20 suspended and unsuspended portion including probation. This
21 case we have here does not have a probationary sentence, and
22 it's an unusual sentence and not a lot of judges suspend
23 actives upon lesser actives. And I'm assuming in this case
24 it was because it was a burglary first which has a mandatory
25 minimum of 15 which at the time judges were routinely

1 suspending, at least in this county, to lesser active
2 offenses.

3 So in Picklesimer they came to that decision saying: In
4 a prior case, State v. Dawkins, they held that community
5 supervision and probationary sentences run simultaneously.
6 So they believe that it's impossible to satisfy the
7 conditions of probation upon which the balance is suspended
8 without also satisfying the conditions of community
9 supervision which is why they held that in Picklesimer when
10 you have an active followed by a probationary sentence for a
11 no-parole offense, you can revoke the full maximum original
12 sentence because probation cannot be satisfied without also
13 satisfying community supervision, and I believe that that's
14 not the case we have here.

15 I think that -- I agree with Mr. Aplin's interpretation
16 of what Picklesimer says, and if this was 15 years suspended
17 to 30 months and probation, then I would definitely agree
18 with his position. But when Judge Childs sentenced Mr.
19 Blakney in 2008, the only condition upon which she suspended
20 the balance, 12 and a half years, was on the service of
21 30 months, and community supervision was triggered by statute
22 once he completed approximately 85 percent of that 30 months.

23 I believe that once he served 30 months on his second
24 revocation, he satisfied the conditions upon which the 12 and
25 a half years was suspended. It was essentially, in my mind,

April 17, 2012 hearing

1 an arbitrary suspension. I can't say why judges do that and
2 why they don't just impose 30-month sentences, but I don't
3 believe that any of the parties at the time intended this to
4 be the situation we're in.

5 If you look at the sentencing sheet, Your Honor, there
6 is no probation, and the solicitor's recommendation was a cap
7 of five. I don't believe that Picklesimer is controlling in
8 this case because there is no probation. The Court also
9 mentioned in dicta that they said when the Picklesimer
10 briefs -- one of the parties had made an argument that, you
11 know, you could separately satisfy the conditions of the
12 suspended portion independently of community supervision. I
13 think prior to that some of what was happening was some
14 argued that you must first complete community supervision and
15 you cannot be revoked in excess of the original active
16 portion, and the Court held, no, you can reach into the
17 entire sentence on community supervision revocations because
18 community supervision and normal probation run concurrently.

19 We don't have that case here, and I believe that the
20 suspended portion was satisfied by the service of 30 months.
21 I don't think that Picklesimer is controlling in this
22 particular issue, and the Court believed that what I'm
23 arguing is a moot point because those two, probation and
24 supervision, run simultaneously. And I don't think that they
25 contemplated sentences like these when they made their

1 pronouncement in Picklesimer.

2 **Mr. Aplin:** And, Your Honor, we've discussed this
3 obviously many times and I certainly understand the argument
4 that Mr. Pournaras is making which is one reason it's a good
5 case that's gone up on appeal and perhaps they will resolve
6 the issue. But from the State's perspective, it's simply
7 that -- and I think Mr. Pournaras already pointed this out.
8 If the judge wanted to give a 30-month sentence, it could
9 have just been a straight 30-month sentence and we wouldn't
10 be here arguing. He would have satisfied it by now by doing
11 community supervision and would be finished.

12 But for some reason, the judge imposed a 15-year
13 sentence suspended to 30 months. Like he mentioned, it may
14 be because there was a mandatory minimum of 15 years and so
15 she felt she had to at least impose that, but whatever the
16 case, that is the sentence that was handed down. And it just
17 appears under a straight clear reading of Picklesimer that
18 you would have to go back to that suspended portion of the
19 sentence to determine what is the original sentence in the
20 case, regardless of whether probation was attached or
21 probation wasn't attached as part of that sentence.

22 **Mr. Pournaras:** And just briefly on that, Your Honor --
23 and I understand Mr. Aplin's reading as well, but I still
24 contend that, you know, the way the Court came to their
25 ruling in Picklesimer was through that understanding that

April 17, 2012 hearing

1 probation and C.S.P. run concurrently. That was one of two
2 things that they considered in making their Picklesimer
3 analysis, and that doesn't exist here.

4 And following Mr. Aplin's interpretation, it makes no
5 distinction between sentences -- if the judge were to impose
6 ten years suspended upon five active, that would be treated
7 identically to ten years suspended on five active with
8 probation. There would be no distinction between those
9 sentences, and I believe that there is a difference in the
10 judge's intent when they order probation or when they don't
11 order probation. But in any no-parole offense with any
12 suspension, probation would treat it as if there was a
13 probationary sentence imposed, whether or not the judge
14 actually ordered it.

15 **The Court:** This is going to be interesting, isn't it?
16 All right. I agree with you, but you have to prepare an
17 order.

18 **Mr. Aplin:** Your Honor, would you like to go ahead and
19 put on the record the violations themselves or no need to
20 address those at this point?

21 **The Court:** Well, I don't think there is.

22 **Mr. Aplin:** Okay.

23 **The Court:** Do you -- I mean, do you want to put them on
24 the record?

25 **Mr. Aplin:** I guess if -- I guess if you're ruling that

1 way, there's really no point in doing that at this stage. If
2 it comes back, then we'll address it at that point. It may
3 be a couple of years from now.

4 **The Court:** I guess -- yeah. What I'm saying is there's
5 no need to take it up because he shouldn't be here.

6 **Mr. Aplin:** Okay.

7 **The Court:** I guess we'll see.

8 **Mr. Aplin:** I would just ask that he remain in custody
9 until the order is signed and that we've had a chance to
10 review it to make sure we know -- because I assume that Mr.
11 Blakney will then be cut loose.

12 **Mr. Pournaras:** I believe he has additional pending
13 charges.

14 **Mr. Aplin:** Oh, there are pending charges? I'm sorry.

15 **Mr. Pournaras:** He has not made bond on those pending
16 charges, but if you'd like him to remain in custody until --
17 if you would like him to be unable to post that bond until we
18 prepare the order, I'd be fine with that.

