

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Steven H. John, Circuit Court Judge

RECEIVED

MAR - 5 2015

S.C. Supreme Court

Opinion No. 2014-UP-446 (S.C. Ct. App. filed 12/10/14)

10-GS-26-01601

THE STATE,

RESPONDENT,

V.

UBALDO GARCIA,

PETITIONER

APPENDIX

WANDA H. CARTER
Deputy Chief Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

J. BENJAMIN APLIN
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....i

NOTICE OF APPEAL 1

SCACR, RULE 203(d)(1)(B)(iv), LETTER3

UNPUBLISHED OPINION NO. 2014-UP-446, FILED DECEMBER 10, 2014.....4

PETITION FOR REHEARING.....7

RETURN TO PETITION FOR REHEARING13

ORDER DENYING PETITION FOR REHEARING20

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge
Case No. 2010-GS-26-01601

The State, _____ Respondent,

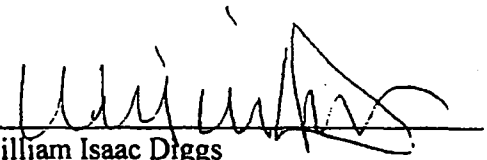
v.

Ubaldo Garcia Jr. _____ Appellant.

NOTICE OF APPEAL

Ubaldo Garcia Jr. appeals the Order dated February 29, 2012, Denying Motion to Reconsider Sentence imposed by the Honorable Steven H. John on December 14, 2011. The order denying reconsideration was received by counsel on March 6, 2012.

March 8, 2012



William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 25977
843-626-4243
Attorney for the Appellant

Other Counsel of Record:

Nancy G. Cote
Assistant Solicitor
P.O. Box 1276
Conway, SC 29526
843-915-5460
Attorney for the Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge
Case No. 2010-GS-26-01601

The State,

Respondent,

v.

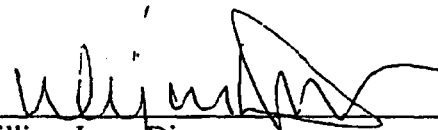
Ubaldo Garcia Jr.

Appellant.

CERTIFICATE OF SERVICE

This is to certify that I have this 8th day of March, 2012 deposited one copy of the Notice on Appeal in the U.S. Postal Service with proper postage affixed thereto and addressed to opposing counsel as follows:

Nancy G. Cote
Assistant Solicitor
P.O. Box 1276
Conway, SC 29526


William Isaac Diggs

Sworn to before me this 8th day of
March, 2011



Notary Public for South Carolina
Commission Expires
April 7, 2015



Law Offices of
WILLIAM ISAAC DIGGS
Licensed in NC & SC

1700 Oak Street, Suite D
Myrtle Beach, SC 29577
843.626.4243
843.626.5123 Fax
www.MyrtleBeachLaw.com

March 27, 2012

The Honorable V. Claire Allen, Deputy
Clerk
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

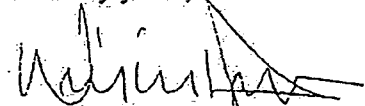
Re: The State v. Garcia, Ubaldo

Dear Ms. Allen

This is in response to your letter dated March 23, 2012, and pursuant to S.C.A.C.R. 203(d)(1)(B)(iv). Mr. Garcia did plead guilty before the Honorable Steven H. John, Judge on December 14, 2011 to trafficking in cocaine. He received a sentence of 10 (ten) years. Two years prior to the plea, Mr. Garcia had been admitted to bail. A condition of his release was home detention *and* he was required to wear a GPS monitoring device. He did so for two (2) years. ~~At the time he was sentenced, counsel argued that Mr. Garcia should receive credit for the time he has served on home detention and while wearing the GPS monitor.~~ There is no case law directly on point in this circumstance in South Carolina. The closest case rejects the argument for receiving time served while on home detention. However, that case did not require the defendant to wear a GPS monitoring device. Judge John denied my request.

Mr. Garcia filed a motion to reconsider. ~~This motion was heard on February 23, 2012.~~ Again the argument for home detention GPS monitoring credit was made, but again it was rejected. That is the order / ruling which has been appealed. Thus, we would assert that the issue is appealable and preserved, notwithstanding the guilty plea which was entered. If you have any questions, please advise. With kind regards, I am

Sincerely yours,


William Isaac Diggs

RECEIVED

MAR 29 2012

Cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Deputy Attorney General Salley W. Elliott

SC OFFICE OF
APPELLATE DEFENSE

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

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

The State, Respondent,

v.

Ubaldo Garcia, Jr., Appellant.

Appellate Case No. 2012-209447

Appeal From Horry County
Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2014-UP-446
Heard November 3, 2014 – Filed December 10, 2014

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General John Benjamin Aplin, both of
Columbia; and Solicitor Jimmy A. Richardson II, of
Conway, for Respondent.

PER CURIAM: Appellant Ubaldo Garcia Jr. challenges the denial of his motion to reconsider his ten-year sentence for trafficking in cocaine, twenty-eight to one

hundred grams. Garcia argues the circuit court erred in declining to give him sentencing credit for the time he spent on house arrest with GPS monitoring. Garcia also seeks review of the circuit court's failure to provide a hearing to Garcia before placing him on GPS monitoring. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Garcia's request for sentencing credit under section 24-13-40 of the South Carolina Code (2007): *State v. Warren*, 392 S.C. 235, 237-38, 708 S.E.2d 234, 235 (Ct. App. 2011) (holding that the authority to change a sentence rests exclusively within the sentencing judge's discretion and an abuse of discretion occurs when the conclusions are either controlled by an error of law or lack evidentiary support); *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).
2. 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." (emphases 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)); *Warren*, 392 S.C. at 237-38, 708 S.E.2d at 235 (holding that the authority to change a sentence rests exclusively within the sentencing judge's discretion and an abuse of discretion occurs when the conclusions are either controlled by an error of law or lack evidentiary support).
3. As to Garcia's due process argument: *State v. Walker*, 366 S.C. 643, 660, 623 S.E.2d 122, 130 (Ct. App. 2005) ("An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review." (citations omitted)); *State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error [that] his own conduct has induced." (citation omitted)).

AFFIRMED.

WILLIAMS, GEATHERS, and McDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

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

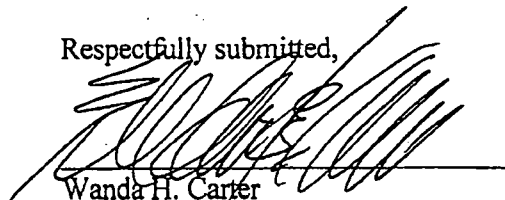
Statutes are to be construed retroactively rather than prospectively if they are remedial or procedural in nature; and a statute is procedural where it sets out a mode of procedure for a court to follow or prescribes a method of enforcing a particular right. Edwards, supra. This amended time served credit 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.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

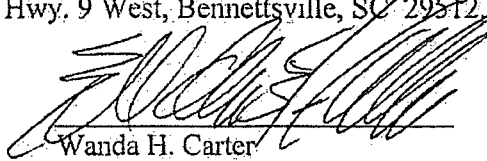
v.

UBALDO GARCIA,

APPELLANT

CERTIFICATE OF SERVICE

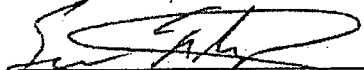
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Ubaldo Garcia #349072, at Evans Correctional 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.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Steven H. John, Circuit Court Judge

Opinion No. 2014-UP-446 (S.C. Ct. App. filed December 10, 2014)

Appellate Case No. 2012-209447

THE STATE,RESPONDENT

v.

UBALDO GARCIA, JR.,APPELLANT.

RETURN TO PETITION FOR REHEARING

On December 10, 2014, this Court issued an unpublished opinion which affirmed Appellant's (Garcia's) conviction and sentence for trafficking in cocaine, twenty-eight to one hundred grams. State v. Garcia, Op. No. 2014-UP-446 (S.C. Ct. App. filed December 10, 2014). On December 19, 2014, Garcia submitted a Petition for Rehearing and by letter dated December 23, 2014, this Court requested that Respondent (the State) submit a return. This return to the petition for rehearing now follows.

A. Statement of the Case, Statement of Facts, and Argument

The procedural history, the statement of facts, and the substantive arguments recited in the Final Brief of Respondent are hereby incorporated by reference.

B. Not Preserved

The State first respectfully asks the Court to deny the petition for rehearing pursuant to Rules 208(b)(1), 208(b)(3), & 221(a), SCACR, because the argument presented is not preserved for appellate review. The retroactivity issue regarding the 2013 amendment to Section 24-13-40 of the South Carolina Code, which is being argued by Garcia in his petition for rehearing, is now being articulated for the first time in this case. It was neither raised to nor ruled upon by the trial court and it was never specifically raised to this Court in Garcia's briefs. Indeed, Garcia did not submit a reply brief arguing retroactivity of the statutory amendment even after the State addressed retroactivity as a precautionary matter in the Brief of Respondent. Since this issue is being raised for the first time in Garcia's petition for rehearing, it is not preserved for appellate review. See Kiawah Prop. Owner's Group v. Pub. Serv. Comm'n of South Carolina, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (finding an issue raised for the first time in a petition for rehearing was not preserved). The State recognizes this Court relied in part upon Edwards v. State Law Enforcement Div., 395 S.C. 571, 720 S.E.2d 462 (2011), in regard to whether statutes are to be construed retroactively; however, this reference does not excuse Garcia's failure to raise the issue in the first place and should not prohibit dismissal of the issue as unpreserved. In any event, the State submits rehearing should be denied on the merits of Garcia's petition.

