THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BRAD ALAN DAY,

APPELLANT

APPELLATE CASE NO. 2013-002558

Appeal from Lexington County

R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 2015-UP-039

PETITION FOR REHEARING

Appellant, Brad Alan Day, by and through his undersigned counsel, respectfully petitions this Court for rehearing pursuant to Rule 221(a), SCACR. Appellant seeks rehearing of the Court's conclusion that Appellant continues to be subject to a community supervision program (CSP) even though he has served the entire five-year unsuspended portion of his sentence day for day. Respectfully, this Court misapprehends S.C. Code Ann. § 24-21-560(D). Under the plain language of § 24-21-560(D), Appellant is not required to serve the suspended portion of his sentence.

On October 29, 2007, Appellant pled guilty to second degree criminal sexual conduct and was sentenced by the Honorable Kenneth Goode to ten years suspended upon the service of five years imprisonment. Appellant was not sentenced to a probationary term to follow the five year term of incarceration. R. 5, ll. 16-23; R. 46. On April 29, 2011, after serving eighty-five percent of his five year sentence (four years and sixty-nine days), Appellant was released from incarceration and placed in a CSP. R. 6, ll. 1-2. He was twice found in violation of the CSP and sentenced to ninety days and one year respectively. After each violation, Appellant was continued on the CSP after he served the revoked sentence. R. 6, ll. 1-10.

At a third CSP violation hearing before the Honorable R. Markley Dennis, Jr., Appellant argued he was no longer subject to a CSP because he had served the five year unsuspended portion of his sentence day for day and had thus satisfied his sentence. R. 6, l. 19 – 7, l. 1. Judge Dennis continued Appellant on the CSP and ruled he could be re-incarcerated for subsequent violations of the CSP until he served ten years in prison. R. 7, l. 18 – 8, l. 1.

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

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

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

(emphasis added).

As defense counsel argued below, the emphasized language above clearly states that a defendant may not be incarcerated on successive community supervision revocations for a period longer than the original sentence and the original sentence "**does not include any portion of a suspended sentence**." S.C. Code Ann. § 24-21-560(D) (emphasis added). Therefore, Appellant's original sentence under the statute was the unsuspended five years, which Appellant had already served day for day during his initial period of incarceration and his two previous CSP revocations. Because Appellant had satisfied the sentenced imposed by Judge Goode, he could not be continued on a CSP nor could he be re-incarcerated for any alleged violations of the CSP.

This case is distinguishable from State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010). In Picklesimer, our Supreme Court held "that the 'original sentence' as referenced in § 24-21-560(D), includes both the suspended and unsuspended portions of the circuit court's sentence . . ." 388 S.C. at 268, 695 S.E.2d at 848. However, Picklesimer dealt with a situation where the defendant was sentenced to ten years imprisonment suspended upon the service of five years imprisonment **and five years probation**. Appellant, on the other hand, was not sentenced to serve a probationary term after he served his five year unsuspended sentence. Because of this distinction, the specific holding in Picklesimer does not apply to this case and defense counsel's argument below that Appellant had satisfied the sentenced imposed by Judge Goode by serving the entire five

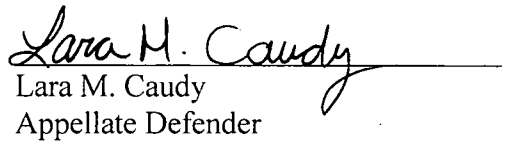
year unsuspended portion of his sentence is correct. Again, **once Appellant served the five year unsuspended portion of his sentence, the suspended portion of his sentence was discharged, leaving no additional revocable time to serve on CSP violations.**

Despite what Judge Dennis maintained below, Judge Goode could not have intended Appellant to serve more than the unsuspended five years in prison since he imposed a sentence of ten years suspended upon the service of five years imprisonment **with no probation to follow**. See State v. DeAngelis, 257 S.C. 44, 50, 183 S.E.2d 906, 909 (1971). If Judge Goode had intended Appellant to serve more than five years, he would have imposed a probationary term to follow the five year unsuspended sentence. The remainder of Appellant's five year unsuspended sentence (about 296 days) was the sentence he had to serve if he violated the CSP and Appellant served this remaining time during his two previous revocations.

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

Because this Court overlooked the plain language of S.C. Code Ann. § 24-21-560(D), rehearing should be granted.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

This 27th day of January, 2015.

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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 the South Carolina Department of Probation, Parole and Pardon Services, P.O. Box 50666, Columbia, SC 29250, this 27th day of January, 2015.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day of January, 2015.

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