19 **Mr. Aplin:** I would, yes.

20 **Mr. Pournaras:** Okay. Thank you.

21 **Mr. Aplin:** Thank you, Your Honor.

22 **The Court:** All right. We'll see, won't we?

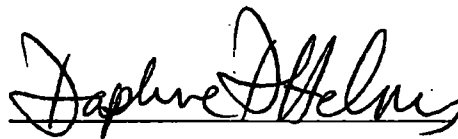
23 **Mr. Pournaras:** Thank you, Your Honor.

24 (Whereupon, the proceedings were concluded. There were
25 no exhibits introduced.)

I, the undersigned Daphne D. Helms, official court reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the circuit court for Richland County, South Carolina, on the 17th of August, 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

September 25, 2012

A handwritten signature in cursive script that reads "Daphne D. Helms". The signature is written in dark ink and is positioned above a horizontal line.

Daphne D. Helms, court reporter

08/21/12

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 State of South Carolina)
)
 v.)
)
 Anthony Kinard Blakney)
 AKA Derrick Jenkins)
 Defendant.)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT No: 08-GS40-02974

WARRANT No: W-40-120074

ORDER

JEANETTE W. BRIDGEMAN
 C.C.P. & S.
 2012 SEP 13 PM 12:22
 RICHLAND COUNTY
 FILED

This matter comes before the court pursuant to a community supervision violation hearing.

IT APPEARS that defendant Blakney was arrested March 23, 2008, and pleaded guilty to Burglary, 1st degree, on November 6, 2008. He was sentenced by Judge Michelle Childs to a term of incarceration of fifteen (15) years, provided upon the service of thirty (30) months active incarceration. He was released from the Department of Corrections and placed on two (2) years of community supervision on April 30, 2010.

Blakney was arrested on November 3, 2010, for violation of community supervision. He appeared in court for a revocation hearing on February 25, 2011. Judge G. Thomas Cooper, Jr. found Blakney in violation and was revoked time served (three (3) months and fifteen (15) days). He was released and placed on two (2) years of community supervision.

Blakney was arrested May 13, 2011 for violation of community supervision. Blakney appeared in court for a revocation hearing on June 25, 2011. On that date, Judge James R. Barber III ordered the hearing be rescheduled to hear the issue of law with counsel for the South Carolina Department of Probation, Parole, and Pardon (the Department) present. The hearing convened on December 9, 2011, at the conclusion of which, Judge G. Thomas Cooper took the issue under advisement and directed the parties to submit memoranda. On January 13, 2012,

Blakney was found in violation of his community supervision, revoked time served, and placed on two (2) years of community supervision.

Blakney was arrested April 27, 2012, for violation of community supervision. The matter was argued before this court on August 17, 2012. Present for the hearing were Mr. Benjamin Aplin on behalf of the SC Department of Probation, Parole, and Pardon Services and Mr. Constantine G. Pournaras on behalf of Blakney.

THIS COURT FINDS that Blakney's case is distinguishable from State v. Picklesimer, 388 S.C. 264 (2010), in that Blakney's original sentence, as ordered by Judge Michelle Childs, did not include a term of probation.

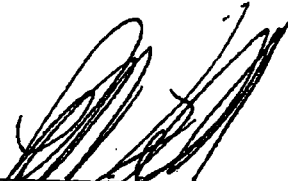
THIS COURT FURTHER FINDS that Blakney satisfied the terms of his original sentence upon the service of thirty (30) months during his second revocation, upon which the suspended portion of his sentence was discharged, leaving no additional revocable time to serve on community supervision violations. Having 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 for indictment 2008-GS40-02974. It is therefore unnecessary to address the current violations.

IT IS THEREFORE ORDERED that warrant W-40-120074 be quashed and Blakney's community supervision case associated with indictment 2008-GS40-02974 be closed upon the filing of this order.

IT IS SO ORDERED

Lauca
Columbia, South Carolina

This 7 day of July, 2012.


BROOKS F. GOLDSMITH
Presiding Judge
Court of General Sessions
Fifth Judicial Circuit

46
STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF RICHLAND
STATE VS. Anthony K Blakney

INDICTMENT/CASE#:

2008-GS-40-02974

AW#: K333118

Date of Offense: 03/13/2008

S.C. Code §: 16-11-0311

CDR Code #: 0079

AKA: _____
Race: B Sex: M Age: 19
DOB: 07/23/1989 SS#: _____
Address: 2322 PARK ST
City, State, Zip: Columbia, SC 29201
DL# _____ SID# _____

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS TO: BURGLARY 1ST DEGREE

in violation of § 16-11-311 of the S.C. Code of Laws, bearing CDR Code # 0079

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS (CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. _____ (defendant initial)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST:

Heather S. Weis Anthony K Blakney Barbara A. Scott 681602
Solicitor Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 6 days/months/years or under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of 30 days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
 The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. (since 3-23-08)
 The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP _____
Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment
Payment Terms: _____ Obtain GED
 set by SCDPPPS _____ Attend Voc. Rehab. or Job Corp. _____
Recipient: _____ May serve W/E beginning _____
*Fine: \$ _____ Substance Abuse Counseling _____
\$14-1-206 (Assessments 107.5%) \$ _____ Random Drug/Alcohol Testing _____
\$14-1-211(A)(1) (Conv. Surcharge) \$100 \$ _____ Fine may be pd. in equal, consecutive weekly/monthly
\$14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____ pmts. of \$ _____ Beginning
\$56-5-2995 (DUI Assessment) \$12 \$ _____ \$ _____ paid to Public Defender Fund
\$35.13 (Public Def/Prob) \$500 \$ _____ Other: _____
\$73.3, 1B TP (Law Enforce. Funding) \$25 \$ _____
\$33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____
\$50-21-114(BUI Breath Test Fee) \$50 \$ _____
\$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____
3% to County (if paid in installments) \$ _____
\$90.11 TP (SCCJA Surcharge) \$5 \$ _____
TOTAL \$ _____

Appointed PD or appointed other counsel, \$35.13 TP Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: _____

Sentence Date: _____

Barbara A. Scott
Clerk of Court/ Deputy Clerk
Court Reporter: E. Harris

Barbara A. Scott
2008 176
11-6-08

WITNESSES

(s) INV PETOSKEY

47

ARREST WARRANT NUMBER

K333118

TRUE BILL
ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: **SEP 19 2008**

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2008-GS-40-2974

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2008

102

THE STATE

vs.

