

ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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DEC 19 2014

THE STATE,

RESPONDENT, **SC Court of Appeals**

V.

UBALDO GARCIA,

APPELLANT

Appellate Case No. 2012-209447

Appeal from Horry County

Steven H. John, Circuit Court Judge

Opinion No. 2014-UP-446

PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, the undersigned counsel would petition for rehearing in this appeal because this Court may have overlooked the fact that although appellant's request for time served credit while on house arrest occurred prior to the amended time served credit statute that now allows for such credit; nonetheless, the amended statute applied retroactivity to appellant's case since it's an amendment that is remedial and procedural in nature. Therefore, it was error not to retroactively apply time served credit accrued during appellant's house arrest to his sentence. In support of this motion, the undersigned counsel submits the following information.

On September 30, 2009, appellant was stopped by police for driving sixty-five-miles per hour in a fifty-five-mile per hour zone on Highway 378 in Horry County, South Carolina. Upon smelling an odor of marijuana coming from the vehicle during the stop, a police search of appellant's vehicle resulted in a finding of three-quarters of a kilo of cocaine. Appellant was arrested at the scene and later charged with trafficking in cocaine. R. 8, l. 14 – R. 9, l. 8. Subsequently, appellant pled guilty to trafficking in cocaine and was sentenced to ten years imprisonment. R. 4, l.1-R. 11, l. 9.

Thereafter, appellant appeared before the plea judge requesting credit for time served¹ while on home detention and GPS monitoring as bail conditions pending adjudication on his trafficking charge. The plea judge denied appellant's request for time served credit while on house arrest via the prohibition announced in Higgins. R. 30, l. 12-R. 31, l. 24. In Higgins, the Court interpreted S.C. Code Ann. § 24-13-40, which mandates that prisoners receive "full credit against the sentence must be given for time served prior to trial and sentencing," to mean that time served credit could only be awarded to a "prisoner" who was "serving time in prison," and that "prisoners" were those who were actually confined to a "penal institution;" and that as a result, pre-trial house confinement status could not be deemed the equivalent of a prisoner confined in prison.

However, on June 7, 2013, S.C. Code Ann. § 24-13-40, was amended to read as follows:

The computation of the time served...must be calculated from the date of the imposition of the sentence.....[and] full credit against the sentence must be given for time served prior to trial and sentencing and may be given for any time spent under monitored house arrest.

Consequently, S.C. Code Ann. § 24-13-40 as amended meant that Higgins was no longer controlling on the issue of whether to bestow time served credit on home detention pretrial

¹ Appellant was on house arrest and GPS monitoring from September 28, 2009 to December 11, 2011 as a condition of release after being granted bail.

detainees. Therefore, appellant's request for time served credit while on house arrest as requested, which was retroactively applicable, was preserved as an issue at the circuit level for the appeal.

On appeal, this Court held that:

As to Garcia's request for sentencing credit under section 24-13-40 of the South Carolina Code (2007)...*State v. Higgins*, 357 S.C. 382, 385, 593 S.E.2d 180, 182 (Ct. App. 2004) (holding that our legislature intended to allow credit for time served only in a penal institution and not on home detention).

As to the 2013 amendment to section 24-13-40: *Edwards v. State Law Enforcement Div.*, 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011) (“[A]bsent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature.” (citations omitted); S.C. Code Ann § 24-13-40 (Supp. 2013) (“In every case in computing the time served by a prisoner, full credit against the sentence *must* be given for time served prior to trial and sentencing, and *may* be given for any time spent under monitored house arrest.” (emphasis added); *State v. Hill*, 314 S.C. 330, 332, 444 S.E.2d 255, 256 (1994) (“The word ‘may’ ordinarily ‘signifies permission and generally means the action spoken of is optional or discretionary.’” (citation omitted)).

Clearly, this Court may have overlooked the fact that the amended time served statute allowing prisoners to receive credit for time served while on house arrest prior to trial applied retroactively in appellant's case because the amended statute was procedural and remedial in nature. As a rule, enacted statutes are to be construed retroactively rather than prospectively if the statute is remedial or procedural in nature. *Edwards v. State Law Enforcement Division*, 395 S.C. 571, 720 S.E.2d 462 (2011).