C. Not Retroactive

"Generally, 'statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision in the enactment or clear legislative intent to the contrary.'" Wiesart v. Stewart, 379 S.C. 300, 303, 665 S.E.2d

187, 188 (Ct. App. 2008). Indeed, “A statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt.” State v. Brown, 402 S.C. 119, 127, 740 S.E.2d 493, 496 (2013). “The statute must contain express words evincing intent that it be retroactive or words necessarily implying such intent.” Id. at 127, 740 S.E.2d at 497. “The only exception to this rule is a statutory enactment that effects a change in remedy or procedure.” Id.; See also Wiesart, 379 S.C. at 303, 665, S.E.2d at 188 (“Statutes that are remedial or procedural in nature, however, operate retroactively.”). Here, the legislature did not express or imply retroactive application. Additionally, the amendment to § 24-13-40 must be considered substantive because it created a new “right” for a defendant to seek credit against his sentence for “time spent under monitored house arrest.” The amendment was neither remedial nor procedural and therefore should not apply retroactively to Garcia.

1. Not Remedial

A statute is remedial and applies retroactively when it creates new remedies for existing rights or enlarges rights of persons under disability. Edwards v. State Law Enforcement Div., 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011); Wiesart, 379 S.C. at 303, 665, S.E.2d at 188. In Edwards the Supreme Court considered amendments to the sex offender registry which provide that if a sex offender received a pardon for an offense for which he was required to register, he must reregister and may not be removed from the registry except in certain enumerated circumstances. The Court held the amendments were not merely remedial because even though they did not create a new right, they did “impose an obligation which did not exist prior to the amendments.” Edwards, 395 S.C. at 579, 720 S.E.2d at 466.

Garcia argues that unlike the amendments in Edwards, the amendment to § 24-13-40 would qualify as remedial in nature because it “created a new remedy.” He contends there was an existing statutory right to time served credit for pre-trial detainees awaiting trial, and that the amendment “created a new remedy, i.e., the right to time served credit for pre-trial detainees on house arrest awaiting trial.” The State disagrees and submits Garcia has turned the analysis of this issue on its head. The existing “right” was clearly defined by the pre-amendment statute, as interpreted by this Court in State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004). Only a “prisoner” was entitled to sentencing credit. Since a person on monitored house arrest was not spending time confined in a penal institution, he did not meet the plain and ordinary meaning of the term “prisoner” and had no right to this sentencing credit for “time served.” Higgins, 357 S.C. at 385, 593 S.E.2d at 182. The amendment to § 24-13-40 has now created a new right which allows the court to award sentencing credit to a person who, by definition, is still not a “prisoner.” Indeed, the legislature has created a whole new and different class of people who may be given pre-trial credit against their sentence, despite the fact that they are not prisoners. The amendment did not alter the definition of “prisoner” and did not suggest credit for “time spent under monitored house arrest” was included in or somehow a subset of the credit described as “time served” by a “prisoner.” Instead, it identified an additional, new, and entirely different credit which may be awarded in the court’s discretion: credit for “time spent under monitored house arrest.” Thus, the amendment is not merely remedial. It must be construed prospectively, not retroactively, and accordingly does not apply to Garcia.

2. Not Procedural

A statute is procedural if it sets out a mode of procedure for a court to follow, or prescribes a method of enforcing rights. Edwards, 395 S.C. at 580; 720 S.E.2d at 466; Wiesart, 379 S.C. at 303, 665 S.E.2d at 188. In Wiesart, this Court found the 1996 amendment to § 23-3-430 was procedural in nature because it created a requirement that the trial court make a specific finding on the record regarding whether a person convicted of indecent exposure should register as a sex offender. By comparison, in Edwards the Supreme Court found the 2008 amendments to § 23-3-430 were not procedural in nature because they “do not provide a procedure for a court to follow, or prescribe a method for enforcing rights.” Edwards, 395 S.C. at 582, 720 S.E.2d at 467.

Garcia argues that since the award of credit is discretionary, this “obviously means there must be some mode of procedure for a judge to follow in these cases.” Yet, this argument ignores the lack of any required procedure in the actual terms of the statute. The statutory amendment at issue leaves the award of credit for time spent under monitored house arrest entirely in the discretion of the sentencing court. It does not provide a procedure for the court to follow, or prescribe a method for enforcing rights. Just as in Edwards, the statutory amendment at issue here is not procedural in nature. Thus, it must be construed prospectively only and does not apply to Garcia.

3. Discretionary

Finally, the State emphasizes the fact that the award of credit for time spent on monitored house arrest is discretionary rather than mandatory. Unlike credit for time served prior to trial and sentencing in a penal institution, which “must be given,” credit for time spent on monitored house arrest “may be given.” S.C. Code Ann. § 24-13-40

(Supp. 2013). Because the award of the credit sought by Appellant was entirely in the discretion of the trial court, the decision to deny such credit must be affirmed. This is particularly true where the trial judge was given uncontested information that Appellant had actually violated the conditions of his house arrest. Compare Higgins, 357 S.C. at 383, 593 S.E.2d at 181 (noting there was no evidence Higgins violated the conditions imposed in his release order).

D. Conclusion

WHEREFORE, based on the foregoing arguments and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court deny Appellant's petition for rehearing.


Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

BY:


J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
January 9, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Steven H. John, Circuit Court Judge

Opinion No. 2014-UP-446 (S.C. Ct. App. filed December 10, 2014)

Appellate Case No. 2012-209447

THE STATE,RESPONDENT

v.


UBALDO GARCIA, JR.,APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Return to Petition for Rehearing*, dated January 9, 2015, on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served.
This 9th day of January, 2015.


Angela Bennett
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

20

The South Carolina Court of Appeals

The State, Respondent,

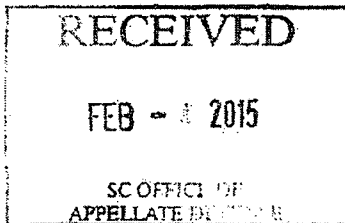
v.

Ubaldo Garcia Jr., Appellant.

Appellate Case No. 2012-209447

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.



H. B. ... J.

John D. ... J.

Stephanie P. McDonald J.

Columbia, South Carolina

cc:
Wanda H. Carter, Esquire
Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
Jimmy A. Richardson, II, Esquire
The Honorable Steven H. John

FILED

2/3/15

20956

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

UBALDO GARCIA, JR.,

APPELLANT

APPELLATE CASE NO. 2012-209447

RECORD ON APPEAL

WANDA H. CARTER
Deputy Chief Appellate Defender

ALAN WILSON
Attorney General

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

J. BENJAMIN APLIN
Assistant Attorney General
S.C. Bar No. 8729
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

Attorney for Appellant

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit
Post Office Box 1276
Conway, SC 29528
(843) 915-8610

Attorneys for Respondent

INDEX

INDEX.....i

CONSENT ORDER MODIFYING BOND DATED AND FILED OCTOBER 16, 2009.....1

GUILTY PLEA TRANSCRIPT DATED DECEMBER 14, 20113

MOTION TO RECONSIDER SENTENCE19

SENTENCING RECONSIDERATION HEARING TRANSCRIPT DATED FEBRUARY 29, 2012.....22

ORDER DENYING MOTION TO RECONSIDER SENTENCE.....34

NOTICE OF APPEAL35

LETTER PER RULE 203(D)(1)(B)(IV).....37

INDICTMENT38

CERTIFICATE OF COUNSEL.....41

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT
Warrant No.: M-316598

The State of South Carolina)

vs.)

Ubaldo Garcia,)
Defendant)

**CONSENT
ORDER MODIFYING BOND**

RECEIVED
HORRY COUNTY
CLERK OF COURT
OCT 16 2009 15

THIS MATTER COMES BEFORE ME on Motion to Reconsider Bond by counsel for the defendant Ubaldo Garcia.

WHEREAS, it appears that the defendant is currently on a surety bond set at \$150,000.00 on the offense of Trafficking in cocaine 200g or more, but less than 400g, and


WHEREAS, it now appears that it would be appropriate to reduce the bond to a \$45,000.00 surety bond with the condition that the defendant be placed on home detention except for purposes of going to and from work and/or school, for medical treatment, and to attend church services; and

w/ G.P.S. monitoring

ORDERED, ADJUDGED, AND DECREED that the defendant's bond is modified and reduced to \$ 45,000.00 surety bond with the condition that the defendant be placed on home detention, it is further

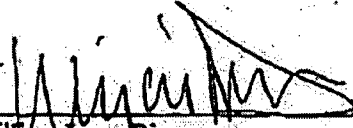
ORDERED, all other provisions of the previous order for bond shall remain in effect.

IT IS SO ORDERED this 16 day of October, 2009


Presiding Judge for the Fifteenth Judicial Circuit

This 16th day of October, 2009
Conway, South Carolina

I SO MOVE!



William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 29577
843-626-4243

ATTORNEY FOR THE DEFENDANT

I CONSENT



Assistant Solicitor for the Fifteenth Judicial Circuit

1 STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
 2 COUNTY OF HORRY) (2010-GS-26-01601)
 3)
 4 STATE)
 5 VERSUS) TRANSCRIPT OF RECORD
 6)
 7 UBALDO GARCIA, JR.) December 14, 2011
 8) Conway, S. C.
 9)

9 B E F O R E:
 10 HONORABLE STEVEN H. JOHN, Judge.
 11

12 A P P E A R A N C E S:
 13 BRADLEY COY RICHARDSON, ESQ.
 14 ASSISTANT SOLICITOR FOR HORRY COUNTY
 ATTORNEY FOR STATE
 15 WILLIAM I. DIGGS, ESQ.
 16 ATTORNEY FOR DEFENDANT
 17
 18

19 DIXIE COX EUBANK
 20 CIRCUIT COURT REPORTER
 FIFTEENTH JUDICIAL CIRCUIT
 21
 22
 23
 24
 25

1 (THE FOLLOWING TAKES PLACE ON DECEMBER 14, 2011.)