ANTHONY BLAKNEY

Indictment for

**BURGLARY/(AFTER 6/20/85)
1ST DEGREE**

SC Code: 16-11-311

CDR Code: 079

Class FEL-EXM(V)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on SEPTEMBER 17, 2008 the Grand Jurors of Richland County present upon their oath:

BURGLARY(AFTER 6/20/85) – 1ST DEG

That ANTHONY BLAKNEY did in Richland County on MARCH 13, 2008, willfully and unlawfully enter the dwelling of MARY LEE HUTSON located at 3128 Oakview St, Columbia, South Carolina and arm himself with a deadly weapon, without consent and with the intent to commit a crime therein, all in violation of §16-11-311, Code of Laws of South Carolina.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Warren B. Giese, SOLICITOR

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 12th, 2013



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT /APPELLANT,

V.

ANTHONY K. BLAKNEY,

APPELLANT/ RESPONDENT

Appellate Case No. 2012-207286

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by ruling appellant could continue to be re-incarcerated until he had served fifteen years in jail for violations of his community supervision where he was sentenced to fifteen years imprisonment, suspended upon the service of thirty months, with no probation after the service of the maximum thirty months?

STATEMENT OF THE CASE

Appellant was sentenced by the Honorable Michelle Childs to fifteen years imprisonment suspended upon the service of thirty months for burglary in the first degree. There was no term of probation included after the service of the thirty months. R. 46. (sentencing sheet).

Appellant first appeared for a community supervision violation hearing on December 9, 2011 before the Honorable G. Thomas Cooper, Jr. Constantine Pournaras represented appellant. Benjamin Aplin represented the Department of Probation. R. 1. Judge Cooper revoked appellant's probation at a subsequent hearing held on January 19, 2012. R. 27, ll. 13-18. That ruling is the subject of appellant's present appeal.

Appellant appeared for another community supervision revocation hearing before Judge Goldsmith on August 17, 2012. Judge Goldsmith issued an order ruling appellant had satisfied the terms of his incarceration and community supervision. R. 44. That order is the subject of this state's appeal. Appellant has filed the initial brief of respondent in that case simultaneously with the initial brief of appellant in this cross-appeal case.

ARGUMENT

The court erred by ruling appellant could continue to be re-incarcerated until he had served fifteen years in jail for violations of his community supervision where he was sentenced to fifteen years imprisonment, suspended upon the service of thirty months, with no probation after the service of the maximum thirty months.

Relevant facts

Appellant was sentenced by the Honorable Michelle Childs to fifteen years imprisonment suspended upon the service of thirty months for burglary in the first degree, with **no probation** to follow that term of incarceration. R. 46.

Appellant appeared for a community supervision violation hearing on December 9, 2011 before the Honorable G. Thomas Cooper, Jr. Judge Cooper revoked appellant's probation at a subsequent hearing held on January 19, 2012. R. 27, ll. 13-18.

Defense counsel argued to Judge Cooper that Judge Childs had sentenced appellant to thirty months imprisonment – "15 years suspended upon 30 active months. Judge Childs did not include a probationary period to follow." R. 4, ll. 15-18.

Defense counsel argued appellant served eighty-five percent of his sentence -- 30 months -- at the Department of Corrections and he was put on community supervision "but our contention is that he has [now] exceeded that thirty months that was ordered by Judge Childs." R. 5, ll. 1-9. "Again, probation is applying Pickelsimer, [State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010)] but we believe that the court in that case did not consider sentences suspended upon lesser sentences, which I believe is quite common. I'm arguing that the judge did not intend a supervisory period past that active sentence [30 months imprisonment].. R. 5, ll. 10-15.

Counsel agreed with Judge Cooper that *Judge Childs understood since it was a no-parole sentence that she anticipated there would be community supervision*. However, the maximum term of incarceration could not exceed the thirty months where *no further term of supervision – probation -- was ordered by Judge Childs*. R. 6, l. 4 – 7, l. 19.

Counsel Aplin said he understood appellant's position to be "if Judge Childs had given him fifteen years suspended to thirty months and five years probation. Then you would agree Picklesimer applies. He could be revoked up to the full fifteen years."

Defense counsel confirmed that was his position. R. 7, l. 21 – 8, l. 5. At the conclusion of the hearing Judge Cooper took the matter under advisement until a further hearing could be held. R. 14, ll. 2-7.

On January 19, 2012, Judge Cooper held that hearing. R. 16. Defense counsel argued that the fifteen year sentence suspended upon the service of thirty months "was satisfied upon the service of his thirty months, *which he completed after his last revocation on community supervision*." R. 21, ll. 6-25. (emphasis added). Counsel argued "he could not have served the thirty months in his first-term incarceration because the community supervision released him by statute after 85 percent." Appellant had now "maxed out the remaining 15 percent." Appellant had not been placed on probation and he had therefore satisfied the terms of his "straight thirty month sentence." R. 20, l. 13 – 21, l. 22.

Counsel Aplin argued: "We're treating **it no different** than if the original sentencing judge had said *fifteen suspended to thirty months and five years' probation* or four years' probation or one year or no probation." R. 23, ll. 9-18. (emphasis added). Counsel Aplin argued the original sentence was fifteen years and that was how much time appellant could

serve “through successive revocations . . . [15 years imprisonment]” R. 22, l. 17 – 23, l. 23.