REMEDIAL

Statutes are to be construed retroactively rather than prospectively if they are remedial or procedural in nature, and a statute is remedial where it creates a new remedy for an existing right or enlarges the right of person under disability. *Edwards*, supra. Originally, S.C. Code Ann § 24-13-40, as interpreted in *Higgins*, held that time served credit must be awarded only to prisoners awaiting trial who served time in a penal institution without any credit for prisoners serving time

while on home detention. However, §24-13-40, as amended, announced that credit for time served may be granted to prisoners serving time under monitored house arrest. This amended statute would qualify as remedial in nature because it created a new remedy, i.e., the right to time served credit for pre-trial detainees on house arrest awaiting trial, for an existing right, i.e., the existing right to time served credits already in effect for pre-trial detainees awaiting trial under the original statute. The new remedy for an existing right under the amended statute at issue effectively expanded the definition of the location of pretrial detainees who await trial in connection with the existing right to receive time served credit.

Thus, this remedial provision under the amended statute in turn meant that it applied retroactively in appellant's case. Compare Edwards, where the Court held that amendment to S.C. Code Ann. § 23-3-430 did not require Edwards who was pardoned of his sex crime, to re-register on the sex offender registry via a retroactive application because there was no existing registration right in place in that regard prior to the amendment as the prior statute was silent on the issue of whether pardoned sex offenders must so register; and as a result, there was no remedy for an existing right that came into play. To the contrary, the right to time served credit in the case at bar was in existence prior to the amended statute at issue here, save a new location from which a pretrial detainee could apply and receive such credit.

PROCEDURAL

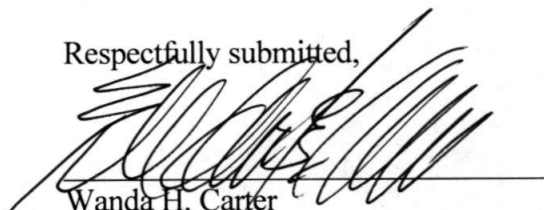
Statutes are to be construed retroactively rather than prospectively if they are remedial or procedural in nature; and a statute is procedural where it sets out a mode of procedure for a court to follow or prescribes a method of enforcing a particular right. Edwards, supra. This amended time served credit statute that enlarged the rights of prisoners to receive time served credits accrued while on house arrest would qualify as procedural in nature because of the expansion of such a right; and

because of the trial judge's discretion in the matter since such credit "may" be given, which obviously means there must be some mode of procedure for a judge to follow (mini hearing at the very least) in in these cases.

This procedural aspect of the amended statute meant that it applied retroactively to appellant's case. Compare, Wiesart v. Stewart, 379 S.C. 300, 665 S.E.2d 187 (Ct. App. 2008), where the Court held that since the prior automatic sex registration requirement for indecent exposure offenders had been amended under S.C. Code § 23-3-430, then the trial judge would be charged with the new task of making specific findings on the records based on the circumstances as to whether indecent exposure offenders would have to register as sex offenders; and that this in turn was deemed a mode of procedure that characterized the amended statute to be applied retroactively. Likewise, in the case at bar, the presence of the word "may" in the amended time served credit statute signaled a discretionary finding by the trial judge that would certainly be accomplished by some mode of procedure to enforce such credit. Therefore, this procedural aspect of the amended time served credit statute in this case would apply retroactively to appellant's sentence.

WHEREFORE, the undersigned counsel would request the grant of this petition for rehearing on appellant's request for the retroactive application of time served credit accrued during his house arrest in his case be reflected in his sentence.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

This 19th day of December, 2014.

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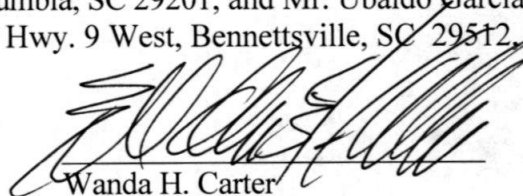
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UBALDO GARCIA,

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CERTIFICATE OF SERVICE

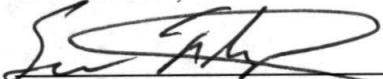
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Ubaldo Garcia #349072, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 19th day of December, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 19th day
of December, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.