2 MR. RICHARDSON: The State would call (2010-GS-26-
3 01601), State of South Carolina, County of Horry versus Ubaldo
4 Garcia, Jr., and that's U-B-A-L-D-O, Garcia, common spelling.
5 It's a true-bill indictment for trafficking in cocaine, an
6 amount more than four hundred grams, Your Honor.

7 The Defendant is being allowed to plead to the lesser-
8 included offense of twenty-eight to one hundred grams. That's
9 the seven to twenty-five range, Your Honor. The State is
10 recommending a range of ten to fifteen in there, Your Honor.

11 This case is from 2009.

12 THE COURT: All right. Very good.

13 MR. RICHARDSON: The Defendant is represented by Mr.
14 Bill Diggs. Brad Richardson on behalf of the State.

15 THE COURT: All right. Mr. Garcia, give me your
16 attention, sir. You come before the Court pleading guilty to
17 trafficking cocaine, weight twenty-eight to a hundred grams,
18 first offense; is that correct?

19 A. Yes sir.

20 THE COURT: All right, sir. You understand the
21 potential here can go from seven, a minimum of seven years, up
22 to twenty-five years, along with a Fifty Thousand Dollar fine;
23 you understand that?

24 A. Yes sir.

25 THE COURT: You understand that this is a lesser-

1 included offense. You understand that you were actually
2 charged with trafficking in cocaine, weight four hundred plus
3 grams; you understand that?

4 A. Yes sir.

5 **THE COURT:** All right, sir. And you understand that
6 the recommendation of the State is that the Court impose a
7 sentence from minimum of ten up to a maximum of fifteen years;
8 you understand that?

9 A. Yes sir.

10 **THE COURT:** You understand I do not have to follow that
11 recommendation, or give you a sentence in that range; you
12 understand that?

13 A. Yes sir.

14 **THE COURT:** Understanding this, do you want to go
15 forward with your guilty plea at this time?

16 A. Yes sir.

17 **THE COURT:** Are you currently under the influence of
18 any drugs or intoxicants of any kind, or currently have them
19 in your system?

20 A. No sir.

21 **THE COURT:** Are you suffering from any kind of
22 physical, mental or emotional problem that would keep you from
23 understanding what you are doing here today?

24 A. No sir.

25 **THE COURT:** When you plead guilty you give up certain

1 Constitutional Rights, among those are the right to remain
2 silent, so when you speak to me you give those rights up; you
3 understand that?

4 A. Yes sir.

5 **THE COURT:** Other rights are the presumption of
6 innocence, the right against self-incrimination at a trial;
7 the State has to prove your guilt beyond a reasonable doubt.
8 When you plead guilty you give those rights up; you understand
9 that?

10 A. Yes sir.

11 **THE COURT:** You are entitled to a jury trial, again,
12 about the twelve men and women would listen to the State to
13 see if there's enough facts to prove you guilty beyond a
14 reasonable doubt, and in that jury trial you can testify, you
15 can call witnesses on your behalf, you can challenge the State
16 regarding it's evidence, make the State prove you guilty, if
17 it can, beyond a reasonable doubt, but when you plead guilty
18 you give all that up; you understand that?

19 A. Yes sir.

20 **THE COURT:** Now, you come before the Court and you are
21 pleading guilty to trafficking in cocaine, weight twenty-eight
22 to a hundred grams, first offense. Are you pleading guilty to
23 this crime freely and voluntarily?

24 A. Yes sir.

25 **THE COURT:** Of your own freewill and accord?

1 A. Yes sir.

2 THE COURT: Pleading guilty because you are indeed
3 guilty of this crime?

4 A. Yes sir.

5 THE COURT: Now did anybody promise you anything, or
6 threaten you, or force you in any way to get you to plead
7 guilty?

8 A. No sir.

9 THE COURT: You are here today with your attorney, Mr.
10 Diggs; is that right?

11 A. Yes sir.

12 THE COURT: Did you tell him everything you needed to
13 tell him about this case?

14 A. Yes sir.

15 THE COURT: Have you had enough time to talk to him?

16 A. Yes sir.

17 THE COURT: Do you need any more time to talk to him?

18 A. No sir.

19 THE COURT: Are you satisfied with his help and
20 representation?

21 A. No sir.

22 THE COURT: Any complaints about his representation?

23 A. No sir.

24 THE COURT: All right, Mr. Diggs, you represent the
25 interest of your client, Mr. Garcia, in this matter?

1 **MR. DIGGS:** Yes sir.

2 **THE COURT:** He comes before the Court tendering his
3 plea of guilty to the offense named; do you concur?

4 **MR. DIGGS:** I do, Your Honor.

5 **THE COURT:** And do you believe he's coming before the
6 Court of his own freewill and accord?

7 A. I believe he does.

8 **THE COURT:** And have you explained to him his
9 Constitutional Rights, any defenses he might have, as well as
10 the information, the evidence in the possession of the State?

11 **MR. DIGGS:** Yes sir.

12 **THE COURT:** Thank you very much.

13 All right, Solicitor, the facts of the case, please.

14 **MR. RICHARDSON:** Thank you, Your Honor.

15 Your Honor, on or about September 28th, 2009, at about
16 one-thirty in the afternoon, officers with the Highway Patrol
17 were traveling on 378. The Defendant was driving the vehicle.
18 It was going sixty-five in a fifty-five. The officers
19 conducted a traffic stop, made contact with this Defendant.
20 The officers noticed an odor of marijuana coming from the
21 vehicle. Officers ordered Mr. Garcia out of the vehicle and
22 conducted a search of his person, noticed that Mr. Garcia had
23 large sums of money in his right front pocket, searched the
24 vehicle. They found two hand-rolled cigars contain -- or
25 blunts, containing green, leafy substance, smelled like

1 marijuana, found three plastic bags containing a white rock-
2 like substance, Your Honor, in the third row seat area.

3 The Defendant also had Twenty-Two Hundred Dollars on
4 him.

5 Your Honor, that -- the white powder was taken, Best-
6 bagged, and submitted to S.L.E.D. for analysis, found to be
7 seven hundred fifty-one grams of, or three-quarters of a kilo
8 of cocaine, Your Honor.

9 The Defendant was facing a mandatory, I believe it was
10 twenty-five to thirty years, Your Honor. The State has
11 allowed the Defendant to plead to the lesser-included, the
12 twenty-eight to one hundred, and the State would respectfully
13 request the recommendation be followed, to ten to fifteen, and
14 I would just ask for the higher range on that, Your Honor.

15 **THE COURT:** All right. Very good. Does the Defendant,
16 as far as you know, have a prior record?

17 **MR. RICHARDSON:** Your Honor, all I could see is, he was
18 charged with possession of marijuana contemporaneously with
19 the cocaine charge.

20 **THE COURT:** All right, sir.

21 **MR. RICHARDSON:** There was some indication the
22 Defendant was going to try to work or something, but in
23 speaking with DEU they indicated recently that he's done no
24 work ---

25 **THE COURT:** All right. Very good.

1 **MR. RICHARDSON:** ---Has not cooperated.

2 **THE COURT:** All right. Very good.

3 All right, Mr. Garcia, as to the facts of this
4 particular case, as to what occurred back in 2009, you heard
5 the Solicitor state those facts for the record, and further a
6 brief summary of those facts is also set forth in your
7 indictment. My question to you is, are those facts true and
8 correct; is that what occurred?

9 A. Yes sir.

10 **THE COURT:** I'm sorry. I didn't hear you, sir.

11 A. Yes sir.

12 **THE COURT:** And you understood when you engaged in that
13 kind of activity you were committing a crime; you understood
14 that?

15 A. Yes sir.

16 **THE COURT:** Have you understood my questions here
17 today?

18 A. Yes sir.

19 **THE COURT:** Have all your answers to me been the truth?

20 A. Yes sir.

21 **THE COURT:** Anybody tell you how to answer my
22 questions?

23 A. No sir.

24 **THE COURT:** And you understand you have the right to
25 appeal your guilty plea within ten days?

1 A. Yes sir.

2 THE COURT: I find there's been a substantial factual
3 basis for the plea; I find the Defendant's decision to plead
4 guilty has been done freely, voluntarily, knowingly and
5 intelligently made, he's had the advice of competent counsel
6 with whom he's satisfied, therefore Mr. Garcia's decision to
7 plead guilty to trafficking cocaine, weight twenty-eight to a
8 hundred grams, first offense, is accepted.

9 Yes sir, Mr. Diggs. Be glad to hear from you, sir.

10 MR. DIGGS: Your Honor, first of all, it's been a
11 privilege to represent Ubaldo. I've had an opportunity to get
12 to know him as you can see from the paperwork in the case.
13 The incident occurred over two years ago. He has been on
14 monitor and house detention since that time, and eventually,
15 when the Court imposes a sentence, we are going to ask the
16 Court to consider giving him credit for that, a period of time
17 that he has been on the monitor.

18 Your Honor, he is, in spite -- when you look at what the
19 Solicitor said on it's face it appears to be a serious
20 offense. We know about drug activity. We know what can
21 happen and all that, but when you look at your paperwork that
22 was submitted, we don't have a situation here where there is a
23 victim, where somebody is saying, look, this is what he did
24 that caused me to have this particular problem. He's not at
25 that stage in his life. Your Honor, when this happened he was

1 nineteen years old.

2 His father, or step-father, one of the two, had been
3 killed himself in a drug-related shooting. He's a young man,
4 Your Honor. He hasn't really had an opportunity to learn
5 about the world, to learn what the possibilities are in life,
6 and I guarantee you there's going to be a time when this young
7 man, who is now twenty-one, who was nineteen at the time,
8 there's going to come a time in his life when he would not
9 think about doing this again. He knows now that he shouldn't
10 have done it, but he knows -- I submit to you, Your Honor,
11 there will come a time in his life when he wouldn't consider,
12 would not even consider doing it.

13 Your Honor, he's a young man that's very much loved by
14 his family, by his friends, people in the community.

15 I'm going to ask everyone to stand who is here today on
16 behalf of Mr. Garcia.

17 Your Honor, these are family members, they are teachers
18 from school, they are friends in the community, young
19 children, siblings.