Judge Cooper ruled:

It’s a very interesting question, and it’s an interesting argument. But in my opinion, I’m going to agree with the Department, and I’m going to continue to impose the community supervision until your client complies with it. If he doesn’t comply with it, *then has got a long row to hoe ahead of him.*

R. 27, ll. 13-18. (emphasis added)

Judge Goldsmith (the cross-appeal)

Appellant appeared again on a community service violation on August 17, 2012 before the Honorable Brooks P. Goldsmith. Constantine Pournaras again represented appellant. Benjamin Aplin again represented the Department of Probation, Pardon and Parole. R. 33.

Counsel Aplin told the judge that appellant was sentenced to fifteen years imprisonment suspended “to thirty months with no probation or anything to follow.”

Defense counsel again argued that State v. Picklesimer involved a non-parole offense with a split “suspended and unsuspended portion including probation. This case we have here does not have a probationary sentence, and it’s an unusual sentence and not a lot of judges suspend actives upon lesser actives. I’m assuming in this case it was because it was a burglary first which has a mandatory minimum of 15 which at the time judges were routinely suspending, at least in this county, to lesser active offenses.” Counsel argued the only condition Judge Childs place upon appellant was the service of thirty months imprisonment and then community “supervision was triggered by a statute once he completed approximately 85 percent of that 30 months.” R. 38, ll. 15-22.

Judge Goldsmith issued an order dated September 7, 2012. The judge wrote:

THIS COURT FURTHER FINDS that Blakney satisfied the terms of his original sentence upon the service of thirty (30) months during his second revocation upon 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 for indictment 2008-GS40-02974. It is therefore unnecessary to address the current violations.

R. 45.

A further argument on the hearing before Judge Goldsmith is contained in the brief of respondent Blakney in this cross-appeal.

Discussion

As seen, 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*.

Here, Judge Childs must have intended for appellant 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 appellant would serve 85% of his 30 months in the Department of Corrections and that community supervision would follow*. However, if appellant 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 appellant 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.” 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 run a sentence concurrently or consecutive – meaning the amount of time the judge intended the defendant to serve – “the intent of the judge is controlling.” Again, judge could not have intended that respondent could serve 15 years imprisonment where she suspended that sentence on the service of 30 months with no probation to follow.

Counsel for PPP argued that its position would be the same if Judge Childs had sentenced appellant to fifteen years imprisonment, suspended on the service of thirty months, and five years probation. The state is totally inflexible on demanding the worst scenario possible for the defendant when interpreting this criminal statute. That is true despite the fact that penal statutes are construed strictly against the state and in favor of the defendant. See Hair v. State, 305 S.C. 77, 406 S.E.2d 332 (1991); State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980). It is the state’s position that if appellant had been sentenced to 50 years imprisonment suspended on ten years imprisonment and no probation to follow that if he violated his community supervision he could continuously be returned to prison until he had served 50 years imprisonment or two continuous years of community supervision without a violation.

The intent of the sentencing judge aside in Picklesimer, this Court dealt with a suspended sentence including probation too follow. This 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. 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 appellant Blakney satisfied the terms of his original sentence upon the service of thirty months during the second revocation. “upon 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. 42.

The judge correctly distinguished Picklesimer since appellant was not sentenced to a suspended sentence with a term of probation to follow.

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.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)

(quoting Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992)).

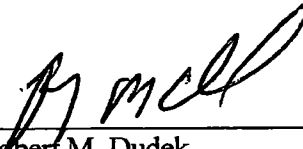
The legislature understands that judges have the discretion to order probation to assure continued supervision once an inmate is released. Community supervision assures that result in appellant's case where no period of probation was imposed. The legislature could not have intended that appellant – where no probation was imposed -- could serve the entire fifteen years where **no term of probation was imposed.**

Judge Childs sentenced appellant to fifteen years incarceration, suspended upon the service of thirty months. The thirty months was appellant'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 appellant could violate his community supervision with impunity. It only meant that the maximum sentence he could serve as 30 months just the same as if the judge would have sentenced him to 30 months in prison for another crime without a mandatory minimum, and no probation ordered to follow. For that reason, Judge Goldsmith correctly ruled appellant could no longer be incarcerated after he served 30 months in prison.

CONCLUSION

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

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of January, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT /APPELLANT,

V.

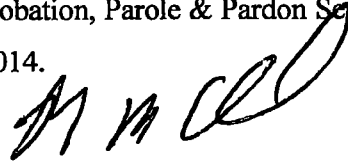
ANTHONY K. BLAKNEY,

APPELLANT/ RESPONDENT

Appellate Case No. 2012-207286

CERTIFICATE OF SERVICE

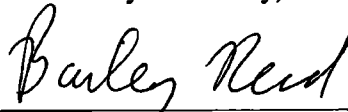
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Tommy Evans, Jr., Esquire, at the South Carolina Department of Probation, Parole & Pardon Services, PO Box 50666, Columbia, SC 29250,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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

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

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021 .

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
The Honorable Brooks Goldsmith

Case No.: 08-GS-40-02974
Appellate Case No.: 2012-207286

THE STATE, RESPONDENT /APPELLANT

v.

ANTHONY KINARD BLAKNEY AKA
DERRICK JENKINS, APPELLANT/RESPONDENT

APPELLANT'S FINAL BRIEF OF RESPONDENT/APPELLANT

Tommy Evans, Jr.
Assistant General Counsel

**South Carolina Department of Probation,
Parole, and Pardon Services
P.O. Box 50666
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(803)734-9220**

Attorney for the Respondent/Appellant

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STATEMENT OF ISSUE ON APPEAL

1. **HAS THE COURT ERRED IN DETERMINING THAT THE RESPONDENT HAS SATISFIED HIS SENTENCE UPON HIS SECOND VIOLATION OF COMMUNITY SUPERVISION AND CAN NO LONGER HAVE ANY TIME REVOKED PURSUANT TO PICKLESIMER?**

STATEMENT OF THE CASE

On April 30, 2010, the Appellant/Respondent appeared before the Honorable J. Michelle Childs for the offense of Burglary in the First Degree (Burglary 1st). At the conclusion of this appearance Judge Childs sentenced the Appellant/Respondent to a fifteen year term of imprisonment suspended to the service of thirty (30) months incarceration. (R.p.46-p.48). Pursuant to South Carolina law the Appellant/Respondent began Community Supervision on May 13, 2011.

