

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

FEB 06 2015
SC Court of Appeals

Opinion No. 2015-UP-039

THE STATE,RESPONDENT

v.

BRAD ALAN DAY,APPELLANT

RETURN TO PETITION FOR REHEARING

The Respondent, the State of South Carolina by and through its attorney does hereby make this return to the Appellant's January 27, 2015, petition for rehearing. The State respectfully requests that the Appellant's petition for rehearing be denied and dismissed.

Pursuant to the Appellant Court Rules a party is only entitled a rehearing if there are points that have been overlooked or misapprehended by the Court. Rule 221(a), SCACR. The Respondent contends that the Court has applied the law, and has not overlooked nor misapprehended any law or issue that was necessary to make a valid decision in this case.

1. This Court did not err in deciding that the Appellant's sentence was not completed, so he is subject to a revocation of Community Supervision.

The Appellant was convicted of committing criminal sexual conduct with a minor in the second degree (CSC 2nd w/minor). He was sentenced to a ten (10) year period of incarceration suspended upon the service of five (5) years. At the time of this conviction, CSC 2nd w/minor was classified as a c-felony, making this a no parole offense.¹ Pursuant to South Carolina law the Appellant was required to serve eight-five (85%) of five years, then released and placed on a community supervision program. (CSP) He violated CSP twice and given sentences of ninety (90) days and one (1) year. The Appellant now argues that upon his final revocation his sentence was completed, so he should no longer be on community supervision. The Appellant argues that the legislature did not wish for the Appellant to continue his sentence, and this Court overlooked the plain language under the law so this case should be reheard.

The Appellant argues that pursuant to South Carolina law the suspended portion should not be included in a CSP revocation. Section 24-21-560(D) states: "the prisoner must not be incarcerated for a period longer than the original sentence. The original term of incarceration does not include any portion of a suspended sentence." S.C. Code Ann. §24-21-560(D)(Supp. 2012). However, the South Carolina Supreme Court decided in *State v. Picklesimer*, 388 S.C. 264, 695 S.E.2d 845 (2010), that the total sentence handed down by the Court includes both the suspended and unsuspended portions of the original sentence. *Id.*, at 268.

The Appellant argues that the original sentence does not include any portion of the suspended sentence, and that his total sentence is five years which he has already served. Recently in the case of *State v. Blakney*, 410 S.C. 244, 763 S.E.2d 622 (2014), this Court decided that this situation is

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

not distinguishable from *Picklesimer*. That the total aggregate sentence does include the suspended and unsuspended portions, regardless if the suspended portion does or does not include probation.

The Appellant also argues that the sentencing Judge wished for the Appellant to not serve more than five years. They argue that if he wished for him to serve more time he would have given him a longer sentence. The Appellant was convicted of committing CSC 2nd w/minor, an offense that carries a maximum sentence of twenty (20) years; however, there exist no minimum. The sentencing Judge could have just given him a straight five year sentence; however, he sentenced him to a ten (10) year sentence, with five (5) years incarceration. It is the belief of the Respondent that the sentencing Judge did not give the Appellant a probationary period due to the South Carolina Supreme Court decision of *State v. Dawkins*, 352 S.C. 162, 573 S.E.2d 783 (2002). In *Dawkins*, the Supreme Court ruled that a Defendant is discharged from a sentence after the successful completion of CSP, including a probationary term. Due to this decision, the Appellant would either successfully complete CSP which would discharge probation, or complete his ten (10) year sentence in one (1) year increments. The sentencing Court never sentenced probation due to the fact he would never serve it, so a probationary sentence is meaningless.

The Appellant argues that allowing him to serve CSP makes him serve his sentence beyond his original sentence, which was not the intent of the legislature. The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 476 S.E.2d 690 (1996). It is the opinion of the Appellant that the above referenced statute does not allow for him to remain on CSP, past the five (5) year incarcerated portion; however, the Supreme Court in *Picklesimer*, and later interpreted by this Court in *Blakney*, state, that the “original sentence” included “both the suspended unsuspended

portions of a circuit court's sentence." *Blakney*, at 250, quoting, *Picklesimer*. *Picklesimer*, also states:

Under 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, which encompasses both the suspended and unsuspended portions of the sentence.

Picklesimer, at 270. (emphasis added)

The Appellant was convicted and given a ten (10) year sentence on October 29, 2007; therefore, he should not remain on CSP past October 29, 2017. This statute does not mean that the Appellant should not be on CSP past the incarcerated portion of his sentence, it means that he cannot be remain on CSP past the length of his "original sentence" which in this case is ten (10) years.

Pursuant to the rules, this Court cannot hear a rehearing unless it has been shown to the Court that points were overlooked or misapprehended. The Appellant has not shown that this court has misapprehended or overlooked any law so this petition should be subject to dismissal.

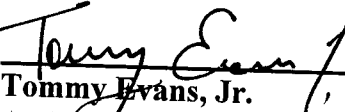
CONCLUSION

For all the reasons set forth above, the Respondent submits this Court should deny the petition for rehearing and allow the case to remain properly decided by this Court.

Respectfully submitted,

Tommy Evans, Jr.
Assistant General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

BY: 
Tommy Evans, Jr.
Assistant General Counsel

Columbia, South Carolina
February 4, 2015

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CERTIFICATE OF SERVICE

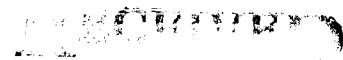
I, Dawn K. Nichols, Executive Administrative Assistant, certify that I have served the within Return to Petition for Rehearing, dated February 4, 2015, by depositing a copy of the same in the United States mail, postage prepaid, this 4th day of February, 2015, addressed to:

Lara Caudy, Appellate Defender
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, S.C. 29211-1589

I further certify that all parties required by Rule to be served have been served.



Dawn K. Nichols
Executive Administrative Assistant



FEB 06 2015

SC Court of Appeals

State of South Carolina
Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
Governor



JERRY B. ADGER
Interim Director

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February 4, 2015

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
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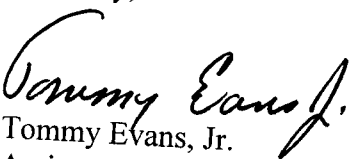
Re: **State v. Brad Alan Day**

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the *Return to Petition for Rehearing*, dated February 4, 2015, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,


Tommy Evans, Jr.
Assistant General Counsel

Enclosures

cc: Lara Caudy

RECEIVED

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SC Court of Appeals

State of South Carolina
Department of Probation, Parole, and Pardon Services
2221 DEVINE STREET, SUITE 600, POST OFFICE BOX 50666
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FEB 06 2016

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