20 You can sit.

21 **THE COURT:** Thank you.

22 **MR. DIGGS:** And Your Honor, some of them may want to
23 make a statement to the Court, but he is a student out at
24 Horry-Georgetown Technical College at this point. He's
25 studying Graphic Design. He's talented. Some of the

1 individuals here could show you some of the artwork he's done,
2 has been able to produce.

3 But Your Honor, all of these people are here because
4 they believe in him, and love him. They care about what
5 happens to him. They understand the nature of the incident.
6 They understand how the Court's hands, a lot of times, and in
7 this situation particularly, are simply tied.

8 Your Honor, we appreciate the State working with us in
9 this case, we do, but I'm asking Your Honor to consider the
10 minimum sentence in this situation. Your Honor, seven years
11 for a twenty-one year old individual is a long time, and I
12 would submit the equities in the case are such that Ubaldo is
13 deserving of mercy from the Court.

14 Your Honor, you know, it's just not a situation where he
15 knows these things are bad and he's out there doing them
16 anyway, without any care or concern about. Your Honor can
17 look at him and see the remorse that he feels, the hurt and
18 the pain that he feels now because of what he's done, and he
19 knows the hurt and pain that he's caused his family, what they
20 are going to have to experience in the future, the near
21 future, because they are going to lose him.

22 Your Honor, we are asking you to consider all of these
23 things, the fact he doesn't have a criminal record, because he
24 is young. We are asking Your Honor to consider a seven year
25 sentence. Now the State agrees to charge him for a twenty-

1 eight to one hundred grams. We appreciate that opportunity,
2 Your Honor, we do, but Your Honor, that's an eighty-five
3 percent. It's just enough to get him over that hurdle.

4 There's not a hope for parole after a third. This is
5 some sentence that he's going to have to do what Your Honor
6 imposes, and you can see, without probation or without any big
7 suspended in terms of the sentence, and Your Honor, we are
8 asking that you consider imposing the minimum allowed by the
9 statute in this situation.

10 Your Honor, one additional request we would ask. He
11 knows he is going to have to go to prison. Your Honor, it is
12 the middle of December and we are asking that he be permitted
13 to report after Christmas. I know the Court, from time to
14 time, is able to do that on behalf of Defendants. Your Honor,
15 he has reported here every opportunity, or every time when
16 requested or required to be in court. If he was going to run
17 certainly he would have done it before now. And Your Honor,
18 we are asking you to consider allowing him to remain free
19 until after the Christmas Holidays so that he can spend that
20 with his family.

21 Your Honor, I don't know how many young children are
22 here, but I know there were at least four youngsters across
23 the hall that were too young to come in the courtroom. All of
24 those people are part of his family. Your Honor, we would ask
25 you to consider this request at this time.

1 We appreciate your listening to us, appreciate the time
2 you have given us.

3 **THE COURT:** All right. Was there an individual who
4 wanted to speak on his behalf?

5 Have them come around up to you, Mr. Diggs.

6 A. I just want to say ---

7 **THE COURT:** I'm sorry, sir. Could you tell me your
8 name, please sir.

9 A. My name is Durell Ferguson. I am a friend of his, and
10 I just wanted to say, I knew Junior before the situation, and
11 as you can see, I know him after that, and I just want to say,
12 man, this is like the best friend that I ever had in my life,
13 like he's that kid that tells you not to do something, you
14 know what I mean, and I understand what he's up here charged
15 with, but like, I just don't want you to get the wrong
16 impression of him in your head because of the case that he's
17 charged with, like, as you see, everybody over there likes
18 him. We just ask you for, you know, the least you can give
19 him, Your Honor.

20 **THE COURT:** All right. Thank you very much, sir.
21 Anything else, Solicitor?

22 **MR. RICHARDSON:** No sir, Your Honor. I believe
23 everything has been stated as far as the State, other than the
24 State believes that all mercy due to him has been tendered by
25 the State.

1 **THE COURT:** All right. Very good.
2 (2010-GS-26-01601), State of South Carolina, County of
3 Horry versus Ubaldo Garcia, Jr. regarding trafficking in
4 cocaine, weight twenty-eight to a hundred grams, first
5 offense, Mr. Garcia, I have taken into consideration what's
6 been said on your behalf. I have also taken into
7 consideration the State -- and you were originally indicted
8 for a crime for which the minimum sentence was twenty-five
9 years. The State has offered you a plea bargain which you
10 have decided in your best interest to accept, to a lesser-
11 included offense where the range is seven to twenty-five
12 years.

13 The sentence of the Court in this particular matter is,
14 Defendant is committed to the State Department of Corrections
15 for a determinate term of ten years.

16 Defendant is given credit for any jail time that he has
17 actually served. I do not believe it is proper to extend
18 credit for time spent on GPS monitoring.

19 Mr. Diggs, I appreciate your request regarding the
20 Christmas Holidays. I think, in these circumstances, with the
21 length of the sentence, it's either the pain is going to come
22 now or it's going to come later, and I'm -- in my
23 consideration we are going to impose a sentence and it will
24 start now.

25 Thank you very much.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

MR. RICHARDSON: Thank you, Your Honor.

-----END OF REQUESTED TRANSCRIPT OF RECORD -----

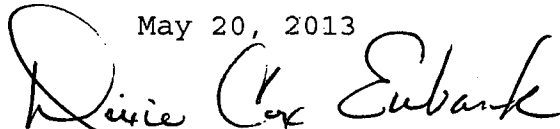
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, the undersigned, DIXIE COX EUBANK, Official Court Reporter for the Fifteenth 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 **GUILTY PLEA** of the captioned case, relative to appeal, in the **COURT OF GENERAL SESSIONS** for **HORRY COUNTY, SOUTH CAROLINA**, on the 14th day of December, 2011.

I DO FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.

May 20, 2013



DIXIE COX EUBANK

CIRCUIT COURT REPORTER

FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 The State,)
)
 v.)
)
 Ubaldo Garcia,)
)
 Defendant.)
 _____)

THE COURT OF GENERAL SESSIONS
 FOR THE 15th JUDICIAL CIRCUIT

Warrant: M-316598 (Trafficking in Cocaine)

**MOTION TO RECONSIDER
 SENTENCE**

HORRY COUNTY
 11 DEC 28 AM 9:45
 CLERK OF COURT

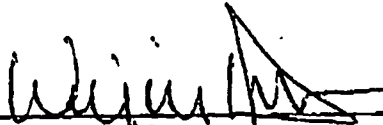
**TO: THE HONORABLE J. GREGORY HEMBREE, SOLICITOR, AND THE
 DEPUTY AND ASSISTANT SOLICITORS OF THE FIFTEENTH JUDICIAL
 CIRCUIT:**

YOU WILL PLEASE TAKE NOTICE that the Defendant, by and through his undersigned counsel, would request of the Court that it reconsider the sentence imposed in this case. Said motion is based on the grounds that (1) mitigating circumstances warrant a minimum sentence in this case; and (2) defendant should be given credit for the time served under house arrest and electric monitoring, to wit: from the time of arrest on September 28, 2009 until the date of his sentencing, December 14, 2011.

BE SO NOTIFIED!

Respectfully submitted

LAW OFFICES OF WILLIAM ISAAC DIGGS



William Isaac Diggs
 1700 Oak Street, Suite D
 Myrtle Beach, SC 25977
 843-626-4243

**ATTORNEY FOR THE DEFENDANT,
UBALDO GARCIA**

This 23rd day of December, 2011
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
)
The State,)
)
)
v.)
)
Ubaldo Garcia,)
)
)
Defendant.)
)
_____)

THE COURT OF GENERAL SESSIONS
FOR THE 15th JUDICIAL CIRCUIT

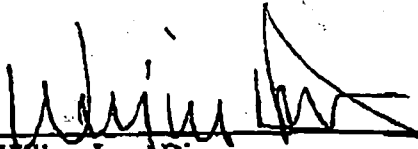
Warrant: M-316598 (Trafficking in Cocaine)

CERTIFICATE OF SERVICE

FILED
11 DEC 28 AM 9:45
CLERK OF COURT

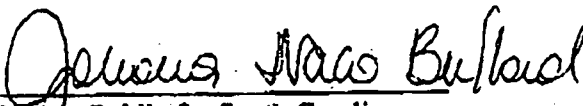
This is to certify that I have this 23rd day of December, 2011 deposited one copy of the Motion to Reconsider Sentence in the U.S. Postal Service with proper postage affixed thereto and addressed to opposing counsel as follows:

Brad C. Richardson
Senior Solicitor
P.O. Box 1276
Conway, SC 29526



William Isaac Diggs

Sworn to before me this 23rd day of
December, 2011



Notary Public for South Carolina
*My Commission Expires
April 7, 2015*

1 STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS

2 COUNTY OF HORRY) (2010-GS-26-01601)

3 STATE)

4)

5 VERSUS) TRANSCRIPT OF RECORD

6)

7 UBALDO GARCIA, JR.) February 29, 2012

8) Conway, S. C.

8)

9
10 B E F O R E:

11 HONORABLE STEVEN H. JOHN, Judge.

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

13 NANCY COTE, ESQ.
14 ASSISTANT SOLICITOR FOR HORRY COUNTY
ATTORNEY FOR STATE

15 WILLIAM I. DIGGS, ESQ.
16 ATTORNEY FOR DEFENDANT

17

18

19

DIXIE COX EUBANK
CIRCUIT COURT REPORTER
FIFTEENTH JUDICIAL CIRCUIT

20

21

22

23

24

25

1 (THE FOLLOWING TAKES PLACE ON FEBRUARY 29, 2012.)