On December 9, 2011, the Appellant/Respondent appeared before the Honorable Thomas G. Cooper for a violation of community supervision. The Appellant/Respondent was accused of violating of community supervision by, failing to report; failing to pay his supervision fees; failing to comply with electronic monitoring; and, failing to follow the advice and instructions of his agent. Upon conclusion of this hearing Judge Cooper decided to revoke community supervision and give him credit for the amount of pre-detention time served. Upon release the Appellant/Respondent was still obligated to successfully complete community supervision. Later another warrant was issued for the violation of community supervision. Within this warrant the Appellant/Respondent was accused of violating supervision by failing to report; providing an invalid address thereby failing to allow his agent to visit his home; and, failing to pay his supervision fee. On August 17, 2012, the Appellant/Respondent appeared before the Honorable Brooks P. Goldsmith for a hearing regarding his violation of community supervision. During this hearing the Appellant/Respondent argued that he has already satisfied his sentence pursuant to State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010). The Appellant/Respondent argued that in Picklesimer the Court of Appeals were referring to split sentences where it was suspended

upon the completion of probation. In this case Judge Childs sentenced the Appellant/Respondent to fifteen years suspended to the service of thirty months, with no probation to follow so he has satisfied his incarcerated, sentence; an, no further time can be revoked. The Respondent/Appellant argued that Picklesimer never distinguished between probationary and non-probationary sentences. His total aggregate sentence is fifteen years, so the Appellant/Respondent should continue to be responsible for community supervision. Judge Goldsmith took both arguments under advisement and decided to make a determination at a later date.

On September 7, 2012, Judge Goldsmith issued his order, determining that the Respondents case is distinguishable from Picklesimer. The Court determined that the Appellant/Respondents sentence did not include a term of probation; therefore, he satisfied the terms of his original sentence. Judge Goldsmith ruled that there exist no additional revocable time to serve on community supervision so it is unnecessary to address any violation, the warrant was ordered quashed. (R.p.44-p.45). Upon receipt of this order the Respondent/Appellant filed a notice of appeal. Within this appeal the Respondent/Appellant will argue that Picklesimer never distinguished between probationary or non-probationary split sentences. The Court in Picklesimer, only ruled that in a no parole sentence the offender is responsible for the entire sentence upon the violation of community supervision. The Appellant/Respondent has not completed his entire fifteen years sentence, so he continues to be responsible for community supervision, or be subject to further incarceration. The Appellant's final brief of the Respondent/Appellant follows.

ARGUMENT

The Court erred in determining that the Respondent has satisfied his sentence and can no longer be revoked pursuant to Picklesimer.

The Appellant/Respondent was convicted of committing a Burglary 1st, and given a sentence of fifteen years suspended upon the service of thirty months. Burglary 1st is classified as an A-felony which makes this a no parole offense.¹ According to South Carolina law:

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. 2011).

Pursuant to South Carolina law the Appellant/Respondent served eighty-five (85%) percent of his sentence or twenty-six (26) months. Pursuant to South Carolina law the Respondent was placed on community supervision upon his release from incarceration.² Once on community

¹For 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. 2011).

²Notwithstanding any other provision of law, except in a case in which the death penalty or a term or 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.

supervision the Appellant/Respondent violated requiring him to appear before a Circuit Court Judge for revocation. This resulted in the revocation for time served, he was released and responsible to complete two continuous years on community supervision. He once again violated and at the revocation hearing argued that due to the sentencing court not ordering probation he was only responsible for the thirty month, and not the fifteen year portion of his sentence. The Respondent/Appellant argued that the Appellant/Respondent is responsible for serving his entire sentence, which is fifteen years. He continues to be eligible for community supervision, and possibly incarceration upon a violation. South Carolina law specifically states:

The maximum aggregate amount of time the prisoner maybe required to serve when sentenced for successive revocations may not exceed an amount of time equal to the length of incarceration imposed for the original no parole offense.

S.C. Code Ann. 24-21-560(D)(Supp. 2011).

The Appellant/Respondent was convicted of the offense of burglary 1st. Pursuant to South Carolina law burglary 1st is a felony punishable by life imprisonment . . . The court, in its discretion may sentence the defendant to a term of not less than fifteen years. S.C. Code Ann. 16-11-311 (Supp. 2011). The Appellant/Respondent received a sentence of fifteen years suspended to thirty months. He argues that according to Picklesimer, the thirty month portion was the only part he was responsible for serving since he was never placed on probation. However Picklesimer never mentions a mandatory probationary sentence must exist for the aggregate sentence to apply. According to Picklesimer and an original sentence is defined as, the

Code Ann. 24-21-560 (Supp. 2011).

total aggregate suspended and unsuspended portions of a circuit courts sentence. Picklesimer, at 268.

The Court never mentions that the suspended portion must be followed by probation. The minimum sentence a person can receive for the offense the Appellant/Respondent committed is fifteen years, he received that sentence suspended upon the service of thirty months. The only difference between this and receiving a suspended probationary sentence is the probation obligation was not ordered upon completion of the incarcerated portion.

The Respondent/Appellant argues that the Appellant/Respondent was not given a thirty month sentence but a fifteen year sentence. For a person to be sentenced to burglary 1st you cannot receive less than fifteen years. The court is obligated to impose the sentence established by the General Assembly. It is clear by the statute the General Assembly did not wish a criminal defendant to receive a sentence less than fifteen years for the offense of burglary 1st. The Court should give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statutes operation. Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 663 S.E.2d 484 (2008). So it is safe to assume Judge Childs wished to follow the statute which clearly had a fifteen year limitation on a sentence upon conviction. The Appellant/Respondent was sentence to fifteen years suspended to the service of thirty months, with any split sentence the total sentence is the entire sentence including the incarceration and non-incarcerated portions regardless if probation was or was not ordered. We think that the word term used in the 1963 amendment refers to the whole term for which the prisoner is sentenced. It includes that portion of the sentence suspended. Picklesimer v. State, 254 S.C. 596, 176 S.E.2d 536 (1970). No case differentiates as whether probation is needed to determine that the full


CONCLUSION

For all of the foregoing reasons, the State respectfully requests this court reverse the prior decision of the lower court.

