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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Lexington County

R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 2015-UP-039 (S.C. Ct. App. filed 1/21/2015)

207-GS-32-01387

THE STATE,

RESPONDENT,

V.

BRAD ALAN DAY,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 19, 2015.

QUESTION PRESENTED

Did the Court of Appeals err by affirming the trial court's erroneous finding that Petitioner continues to be subject to a community supervision program and can be re-incarcerated for violations of the CSP until he serves ten years in prison where Petitioner was sentenced to ten years suspended upon the service of five years imprisonment with no probation and where Petitioner has already served the maximum five year sentence day for day?

STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Petitioner at the April 30, 2007 term of General Sessions for second degree criminal sexual conduct with a minor. R. 44-45. On October 29, 2007, Petitioner pled guilty before the Honorable Kenneth Goode. Judge Goode sentenced him to ten years suspended upon the service of five years imprisonment. The sentence did not include a probationary term after the service of the five years imprisonment. Petitioner was also required to register as a sex offender. R. 5, ll. 16-23; R. 46.

Petitioner was released from incarceration on April 29, 2011 and placed in a community supervision program (CSP). R. 6, ll. 1-2. On November 21, 2013, Petitioner appeared before the Honorable R. Markley Dennis, Jr. for a third CSP hearing. David M. Mauldin represented Petitioner, and Matthew Buchanan represented the Department of Probation, Parole, and Pardon Services. R. 1.

Despite Petitioner's argument that he had served the maximum five year sentence imposed by Judge Goode and should no longer be subject to a CSP, Judge Dennis continued Petitioner on CSP and added the condition that he attend substance abuse counseling. R. 6, l. 23 – 7, l. 1; R. 19, l. 16 – 20, l. 1; R. 26. Judge Dennis also ruled Petitioner could be re-incarcerated for subsequent violations of his CSP until he served ten years in prison. R. 7, l. 18 – 8, l. 1.

The Court of Appeals affirmed the lower court ruling. State v. Day, 2015-UP-039 (S.C. Ct. App. filed January 21, 2015); App. 1-2. Petitioner filed a petition for rehearing on January 27, 2015. App. 3-8. The state filed a return on February 4, 2015. App. 9-14. On February 19, 2015, the Court of Appeals denied the petition for rehearing. App. 15. Petitioner now files this petition for writ of certiorari requesting review of the Court of Appeals' decision.

ARGUMENT

The Court of Appeals erred by affirming the trial court's erroneous finding that Petitioner continues to be subject to a community supervision program and can be re-incarcerated for violations of the CSP until he serves ten years in prison where Petitioner was sentenced to ten years suspended upon the service of five years imprisonment with no probation and where Petitioner has already served the maximum five year sentence day for day.

Relevant Facts

Petitioner appeared before Judge Dennis for a third CSP violation hearing on November 21, 2013. R. 1. Defense counsel argued at this hearing that Judge Goode had sentenced Petitioner to a maximum of five years imprisonment - - "ten years suspended to five years and registry as a sex offender. I note to the Court that **the sentence did not include a probationary term subsequent to the five-year incarceration term.**" R. 5, ll. 18-25 (emphasis added).

Defense counsel explained that Petitioner was released from prison on April 29, 2011 after serving eighty-five percent of his five year sentence (four years and sixty-nine days). On February 10, 2012, Petitioner had a CSP violation hearing, was found to be in violation, and sentenced to ninety days imprisonment. On June 22, 2012, Petitioner had a second CSP violation hearing, was again found to be in violation, and sentenced to one year imprisonment. At each of these hearings, Petitioner was ordered to continue on a CSP after he served the revoked sentence.[1] R. 6, ll. 1-10.

[1] Petitioner has since had a fourth CSP violation hearing. This hearing was held in Lexington County on January 31, 2014 before the Honorable Donald B. Hocker. In an order filed February 7, 2014, Judge Hocker likewise ruled Petitioner had not satisfied his sentence and is still required to participate in a CSP. Judge Hocker also found Petitioner in violation of his CSP and sentenced him to another one year in prison. Petitioner has also appealed this ruling. R. 40-43. The appeal is currently pending in the Court of Appeals.

Defense counsel told Judge Dennis he was uncertain how many days Petitioner actually served on the ninety day revocation, but that he was certain Petitioner had served three hundred and sixty-one days on the one year revocation. Defense counsel said, "And the total would be 1980 days with the 90-day revocation. And even without the 90-day revocation, the sentence [total days Petitioner served] would be 1890 days." R. 6, ll. 11-18.

Defense counsel explained, "Now, a five-year sentence, multiplying 365 times five, would be 1825 days. And in either of those numbers I gave the Court, Mr. Day [Petitioner] has exceeded an incarceration term for that five years." He argued, "[O]ur position is that the ten years was suspended upon the service of five years and that Mr. Day has actually served that five years and, therefore, satisfied that sentence." R. 6, l. 19 – 7, l. 1.