2 THE COURT: All right. This is (2010-GS-26-01601), the
3 State of South Carolina versus Ubaldo Garcia, Jr. The matter
4 was previously before the Court on December 14, 2011, in which
5 time the Court sentenced - as a result of a guilty plea -
6 sentenced Mr. Garcia regarding the offense of trafficking in
7 cocaine, weight twenty-eight (28) to a hundred (100) grams,
8 first offense, to a sentence of ten years. There was a
9 recommendation -- well, the potential sentence could have been
10 from seven to twenty-five years and a Fifty Thousand
11 (\$50,000.00) Dollar fine. There was a recommendation by the
12 State regarding a range of ten to fifteen years. The Court
13 qualified the plea and sentenced the Defendant to the
14 Department of Corrections for a determinate term of ten years,
15 marking the category on the sentencing sheet that the
16 Defendant be given credit for time served.

17 Mr. Diggs has filed a Motion to Reconsider the Sentence
18 in this matter, stating the grounds in the written motion that
19 mitigating circumstances warrant a minimum sentence in this
20 case, and the Defendant should be given credit for the time
21 served under house arrest and electronic monitoring, to wit,
22 from the time of arrest on September 28, 2009, until the date
23 of sentencing, December 14, 2011.

24 All right. Let's see. The Motion was filed on December
25 23rd, 2011, and delivered to the Court at that point in time,

1 on December 23rd, 2011. So it would seem that -- not adding
2 it up in my head, but just the date seems to reflect that it
3 falls within the ten-day time limit regarding the motion,
4 proper time limit for the motion.

5 All right, Mr. Diggs, what do you want to add to your
6 motion, sir?

7 **MR. DIGGS:** Your Honor, we appreciate the Court's time
8 on this case, and the consideration that has already been
9 given by the Court to Mr. Garcia.

10 I would argue, Your Honor, that the mitigating
11 circumstance that I refer to in the Motion is primarily one
12 based on Mr. Garcia's youth. He was nineteen years old at the
13 time of this occurrence, being born in May -- I think it was
14 May 23rd or 26th, of 1990.

15 **THE COURT:** Right. That's -- on the sentencing sheet
16 it has that he was -- date of birth, May 26, 1990, and that
17 would have made him, I guess, twenty-one at the time he was
18 sentenced, I guess.

19 **MR. DIGGS:** Correct, Your Honor. But, of course, being
20 arrested two years prior.

21 **THE COURT:** Right. I understand that.

22 **MR. DIGGS:** Your Honor -- and we made mention of this
23 at the time of the guilty plea that was done in this Court.
24 Mr. Garcia was simply in a really difficult situation. His
25 father, I think the record will reflect - we made note of this

1 at the time - was actually killed in a drug-related incident.
2 It put him -- we go back to, initially on this case, with Mike
3 O'Sullivan out of the Solicitor's Office, was working on it,
4 and the Solicitor's Office was willing to work with Mr. Garcia
5 in the event that he was able to work with the State and help
6 them in their efforts to combat drug activity in this area
7 that was taking place at that time.

8 I would ask the Court to consider what circumstance,
9 what the situation was exactly with Mr. Garcia. He saw his
10 father being killed on one hand, and had concern for himself
11 and his family, I'm sure, on the other hand. I just don't
12 know what a reasonable person is going to do in that situation
13 at the age of nineteen years.

14 Your Honor, he's a good young man. He was in school.
15 He wanted to study to become a culinary -- graphic design. He
16 was in school taking classes to do that. He's talented. I
17 remember one of his instructors coming to be with us during
18 the hearing, at the sentencing initially, the guilty plea and
19 the initial sentencing.

20 And Your Honor, with those things being considered, and
21 now with the passage of time, Mr. Garcia's opportunity to face
22 the reality now of what prison life is like, I would submit to
23 you that justice would be served by imposing a minimum -- the
24 mandatory minimum sentence in this case that's available under
25 the statute, which would be seven years.

1 The Prosecution has allowed Mr. Garcia to plea guilty to
2 that level of offense, and having done so I would ask the
3 Court to consider the mandatory minimum in this situation, and
4 primarily based on Mr. Garcia's youth, his lack of criminal
5 activity, the fact that he had started on a path of learning,
6 studying, and developing -- having career aspiration, and
7 seeking training to develop talents in that area.

8 Your Honor, we would ask you, respectfully, to
9 reconsider the ten years that were imposed, the sentence that
10 was imposed at that time, and reduce it to seven.

11 And additionally, Your Honor, we looked at a lot of the
12 case law on this issue about home detention and the GPS.
13 Admittedly, as an officer of the Court, I didn't discover --
14 didn't come across any case law that directly was on our side
15 on this issue, but as Your Honor knows, the GPS and the house
16 detention issue is slightly separate issues, but both
17 applicable in this case. Mr. Garcia was on house arrest and
18 he was on GPS monitoring, and that's a little bit different
19 from any of the factual scenarios that we find in the case law
20 out of the State of South Carolina regarding credit, or the
21 issue of being given credit for those situations. Admittedly
22 house arrest hasn't warranted credit for -- you know, as a
23 time-served circumstance in our State, but I would submit that
24 house arrest with the GPS monitoring, the limitations on his
25 traveling, that imposed in this case, the typical ones of not

1 being able to travel, other than to go to church and/or to
2 meet with his attorney sufficiently restrictive, sufficiently
3 severe, I would submit, that it warrants meeting the
4 definition of confinement, and we would ask the Court to,
5 under the circumstances of this case, find that Mr. Garcia was
6 a Defendant who was detained, under the circumstances of this
7 case, restrictions on his movement sufficient to allow him
8 credit for the time served under those circumstances,
9 circumstance of house arrest and the GPS monitoring warrant
10 finding that he would be entitled to be given credit for the
11 time that he served under those conditions, Your Honor.

12 **THE COURT:** All right. Thank you, sir.

13 **MR. DIGGS:** Thank you, Your Honor.

14 **THE COURT:** All right. Ms. Cote, be glad to hear from
15 you, Ma'am.

16 **MS. COTE:** Thank you, Your Honor. The State would ask
17 for you to deny this motion, and not reduce the sentence that
18 you imposed back in December of last years. Mr. Garcia has
19 already had his sentencing hearing, Your Honor; you already
20 heard already all these mitigating circumstances about his
21 youth, and you entered the seven years after hearing both from
22 the State and from the Defense at that time.

23 The State and the Court have been more than generous,
24 and more than fair to Mr. Garcia. As you are aware, he was
25 originally indicted with more than four hundred grams on

1 trafficking weight cocaine, Your Honor. It was seven hundred
2 fifty-one grams which carries the mandatory twenty-five to
3 thirty year range, so we allowed him to plead to a reduction
4 of three levels in the twenty-eight to one hundred grams.

5 When I recommended the range of ten to fifteen it wasn't
6 a number that I just pulled out of thin air; it wasn't
7 something that I entered into lightly with Mr. Diggs.
8 Originally Mr. O'Sullivan, who had the case before me, he had
9 a negotiated fifteen years. Mr. Diggs asked me to reduce
10 that. I came up with the range of ten to fifteen. After
11 speaking with DEU it was understood that Mr. Garcia was going
12 to work with them, but then he never did. I didn't want to
13 punish him for that, but I didn't want to reward him for that
14 either. And after speaking with DEU they
15 indicated that Mr. Garcia was still involved in drugs, so I
16 didn't want to reduce it any lower than that ten-year
17 sentence.

18 He -- as for the home detention matter, he had problems
19 while on home detention. Aside from the problems that he had
20 on home detention we don't feel that that's applicable to his
21 time served, based on the case law of our State. But the home
22 detention problems, he was staying out all night, and he
23 actually had a revocation while on home detention, and he
24 would claim his reasons for staying out all night, not
25 attending his medical appointments, school, lawyers, school or

1 church services, were because he was working with DEU, which
2 just wasn't the case; he never worked with DEU.

3 Again, Your Honor, this was a significant amount of
4 cocaine. If I had proceeded to trial he would have been
5 facing twenty-five years, so in our opinion ten years is a
6 gift, and we would ask that you not reduce the sentence
7 anything below what you imposed in December.

8 Thank you.

9 **THE COURT:** Thank you, Ma'am.

10 **MR. DIGGS:** Your Honor, can I make just one point
11 there?

12 **THE COURT:** Yes sir.

13 **MR. DIGGS:** We don't really dispute anything that the
14 Solicitor says. It's unusual, I would submit, for any such a
15 young man, such an early access or entry into the drug
16 activity that takes place in the community because -- and I
17 say that again because he doesn't have any history, that we
18 know of, or any history that he admits to involving drug
19 activity. It's unusual for such a young man, lack of
20 experience in this world, the drug world, to be in possession
21 of such a large amount of cocaine. Normally someone who has
22 that much contraband is going to be higher up in the
23 hierarchy, at a higher level to be able to access and control
24 that much cocaine, and typically they'll get a warrant -- it's
25 going to be an older person, they get a warrant, and more

1 severe sentence under normal circumstances what the Solicitor
2 says is exactly right, it would be a gift to such a person,
3 but to a young man who is not experienced, his first time in
4 this court or any court facing a criminal charge, I would
5 submit that justice -- concern that you would have, Your
6 Honor, of doing justice in this case could be met, it would be
7 met with a seven year sentence in the case. Ordinarily,
8 again, ten years would be a gift to someone facing twenty-five
9 or thirty years in prison, there's no doubt about it, but the
10 circumstances are a little bit different here, and I would
11 submit warrant this consideration of the seven year sentence.

12 **THE COURT:** All right. Thank you, sir.