Respectfully submitted,

Tommy Evans, Jr.
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BY: 
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Columbia, South Carolina
December 20, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
The Honorable Brooks Goldsmith

Case No.: 08-GS-40-02974


THE STATE,RESPONDENT /APPELLANT

v.

ANTHONY KINARD BLAKNEY AKA
DERRICK JENKINS, APPELLANT/RESPONDENT

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.



Tommy Evans, Jr.
Assistant General Counsel

December 20, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT/APPELLANT,

V.

ANTHONY K. BLAKNEY,

APPELLANT/RESPONDENT

Appellate Case No. 2012-207286

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Whether the court correctly ruled that respondent satisfied the terms of his original sentence upon the service of the entire thirty months suspended sentence, leaving no additional revocable time to serve on community supervision violation, particularly since his sentence did not include a term of probation, and this was the intent of the trial judge?

STATEMENT OF THE CASE

Respondent was sentenced by the Honorable Michelle Childs to fifteen years imprisonment suspended upon the service of thirty months for burglary in the first degree. There was no term of probation included after the service of the thirty months imprisonment. R.46. (sentencing sheet).

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

Judge Cooper revoked respondent's probation at a subsequent hearing held on January 19, 2012. R 27, ll. 13-18. That ruling is the subject of respondent's cross-appeal, and the initial brief of appellant was filed simultaneously with the brief of respondent from the state's appeal of Judge Goldsmith's ruling below.

Respondent appeared for another community supervision revocation hearing before Judge Goldsmith on August 17, 2012. Judge Goldsmith issued an order ruling respondent had satisfied the terms of his incarceration and community supervision. R. 44. That order is the subject of this state's appeal. This brief of respondent follows.

STATEMENT OF FACTS

As stated above, respondent was sentenced by the Honorable Michelle Childs to fifteen years imprisonment suspended upon the service of thirty months for burglary in the first degree, with **no probation** to follow. R. 46.

Defense counsel argued to Judge Cooper that Judge Childs had sentenced respondent to thirty months imprisonment -- "15 years suspended upon 30 active months. Judge Childs did not include a probationary period to follow." R. 4, ll. 15-18.

Defense counsel noted respondent had served eighty-five percent of his 30 month sentence at the Department of Corrections and he was put on community supervision after that "but our contention is that he has [now] exceeded that thirty months that was ordered by Judge Childs." R. 5, ll. 1-9. "Again, probation is applying Pickelsimer, [State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010)] but we believe that the court in that case did not consider sentences suspended upon lesser sentences, which I believe is quite common. I'm arguing that the judge did not intend a supervisory period past that active sentence [30 months imprisonment].. R. 5, ll. 10-15.

Counsel agreed with Judge Cooper that Judge Childs understood since it was a no-parole sentence that she anticipated there would be community supervision. However, the maximum term of incarceration could not exceed the thirty months where no further term of supervision -- probation -- was ordered by Judge Childs. R. 6, l. 4 -- 7, l. 19.

Counsel Aplin said he understood respondent's position to be "if Judge Childs had given him fifteen years suspended to thirty months and five years probation. Then you would agree Picklesimer [State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010)] applies. He could be revoked up to the full fifteen years."

Defense counsel confirmed that was his position. R. 7, l. 21 – 8, l. 5. At the conclusion of the hearing Judge Cooper took the matter under advisement until a further hearing could be held. R. 14, ll. 2-7.

On January 19, 2012, Judge Cooper held that additional hearing. R. 16. Defense counsel argued that the fifteen year sentence suspended upon the service of thirty months “was satisfied upon the service of his thirty months, *which he completed after his last revocation on community supervision.*” R 21, ll. 6-25. (emphasis added). Counsel argued “he could not have served the thirty months in his first-term incarceration because the community supervision released him by statute after 85 percent.” Respondent had now “maxed out the remaining 15 percent.” Respondent had not been placed on probation and he had therefore satisfied the terms of his “straight thirty month sentence.” R. 20, l. 13 – 21, l. 22.

Counsel Aplin argued: “We’re treating it no different than if the original sentencing judge had said *fifteen suspended to thirty months and five years’ probation* or four years’ probation or one year or no probation.” R. 23, ll. 9-18. (emphasis added). Counsel Aplin argued the original sentence was fifteen years and that was how much time respondent could serve “through successive revocations . . . [15 years imprisonment]” R. 22, l. 17 – 23, l. 23.

Judge Cooper ruled:

It’s a very interesting question, and it’s an interesting argument. But in my opinion, I’m going to agree with the Department, and I’m going to continue to impose the community supervision until your client complies with it. If he doesn’t comply with it, *then has got a long row to hoe ahead of him.*

R. 27, ll. 13-18. (emphasis added). Respondent filed a notice of intent to appeal Judge Cooper’s ruling and that appeal is pending as a cross-appeal to this case.

Respondent appeared again on a community service violation on August 17, 2012 before the Honorable Brooks P. Goldsmith. Constantine Pournaras again represented respondent. Benjamin Aplin again represented the Department of Probation, Pardon and Parole. R. 33

Defense counsel Aplin told the judge that respondent was sentenced to fifteen years imprisonment suspended "to thirty months with no probation or anything to follow."

Defense counsel Aplin then gave this procedural history:

He came out on community supervision April 30th of 2010 and was charged with some violations, and he appeared in front of Judge Cooper back December 9th of 2011 for a violation hearing. At that point Mr. Pournaras was representing him, and the argument was raised about whether he should even be on community supervision under the Picklesimer case that came out from the Supreme Court shortly before that time frame.