Defense counsel distinguished State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010), from Petitioner's case. He argued, "[T]he Picklesimer case was ten years suspended to five years and five years probation. And we think there's a factual distinction in this case in that there was not a probationary term to be served after the five years." R. 9, ll. 6-10.

Defense counsel acknowledged that the Department of Probation, Parole, and Pardon Services was relying on the following language found in Picklesimer to support its position that Petitioner had not satisfied his sentence and was still subject to community supervision: "We now definitely state that the 'original sentence,' as referenced in section 24-21-560(D), includes both the suspended and unsuspended portions of a circuit court's sentence; it is, in fact, the total sentence handed down by the court." R. 10, l. 23 – 11, l. 5; See Picklesimer, 388 S.C. at 268, 695 S.E.2d at 848.

However, defense counsel argued, "[T]he statute actually says that the original term of incarceration does not include any portion of the suspended sentence." R. 12, ll. 3-5. Therefore,

defense counsel maintained Petitioner was not required under the statute to serve the suspended portion of his sentence and had satisfied his sentence by serving the five year unsuspended portion day for day. Consequently, Petitioner could not be continued on a CSP or be re-incarcerated for any alleged violations.

Judge Dennis denied Petitioner's motion. He said, "I could revoke him [Petitioner] in one-year increments up to the amount of his actual sentence, the sentence that was imposed, which . . . in taking what you said, he's served five, but in Judge Goode's mind for the community supervision, he still would have the balance of that and the five that he hadn't served because he could serve . . . up to ten because that was the sentence." R. 7, l. 18 – 8, l. 1. However, Judge Dennis later admitted, "I don't know what [Judge Goode] knew" and it was "presumptuous of me" to assume what Judge Goode intended. R. 9, ll. 17-22.

Additionally, Judge Dennis noted, "They [the appellate courts] may change this law, but they'll have to do it there because right now it makes perfect sense to me based on just my knowledge of what I've done over the years." R. 13, ll. 12-13.

The court ultimately continued Petitioner on CSP and added the condition that he attend substance abuse counseling. R. 19, l. 16 – 20, l. 1; R. 26.

Discussion

Judge Dennis erred by continuing Petitioner on community supervision and ruling he had not satisfied the original sentence imposed by Judge Goode on October 29, 2007 since Petitioner had already served the five year unsuspended portion of his sentence day for day and was **not sentenced to probation**. Judge Dennis' ruling was erroneous because once Petitioner 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 community supervision violations.

Furthermore, under the plain language of § 24-21-560(D), Petitioner is not required to serve the suspended portion of his sentence.

"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 CSP 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, Petitioner's original sentence under the statute was the unsuspended five years, which Petitioner had already served day

for day during his initial period of incarceration and his two previous CSP revocations. Because Petitioner 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 easily distinguishable from State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845. 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**. Petitioner, on the other hand, was not sentenced to serve a probationary term after he served the five year unsuspended sentence. Because of this distinction, the specific holding in Picklesimer does not apply in this case and defense counsel's argument below that Petitioner had satisfied the sentenced imposed by Judge Goode by serving the entire five year unsuspended portion of his sentence was correct. Again, **once Petitioner 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 Petitioner to serve more than the unsuspended five years in prison since he imposed a sentence of ten years suspended to 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 Petitioner to serve more than the five years, he would have imposed a probationary term to follow the five year unsuspended sentence. The remainder of Petitioner's five year unsuspended sentence (about 296 days) was the sentence he had to serve if he violated the CSP and Petitioner served this remaining time during his two previous revocations.

This Court has previously held, "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 Petitioner had originally served the 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 Petitioner 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.

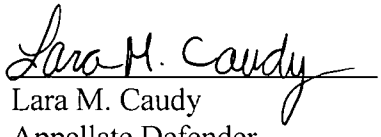
The Court of Appeals relied on its decision in State v. Blakney, 410 S.C. 244, 763 S.E.2d 622 (Ct. App. 2014), which was filed approximately five months before the court's opinion in this case. In Blakney, the Court of Appeals held that this Court's interpretation of § 24-21-560(D) in Picklesimer applies "to all CSP revocations, whether or not the individual subject to CSP is also subject to a term of regular probation." 410 S.C. at 251, 763 S.E.2d at 626. The Court of Appeals' holding in Blakney is respectfully incorrect. The court's analysis in Blakney also ignores the plain language of § 24-21-560(D), specifically that "the original term of incarceration does not include any portion of a suspended sentence."

Therefore, the Court of Appeals erred by affirming the trial court's finding that Petitioner continues to be subject to a CSP and can be incarcerated for violations of the CSP until he serves the entire five year suspended portion of his sentence.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER.

This 27th day of February, 2015

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case has been served on Tommy Evans, Jr., Esquire, at the South Carolina Department of Probation, Parole and Pardon Services, P.O. Box 50666, Columbia, SC 29250, and the South Carolina Court of Appeals, this 27th day of February, 2015.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

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

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