13 Based on the matters presented to the Court I will
14 respectfully decline to reconsider the sentence that I imposed
15 previously. I took the matters into consideration regarding
16 Mr. Garcia's youth, the lack of a record, where he was in his
17 stage of life. I also took into consideration the facts and
18 evidence presented by the State, and the matters to which Mr.
19 Garcia had plead guilty to. I am not now, nor did I, because
20 it wasn't before me at the time, taking into consideration any
21 opinion as to what Mr. Garcia might still have been doing
22 after he was arrested on September 28, 2009. I took only into
23 consideration the facts of that particular crime, and the
24 other surrounding circumstances when I imposed the sentence,
25 and I felt, and still feel that it is the proper and just

1 sentence in this matter, and respectfully decline to reduce it
2 or to change it.

3 As to the issue about the house arrest and electronic
4 monitoring, I believe the matter has been addressed at least
5 by our Court of Appeals. In State versus Higgins - and that's
6 at 357 S.C. 382 - the credit is for the time that a person has
7 spent in a penal institution, confined in some type of penal
8 institution, and not for house arrest.

9 I understand there was a GPS monitoring attached to the
10 house arrest. I do not think that creates any further
11 exception or credit, and it is also the Court's understanding
12 that when you are out on house arrest you are not subject to
13 the same restraint on liberty and freedoms that you are when
14 you are confined in a penal institution, and therefore I think
15 there is valid reason for the distinction, and for the credit,
16 and the Court did not, and I specifically did not put on the
17 sentencing sheet that he would be given credit for that time
18 under house arrest because I did not think it was applicable,
19 and again, respectfully decline to give him credit for the
20 time of house arrest slash GPS monitoring in this matter.

21 Based upon that then the Court respectfully declines to
22 grant the motion to reconsider the sentence, and reaffirms, in
23 full, the sentence the Court imposed in this matter on
24 December 14, 2011.

25 I believe it would be appropriate, Ms. Cote, if you do

1 not mind, to do a short order to that effect. I appreciate it
2 if -- probably the best thing to do, when you have it
3 prepared, is to e-mail it to my law clerk and to Mr. Diggs at
4 the same time, so that if he has any comments on the proposed
5 order he will be receiving it at the same time the Court does.

6 MS. COTE: Yes sir, Your Honor. Thank you.

7 THE COURT: Yes sir, Mr. Diggs.

8 MR. DIGGS: Your Honor, thank you for hearing us.

9 That's all we have.

10 THE COURT: All right. Very good. Thank y'all very
11 much.

12 MS. COTE: Thank you, Your Honor.

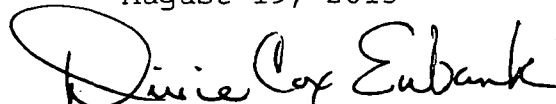
13 -----END OF REQUESTED TRANSCRIPT OF RECORD-----
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

1
2
3 I, the undersigned, DIXIE COX EUBANK, Official Court
4 Reporter for the Fifteenth Judicial Circuit of the State of
5 South Carolina, do hereby certify that the foregoing is a
6 true, accurate and complete Transcript of Record of all the
7 proceedings had and evidence introduced in the **MOTION HEARING**
8 in the captioned case, relative to appeal, in the **COURT OF**
9 **GENERAL SESSIONS for Horry County, South Carolina**, on the 29th
10 day of February, 2012.

11 I DO FURTHER CERTIFY that I am neither of kin, counsel
12 nor interest to any party hereto.

13 August 19, 2013

14 
15 DIXIE COX EUBANK

16 CIRCUIT COURT REPORTER

17 FIFTEENTH JUDICIAL CIRCUIT
18
19
20
21
22
23
24

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

STATE OF SOUTH CAROLINA

VS.

UBALDO GARCIA JR

DEFENDANT.

) IN THE COURT OF GENERAL SESSIONS

) Indictment: 2010GS2601601

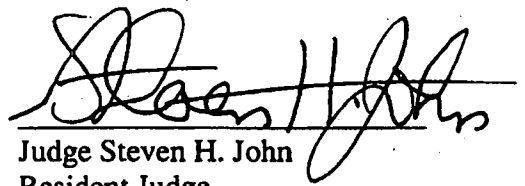
ORDER DENYING MOTION TO RECONSIDER SENTENCE

FILED
2012 MAR -1 PM 2:53
MELANIE HIGGINS
CLERK OF COURT

Nancy G. Cote, attorney for the State, and Attorney William I. Diggs on behalf of Defendant, appear before the Court on this matter. The Defense moved for the Court to reconsider the sentence of ten years imposed by The Honorable Steven H. John on December 14, 2011. The Defense requested the minimum sentence of seven years be imposed as well as that credit should be given to the defendant for time he was on home detention and electronic monitoring.

After hearing from the Defense and the State, the Court denied the Defense's motion and upheld the sentence of 10 years imposed on December 14, 2011. Additionally, the Court denied the request for credit for time served while the Defendant was on home detention. *State v. Higgins*, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004).

AND IT IS SO ORDERED.



Judge Steven H. John
Resident Judge
Fifteenth Judicial Circuit

February 29, 2012
Conway, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge
Case No. 2010-GS-26-01601

The State,

Respondent,

v.

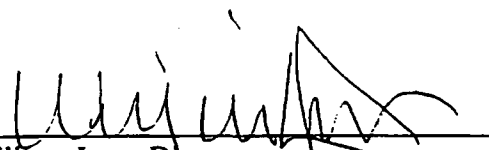
Ubaldo Garcia Jr.

Appellant.

NOTICE OF APPEAL

Ubaldo Garcia Jr. appeals the Order dated February 29, 2012, Denying Motion to Reconsider Sentence imposed by the Honorable Steven H. John on December 14, 2011. The order denying reconsideration was received by counsel on March 6, 2012.

March 8, 2012



William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 25977
843-626-4243
Attorney for the Appellant

Other Counsel of Record:

Nancy G. Cote
Assistant Solicitor
P.O. Box 1276
Conway, SC 29526
843-915-5460
Attorney for the Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge
Case No. 2010-GS-26-01601

The State,

Respondent,

v.

Ubaldo Garcia Jr.

Appellant.

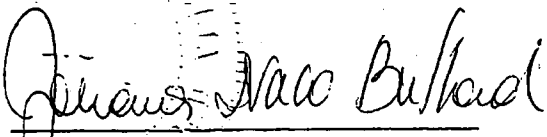
CERTIFICATE OF SERVICE

This is to certify that I have this 8th day of March, 2012 deposited one copy of the Notice on Appeal in the U.S. Postal Service with proper postage affixed thereto and addressed to opposing counsel as follows:

Nancy G. Cote
Assistant Solicitor
P.O. Box 1276
Conway, SC 29526


William Isaac Diggs

Sworn to before me this 8th day of
March, 2011


Notary Public for South Carolina
Commission Expires
April 7, 2015



Law Offices of

WILLIAM ISAAC DIGGS

Licensed in NC & SC

1700 Oak Street, Suite D
Myrtle Beach, SC 29577843.626.4243
843.626.5123 Fax

www.MyrtleBeachLaw.com

March 27, 2012

The Honorable V. Claire Allen, Deputy
Clerk
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: The State v. Garcia, Ubaldo

Dear Ms. Allen

This is in response to your letter dated March 23, 2012, and pursuant to S.C.A.C.R. 203(d)(1)(B)(iv). Mr. Garcia did plead guilty before the Honorable Steven H. John, Judge on December 14, 2011 to trafficking in cocaine. He received a sentence of 10 (ten) years. Two years prior to the plea, Mr. Garcia had been admitted to bail. A condition of his release was home detention *and* he was required to wear a GPS monitoring device. He did so for two (2) years. At the time he was sentenced, counsel argued that Mr. Garcia should receive credit for the time he has served on home detention and while wearing the GPS monitor. There is no case law directly on point in this circumstance in South Carolina. The closest case rejects the argument for receiving time served while on home detention. However, that case did not require the defendant to wear a GPS monitoring device. Judge John denied my request.

Mr. Garcia filed a motion to reconsider. ~~This motion was heard on February 23, 2012.~~ Again the argument for home detention GPS monitoring credit was made, but again it was rejected. That is the order / ruling which has been appealed. Thus, we would assert that the issue is appealable and preserved, notwithstanding the guilty plea which was entered. If you have any questions, please advise. With kind regards, I am

Sincerely yours,

William Isaac Diggs

RECEIVED

MAR 29 2012

Cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Deputy Attorney General Salley W. Elliott

SC OFFICE OF
APPELLATE DEFENSE

WITNESSES

Matthew Sarvis South Carolina Highway Patrol

C

DOCKET NO. 2010-GS-26-1601

The State of South Carolina

County of Horry

Michael J. O'Sullivan
09H04030

COURT OF GENERAL SESSIONS

APRIL, 2010 TERM

ARREST WARRANT NUMBER

M316598
CDR: 0281 44-53-0370(e)(2)(e)
DOA: 9/29/2009

THE STATE

vs.

ACTION OF GRAND JURY

TRUE BILL

Matthew Sarvis

Foreperson of Grand Jury
Date: MAR 25 2010

VERDICT

Foreperson of Petit Jury
Date:

Ubaldo Garcia Jr H/M
[REDACTED]
Myrtle Beach, SC 29588-6850

ATTORNEY: Diggs, William I.

Indictment for

TRAFFICKING COCAINE

J. Gregory Hembree, Solicitor

ORIGINAL

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)

INDICTMENT


At a Court of General Sessions, convened on March 25, 2010, the Grand Jurors of Horry County present upon their oath:

TRAFFICKING COCAINE

CDR: 0281 44-53-0370(e)(2)(e)

That **Ubaldo Garcia Jr** did, in Horry County, State of South Carolina, on or about September 28, 2009, knowingly sell, deliver, purchase or bring into this State, or aid, abet, attempt or conspire to sell, deliver, purchase or bring into this State, or was in actual or constructive possession, or attempted to become in actual or constructive possession of a quantity of Cocaine in an amount of more than four hundred grams, the same being a controlled substance all within the meaning of Section 44-53-370, et. seq., S. C. Code of Laws, 1976, as amended, such possession not having been authorized, and being in violation of Section 44-53-370(e)(2)(e), S. C. Code of Laws, 1976, as amended, for the crime of trafficking.