Judge Cooper heard some arguments and then asked for some memorandum from the parties. Mr. Pournaras submitted a memo, and we reconvened the hearing January 19th of 2012. At that point Judge Cooper listened to further arguments and agreed with the State's position that he was indeed still supposed to be on community supervision. And this is the part where I don't know if I have the exact detail, but I think he revoked him for time served.

Mr. Pournaras: Yes

Mr. Aplin: Okay. Which meant he - - -

The Court: Came back.

Mr. Aplin: - - - came back on community supervision for a new two-year period that started the date and would expire in 2014. He is now before you on additional community supervision violation charges. And because that case was decided and is on appeal now -

- Mr. Pournaras timely filed a notice of appeal. It is pending with the Court of Appeals.

R. 34, l. 16 – 35, l. 15.

Defense counsel again argued that State v. Picklesimer involved a non-parole offense with a split “suspended and unsuspended portion including probation. This case we have here *does not have a probationary sentence, and it’s an unusual sentence* and not a lot of judges suspend actives upon lesser actives. I’m assuming in this case it was because it was a burglary first which has a mandatory minimum of 15 which at the time judges were routinely suspending, at least in this county, to lesser active offenses.” Counsel argued the only condition Judge Childs place upon respondent was the service of thirty months imprisonment and then community “supervision was triggered by a statute once he completed approximately 85 percent of that 30 months.” R. 38, ll. 15-22. (emphasis added)

Judge Goldsmith issued an order dated September 7, 2012. This order noted that Judge Cooper on January 19, 2012 found respondent “in violation of his community supervision, revoked time served, and placed [Blakney] on two (2) years of community supervision. Blakney was arrested April 27, 2012, for violation of community supervision.”

R 45. The judge wrote:

THIS COURT FURTHER FINDS that Blakney satisfied the terms of his original sentence upon the service of thirty (30) months during his second revocation upon 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 for indictment 2008-GS40-02974. It is therefore unnecessary to address the current violations.

R. 45.

ARGUMENT

The court correctly ruled that respondent satisfied the terms of his original sentence upon the service of the entire thirty months suspended sentence, leaving no additional revocable time to serve on community supervision violation, particularly since his sentence did not include a term of probation. Further, this was the intent of the trial judge.

It is the state's position that if respondent had been sentenced to 50 years imprisonment suspended on ten years imprisonment and no probation to follow that if he violated his community supervision he could continuously be returned to prison until he had served 50 years imprisonment or two continuous years of community supervision without a violation.

As seen, defense counsel correctly 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*.

Here, Judge Childs must have intended for respondent 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 respondent would serve 85% of his 30 months in the Department of Corrections and that community supervision would follow. However, if respondent 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 respondent 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.”

Again, the sentencing judge here could not have intended that respondent could serve 15 years imprisonment where she suspended that sentence on the service of 30 months with no probation to follow.

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 respondent Blakney satisfied the terms of his original sentence upon the service of thirty 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.

The judge correctly distinguished Picklesimer since respondent was not sentenced to a suspended sentence with a term of probation to follow.

To put aside the intent of the trial judge, it is elementary that 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.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992)).

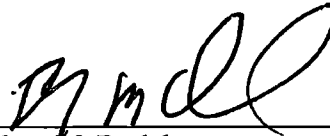
The legislature understands that judges have the discretion to order probation to assure continued supervision once an inmate is released. Community supervision assures that result in respondent’s case where no period of probation was imposed. The legislature could not have intended that respondent – where no probation was imposed -- could serve the entire fifteen years where **no term of probation was imposed**.

Judge Childs sentenced respondent to fifteen years incarceration, suspended upon the service of thirty months. The thirty months was respondent’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 respondent could violate his community supervision with impunity. It only meant that

CONCLUSION

By reason of the foregoing argument, the order of Judge Goldsmith should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

This 2nd day of January, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Brooks P. Goldsmith, Judge

THE STATE,

RESPONDENT/APPELLANT,

V.

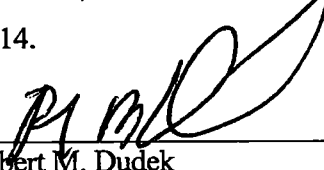
ANTHONY K. BLAKNEY,

APPELLANT/RESPONDENT

Appellate Case No. 2012-207286

CERTIFICATE OF SERVICE

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

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

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021.

STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
The Honorable Brooks Goldsmith

Case No. 08-GS40-02974

THE STATE RESPONDENT/APPELLANT,

V

ANTHONY KINARD BLAKNEY AKA
DERRICK JENKINSAPPELLANT/RESPONDENT.

FINAL BRIEF OF RESPONDENT/APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. **HAS THE COURT ERRED IN DETERMINING THAT THE RESPONDENT HAS SATISFIED HIS SENTENCE UPON HIS SECOND VIOLATION OF COMMUNITY SUPERVISION AND CAN NO LONGER HAVE ANY TIME REVOKED PURSUANT TO PICKLESIMER?**

STATEMENT OF THE CASE

On April 30, 2010, the Appellant/Respondent appeared before the Honorable J. Michelle Childs for the offense of Burglary in the First Degree (Burglary 1st). At the conclusion of this appearance Judge Childs sentenced the Appellant/Respondent to a fifteen year term of imprisonment suspended to the service of thirty (30) months incarceration. (R.p.46-p.48). Pursuant to South Carolina law the Appellant/Respondent began Community Supervision on May 13, 2011.

On December 9, 2011, the Appellant/Respondent appeared before the Honorable Thomas G. Cooper for a violation of community supervision. The Appellant/Respondent was accused of violating of community supervision by, failing to report; failing to pay his supervision fees; failing to comply with electronic monitoring; and, failing to follow the advice and instructions of his agent. Upon conclusion of this hearing Judge Cooper decided to revoke community supervision and give him credit for the amount of pre-detention time served. Upon release the Appellant/Respondent was still obligated to successfully complete community supervision. Later another warrant was issued for the violation of community supervision. Within this warrant the Appellant/Respondent was accused of violating supervision by failing to report; providing an invalid address thereby failing to allow his agent to visit his home; and, failing to pay his supervision fee. On August 17, 2012, the Appellant/Respondent appeared before the Honorable Brooks P. Goldsmith for a hearing regarding his violation of community supervision. During this hearing the Appellant/Respondent argued that he has already satisfied his sentence pursuant to State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010). The Appellant/Respondent argued that in Picklesimer the Court of Appeals were referring to split sentences where it was suspended

upon the completion of probation. In this case Judge Childs sentenced the Appellant/Respondent to fifteen years suspended to the service of thirty months, with no probation to follow so he has satisfied his incarcerated, sentence; an, no further time can be revoked. The Respondent/Appellant argued that Picklesimer never distinguished between probationary and non-probationary sentences. His total aggregate sentence is fifteen years, so the Appellant/Respondent should continue to be responsible for community supervision. Judge Goldsmith took both arguments under advisement and decided to make a determination at a later date.

On September 7, 2012, Judge Goldsmith issued his order, determining that the Respondents case is distinguishable from Picklesimer. The Court determined that the Appellant/Respondents sentence did not include a term of probation; therefore, he satisfied the terms of his original sentence. Judge Goldsmith ruled that there exist no additional revocable time to serve on community supervision so it is unnecessary to address any violation, the warrant was ordered quashed. (R.p.44-p.45). Upon receipt of this order the Respondent/Appellant filed a notice of appeal. Within this appeal the Respondent/Appellant will argue that Picklesimer never distinguished between probationary or non-probationary split sentences. The Court in Picklesimer, only ruled that in a no parole sentence the offender is responsible for the entire sentence upon the violation of community supervision. The Appellant/Respondent has not completed his entire fifteen years sentence, so he continues to be responsible for community supervision, or be subject to further incarceration. The final brief of the Respondent/Appellant follows.

ARGUMENT

The Court erred in determining that the Respondent has satisfied his sentence and can no longer be revoked pursuant to Picklesimer.

The Appellant/Respondent was convicted of committing a Burglary 1st, and given a sentence of fifteen years suspended upon the service of thirty months. Burglary 1st is classified as an A-felony which makes this a no parole offense.¹ According to South Carolina law:

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. 2011).

Pursuant to South Carolina law the Appellant/Respondent served eighty-five (85%) percent of his sentence or twenty-six (26) months. Pursuant to South Carolina law the Respondent was placed on community supervision upon his release from incarceration.² Once on community

¹For 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. 2011).

²Notwithstanding any other provision of law, except in a case in which the death penalty or a term or 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.

supervision the Appellant/Respondent violated requiring him to appear before a Circuit Court Judge for revocation. This resulted in the revocation for time served, he was released and responsible to complete two continuous years on community supervision. He once again violated and at the revocation hearing argued that due to the sentencing court not ordering probation he was only responsible for the thirty month, and not the fifteen year portion of his sentence. The Respondent/Appellant argued that the Appellant/Respondent is responsible for serving his entire sentence, which is fifteen years. He continues to be eligible for community supervision, and possibly incarceration upon a violation. South Carolina law specifically states:

The maximum aggregate amount of time the prisoner maybe required to serve when sentenced for successive revocations may not exceed an amount of time equal to the length of incarceration imposed for the original no parole offense.

S.C. Code Ann. 24-21-560(D)(Supp. 2011).

The Appellant/Respondent was convicted of the offense of burglary 1st. Pursuant to South Carolina law burglary 1st is a felony punishable by life imprisonment . . . The court, in its discretion may sentence the defendant to a term of not less than fifteen years. S.C. Code Ann. 16-11-311 (Supp. 2011). The Appellant/Respondent received a sentence of fifteen years suspended to thirty months. He argues that according to Picklesimer, the thirty month portion was the only part he was responsible for serving since he was never placed on probation. However Picklesimer never mentions a mandatory probationary sentence must exist for the aggregate sentence to apply. According to Picklesimer and an original sentence is defined as, the

Code Ann. 24-21-560 (Supp. 2011).

total aggregate suspended and unsuspended portions of a circuit courts sentence. Picklesimer, at 268.

The Court never mentions that the suspended portion must be followed by probation. The minimum sentence a person can receive for the offense the Appellant/Respondent committed is fifteen years, he received that sentence suspended upon the service of thirty months. The only difference between this and receiving a suspended probationary sentence is the probation obligation was not ordered upon completion of the incarcerated portion.

The Respondent/Appellant argues that the Appellant/Respondent was not given a thirty month sentence but a fifteen year sentence. For a person to be sentenced to burglary 1st you cannot receive less than fifteen years. The court is obligated to impose the sentence established by the General Assembly. It is clear by the statute the General Assembly did not wish a criminal defendant to receive a sentence less than fifteen years for the offense of burglary 1st. The Court should give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statutes operation. Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 663 S.E.2d 484 (2008). So it is safe to assume Judge Childs wished to follow the statute which clearly had a fifteen year limitation on a sentence upon conviction. The Appellant/Respondent was sentence to fifteen years suspended to the service of thirty months, with any split sentence the total sentence is the entire sentence including the incarceration and non-incarcerated portions regardless if probation was or was not ordered. We think that the word term used in the 1963 amendment refers to the whole term for which the prisoner is sentenced. It includes that portion of the sentence suspended. Picklesimer v. State, 254 S.C. 596, 176 S.E.2d 536 (1970). No case differentiates as whether probation is needed to determine that the full

}
}
} sentence includes the suspended portion. Due to the statute requiring a fifteen year minimum, the
} sentence given to the Appellant/Respondent is the entire aggregate sentence of fifteen years;
} therefore, the court could have revoked up to a year and then return the Appellant/Respondent to
} community supervision. He should remain on community supervision, until he has completed
} two continuous years successfully or completed his fifteen year sentence.
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CONCLUSION

For all of the foregoing reasons, the State respectfully requests this court reverse the prior decision of the lower court.

Respectfully submitted,

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BY: 

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Columbia, South Carolina
December 20, 2013

THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
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DERRICK JENKINS,APPELLANT/RESPONDENT

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.



Tommy Evans, Jr.
Assistant General Counsel

December 20, 2013