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


 J. GREGORY HEMBREE
 FIFTEENTH CIRCUIT SOLICITOR

40
STATE OF SOUTH CAROLINA

COUNTY OF Horry
STATE VS.

Ubaldo Garcia Jr

AKA: _____

Race: HISPANIC Sex: M Age: 21

DOB: _____ SS#: _____

Address: _____

City, State, Zip: Myrtle Beach, SC 29588-6850

DL#: _____ SID#: _____

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was

TO: Trafficking in cocaine, 28--100 g. 1st offense (7-25 yrs. + 50,000)

in violation of § 44-53-0370(e)(2)(b)1 of the S.C. Code of Laws, bearing CDR Code # 2359

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

The charge is: As Indicted. Lesser Included Offense; Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)

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

ATTEST: Nancy G. Cote SCB76347 Ubaldo Garcia Jr Walter 11689
Cote, Nancy G. SC Bar# 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 10 years or under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ 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.

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, It is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP _____ days/hours Public Service Employment

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

Set by SCDPPPS _____

Recipient: _____

*Fine:	\$
§ 14-1-206 (Assessments 107.5 %)	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100
§ 56-5-2995 (DUI Assessment)	\$12
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 47.9 (Public Def/Prob)	\$500
§ 14-1-212 (Law Enforce. Funding)	\$25
§ 14-1-213 (Drug Court Surcharge)	\$150
§ 50-21-114 (BUI Breath Test Fee)	\$50
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea
Proviso 90.5 (SCCJA Surcharge)	\$5
3% to County (if paid in installments)	\$
TOTAL	\$ 236.40

Obtain GED

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling

Random Drug/Alcohol testing

Fine may be pd in equal, consecutive weekly/monthly pmts. of \$ 25.00 beginning 11/14/2021

\$ _____ paid to Public Defender Fund

Other: _____

Appointed PD or appointed other counsel. § 47.12 requires \$500 be paid to Clerk during probation.

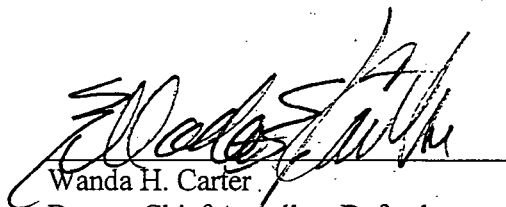
Clerk of Court/ Deputy Clerk Mebanie Huggins Ward
Court Reporter: Dixie Eubank
SCCA/217 (03/2011)

Presiding Judge: _____
Judge Code: _____
Sentence Date: 12/14/11

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."

March 4th, 2014



Wanda H. Carter
Deputy 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 Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

UBALDO GARCIA, JR.,

APPELLANT

APPELLATE CASE NO. 2012-209447

FINAL BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE ON APPEAL 3

STATEMENT OF THE CASE 4

ARGUMENT 5

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Commonwealth v. Carry, 454 Mass. 559, 911 N.E.2d 187 (2009) 7

State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013)..... 7, 8

State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (S.C. Ct. App. 2004)..... 5, 6, 7

State v. Stines, 200 N.C. App. 193, 683 S.E.2d 411 (2009)..... 7, 8

United States v. Arzberger, 592 F. Supp. 2d 590 (2008) 7, 8

United States v. Merritt, 612 F. Supp. 2d 1074 (2009) 7, 8

United States v. Smedley, 611 F. Supp. 2d 971 (2009)..... 7, 8

Statutes

S.C. Code Ann. § 23-3-540(H) 8

S.C. Code Ann. § 24-13-40..... 5, 6

Rules

Rule 203(d)(1)(B)(iv), SCACR..... 4

STATEMENT OF ISSUE ON APPEAL

The trial judge erred in denying appellant's request for time served credit after having submitted to house arrest **and** GPS electronic monitoring because S.C. Code Ann §24-13-40 **as amended** allows such credit for "any time spent under monitored house arrest," and because the GPS liberty restrictions placed upon appellant during home detention elevated his status to that of a prisoner confined in a penal facility who was eligible for time served credit under Higgins¹ and a GPS due process hearing.

¹ State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (S.C. Ct. App. 2004)

STATEMENT OF THE CASE

Appellant Ubaldo Garcia pled guilty to trafficking in cocaine (28 to 100 grams), first offense, during the February 2012 term of the Horry County General Sessions Court before Judge Steven H. John. Appellant was represented by William I. Diggs at the plea proceeding. Judge John sentenced appellant to imprisonment for a period of ten years.

On February 9, 2012, a sentencing reconsideration hearing was convened at the Horry County General Sessions Court before Judge John. Appellant was present at the hearing and represented by William I. Diggs. At the hearing, a motion for time served credit was entered based on appellant's time spent on house arrest and GPS monitoring simultaneously as conditions of bail prior to the plea proceeding. Judge John denied appellant's request for time served credit.

The notice of appeal and letter containing the time served credit issue as the ground for appeal per Rule 203(d)(1)(B)(iv), SCACR, were both timely filed. This brief follows.

ARGUMENT

The trial judge erred in denying appellant's request for time served credit after having submitted to house arrest and GPS electronic monitoring because S.C. Code Ann. § 24-13-40 as amended allows such credit for "any time spent under monitored house arrest," and because the GPS liberty restrictions placed upon appellant during home detention elevated his status to that of a prisoner confined in a penal facility who was eligible for time served credit under *Higgins*² and a GPS due process hearing.

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 per 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 served³ while on home detention and GPS monitoring as bail conditions pending adjudication on his trafficking charge. Counsel's argument regarding the time served credit matter follows:

Your Honor, we looked at a lot of the case law on this issue about home detention and the GPS. [T]he GPS and the house detention issue is slightly separate issues, but both applicable in this case. Mr. Garcia was on house arrest and he was on GPS monitoring, and that's a little bit different from any of the factual scenarios that we find in the case law out of the State of South Carolina regarding credit, or the issue of being given credit for

² State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (S.C. Ct. App. 2004)

³ Appellant was on house arrest and GPS monitoring from September 28, 2009 to December 11, 2011 as a condition of being released after being granted bail.

those situations. Admittedly house arrest hasn't warranted credit for – you know, as a time-served circumstance in our State, but I would submit that house arrest with the GPS monitoring, the limitations on his traveling, that imposed in this case, the typical ones of not being able to travel, other than to go to church and/or to meet with his attorney sufficiently restrictive, sufficiently severe, that it warrants the definition of confinement, and we would ask the Court to, under the circumstances of this case, find that Mr. Garcia was a defendant who was detained, under the circumstances of this case, restriction on his movement sufficient to allow him credit for time served under those circumstances.... house arrest and the GPS monitoring warrant finding that he would be entitled to be given credit for the time that he served under those conditions. R. 26, l. 11- R. 27, l. 11.

The plea judge denied appellant's request for time served credits while on house arrest and GPS monitoring via the prohibition announced in Higgins. R. 30, l. 12-R. 31, l. 24.

In Higgins, the Court held that time served credit could only be awarded to a "prisoner" who is "serving time in prison," and that "prisoners" are those who are 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. Thus, one under house arrest would not qualify as one confined in a penal facility within the meaning of Higgins; and therefore, under the Higgins rationale, a pre-trial house detainee would not receive the benefit of time served credit for time spent on home detention prior to trial. Also, S.C. Code Ann. §24-13-40 mandates that prisoners receive "full credit against the sentence must be given for time served prior to trial and sentencing."

However, in May 8, 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.

Undoubtedly, this amended statute meant that Higgins could no longer be controlling on the issue of whether to bestow time served credit on home detention pretrial detainees. In other words,

our legislature recognized that there are obviously situations where individuals on monitored home detention would qualify similarly as “prisoners” deserving credit for time served during that home detention period. In the case at bar, the additional condition of GPS surveillance attached to house arrest for appellant meant that he was eligible for time served credit under the newly amended statute.

However, notwithstanding the recently amended time served credit statute, appellant nonetheless qualified for time served credit due to the added GPS condition of bail placed upon him while under house arrest because this curtailed his liberty rights, which in turn meant that his home detention coupled with GPS monitoring as condition of bail resulted in a status equivalent to that of a prisoner confined to a penal facility and fit well within the prerequisites to receive time served credit under Higgins. Many courts have addressed the liberty restraints connected to GPS electronic monitoring and the continual surveillance that GPS monitoring brings as infringements on one’s right to be free from government interference and move about freely at will and without restrictions. See State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013), citing to United States v. Merritt, 612 F. Supp. 2d 1074 (2009); State v. Stines, 200 N.C. App. 193, 683 S.E.2d 411 (2009); United States v. Smedley, 611 F. Supp. 2d 971 (2009). See also United States v. Arzberger, 592 F. Supp. 2d 590 (2008). Commonwealth v. Carry, 454 Mass. 559, 911 N.E.2d 187 (2009). Therefore, any home detention coupled with GPS monitoring and its liberty restrictions would elevate such a house arrest to a level similar to the restrictions placed upon prisoners in penal institutions, and would thus warrant time served credit.

Also, since GPS monitoring works to deprive a person of their liberty, courts must assure that such monitoring does not violate due process, which is established by way of a hearing. State v. Stines, 200 N.C. App. 193, 683 S.E.2d 411 (2009). For example, in Dykes, the Court rejected as

unconstitutional an automatic non-reviewable placement of GPS monitoring for those convicted of first degree criminal sexual conduct or lewd act if they violated probation. In Smedley, the Court ruled that imposing home detention with electronic monitoring as a condition of release violated due process as the deprivation of the defendant's liberty interest was at stake and there was no mechanism to challenge the GPS monitoring as a condition for the purpose of bail. Compare similar holdings in United States v. Merritt, 612 F. Supp. 2nd 1074 (2009); United States v. Arzberger, 592 F. Supp. 2nd 590 (2008), where the courts denied attempts by the government to impose GPS electronic monitoring as an added factor to curfews as a condition of bail without due process hearings for the defendants to contest connecting GPS monitoring to their curfews, where the very nature of such monitoring meant that the same would restrict their ability to move about at will and deny them guaranteed constitutional liberty interests. Both Merritt and Arzberger involved Adams Walsh Amendments which were similar to S.C. Code Ann. § 23-3-540(H) which allowed automatic GPS monitoring placements sans any opportunity for review. Hence, the placement of GPS monitoring on appellant sans a hearing violated due process.

Here, the added factor of GPS electronic monitoring that was placed upon appellant as a condition of bail combined with his service time on house arrest prior to his adjudication on the charge against him placed liberty restraints on him that raised him to a sphere beyond house arrest. The restrictions on appellant's movements and constant monitoring of his movements during home detention catapulted him to the level of a prisoner confined in a penal facility who was deserving of time served credit in the case.

Therefore, not only does the new statutory mandate allow for time served credit to be given in monitored home detention cases; but notwithstanding the new statutory mandate, any GPS monitoring of a house arrest pre-trial detainee as a condition of bail should result in the grant of

credit for time served due to the liberty restrictions of GPS monitoring and a GPS due process hearing as well. In the case at bar, appellant was qualified to receive time served credit while under house arrest and GPS monitoring under the amended statute referred to above; but more importantly, appellant was also qualified to receive time served credit as the GPS factor added to his house arrest curtailed his liberty and in the end established him as one on par with a prisoner in penal confinement who would qualify for time served credit.

Thus the trial judge erred in denying appellant's motion for time served credit during his term on home detention and simultaneous GPS monitoring while out on bail.

CONCLUSION

Based on the foregoing argument, appellant requests that this Court reverse the trial judge's denial of his motion for time served credit and remand for a new sentencing proceeding in the case.

Respectfully submitted,



Wanda H. Carter

Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of March, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,


V.

UBALDO GARCIA,

APPELLANT

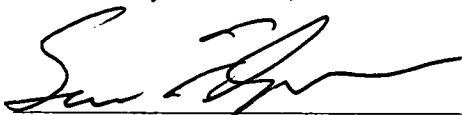
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of March, 2014.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of March, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022 .

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Steven H. John, Circuit Court Judge

Appellate Case No. 2012-209447

THE STATE, RESPONDENT

v.

UBALDO GARCIA, JR., APPELLANT

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General
S.C. Bar No. 8729

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

Post Office Box 1276
Conway, SC 29528
(843) 915-8610

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Respondent’s Statement of Issue on Appeal.....	1
Statement of the Case.....	2
Statement of Facts.....	3
 Argument:	
 The trial court properly denied Appellant’s request for credit against his sentence for the time he served under house arrest and GPS monitoring where: (1) an amendment to the South Carolina Code which allows credit for “any time spent under monitored house arrest” occurred after Appellant was sentenced; (2) Appellant was not entitled to such credit under the pre-amendment version of the Code; and (3) Appellant’s right to due process was not violated by the imposition of GPS monitoring.	6
Conclusion	13

TABLE OF AUTHORITIES

State Cases:

Edwards v. State Law Enforcement Div., 395 S.C. 571, 720 S.E.2d 462 (2011)..... 8

State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013)..... 10

State v. Fleming, 254 S.C. 415, 175 S.E.2d 624 (1970)..... 7, 11

State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005) 7, 11

State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004)..... passim

Wiesart v. Stewart, 379 S.C. 300, 665 S.E.2d 187 (Ct. App. 2008)..... 7, 8

Statutes:

S.C. Code Ann. § 24-13-40..... 5, 7, 8, 9

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court properly denied Appellant's request for credit against his sentence for the time he served under house arrest and GPS monitoring where: (1) an amendment to the South Carolina Code which allows credit for "any time spent under monitored house arrest" occurred after Appellant was sentenced; (2) Appellant was not entitled to such credit under the pre-amendment version of the Code; and (3) Appellant's right to due process was not violated by the imposition of GPS monitoring?

STATEMENT OF THE CASE

Appellant was indicted at the April, 2010 term of the grand jury for Horry County for trafficking in cocaine – more than 400 grams. (Indictment number 2010-GS-26-1601). He was represented by William I. Diggs, Esquire. The State was represented by Bradley Coy Richardson of the Fifteenth Circuit Solicitor's Office. On December 14, 2011, Appellant pled guilty to the lesser included offense of trafficking in cocaine – 28 to 100 grams. He was sentenced by the Honorable Steven H. John to ten years' imprisonment. (R.p.3; p.16, lines 1-25; pp. 38-40). Defendant subsequently filed a motion to reconsider his sentence. (R.p.19). On February 29, 2012, Judge John convened a hearing on Appellant's motion. Appellant was again represented by Mr. Diggs, and the State was represented by Assistant Solicitor Nancy Cote. After hearing arguments, Judge John issued an order denying Appellant's motion. (R.p.34). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

After Appellant was arrested for trafficking in cocaine, he had a surety bond set at \$150,000. His attorney, Mr. Diggs, subsequently moved for a bond reduction, and on October 16, 2009, the Honorable Larry B. Hyman, Jr., issued a consent order reducing bond to: "a \$45,000 surety bond with the condition that the defendant be placed on home detention w/ GPS monitoring except for purposes of going to and from work and/or school, for medical treatment, and to attend church services." Mr. Diggs and an assistant solicitor indicated their agreement to the terms and conditions of the bond by signing the consent order. (R.p.1).

At the guilty plea proceeding, the solicitor recited the facts of the case and Appellant said those facts were true and correct. (R.p.8, line 12-p.10, line 23). After asking Appellant a series of questions, the court found there had been a substantial factual basis for the plea and found that Appellant's decision to plead guilty was made freely, voluntarily, knowingly and intelligently with the advice of competent counsel. The court accepted the plea and asked to hear from Appellant's counsel. (R.p.11, lines 2-9). Mr. Diggs stated: "The incident occurred over two years ago. He has been on monitor and house detention since that time, and eventually, when the Court imposes a sentence, we are going to ask the Court to consider giving him credit for that, a period of time he has been on the monitor." (R.p.11, lines 10-17). After imposing a ten year sentence, the court ordered: "Defendant is given credit for any jail time that he has actually served. I do not believe it is proper to extend credit for time spent on GPS monitoring." (R.p.16, lines 16-18).

In his motion to reconsider, Appellant argued that he: "should be given credit for the time served under house arrest and electronic monitoring, to wit: from the time of

arrest on September 28, 2009 until the date of his sentencing, December 14, 2011.”

(R.p.19). At the February 29, 2012, motion hearing, Appellant advised the court that although he had done some research, he was unable to discover any cases to specifically support his request for credit. He argued, however, that having GPS monitoring in addition to house arrest created a slightly different circumstance than was addressed in the case law. Appellant argued that the limits on his travel associated with house arrest along with the GPS monitoring were sufficiently severe and restrictive to meet the definition of “confinement” for purposes of awarding credit under the relevant statutes.

(R.p.26 line 11-p.27, line 11). The solicitor noted that Appellant had not actually maintained compliance with all the conditions of home detention and had even had a revocation at some point. She also argued that regardless of compliance, Appellant was not entitled to credit for time served on home detention under the existing case law of this state. (R.p.28, line 18-p.29, line 2).

At the conclusion of the hearing, the court referenced an opinion from this Court, State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004), for the proposition that a person is only entitled to credit for time served in a penal institution, and not for house arrest. The court found the GPS monitoring which was attached to the house arrest did not create any exception to this rule, and again declined Appellant’s request for credit for time served on house arrest and GPS monitoring. (R.p.31, lines 3-24). After hearing arguments, the court issued an order formally denying Appellant’s motion to reconsider. The court: “denied the request for credit for time served while [Appellant] was on home detention. *State v. Higgins*, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004).” (R.p.34).

ARGUMENT

I.

The trial court properly denied Appellant's request for credit against his sentence for the time he served under house arrest and GPS monitoring where: (1) an amendment to the South Carolina Code which allows credit for "any time spent under monitored house arrest" occurred after Appellant was sentenced; (2) Appellant was not entitled to such credit under the pre-amendment version of the Code; and (3) Appellant's right to due process was not violated by the imposition of GPS monitoring.

Appellant argues the trial judge erred in denying his request for credit against his sentence for the time he served under house arrest and GPS electronic monitoring prior to his guilty plea. First, Appellant contends he should have been given credit pursuant to a 2013 amendment to Section 24-13-40 of the South Carolina Code that allows credit for "any time spent under monitored house arrest." Second, Appellant contends he should have been given credit pursuant to the pre-amendment version of § 24-13-40 because the GPS liberty restriction placed upon him during the home detention "elevated his status to that of a prisoner confined in a penal facility." Finally, in an argument seemingly unrelated to his request for credit for time served, Appellant contends the pre-trial imposition of GPS monitoring as a condition of bail, without a hearing, violated his right to due process. The State submits each of Appellant's contentions is without merit.

S.C. Code § 24-13-40: Post-2013 Amendment

On the date of the offense (September 30, 2009), the date of Appellant's guilty plea (December 14, 2011), and the date the trial judge heard arguments on Appellant's motion to reconsider (February 29, 2012), the South Carolina Code provided:

The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when (a) a prisoner shall have given notice of

intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the date of the commencement of the service of the sentence. 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. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

S.C. Code Ann. § 24-13-40 (2007 & Supp. 2011) (emphasis added). In State v. Higgins, this court found the legislature only intended to allow credit for time served in a penal institution, and therefore found no error in the trial court's refusal to afford credit to Higgins for the time he served on house arrest while he was released on bond. 357 S.C. 382, 386, 593 S.E.2d 180, 182 (Ct. App. 2004). On June 7, 2013, the legislature amended Section 24-13-40 by adding language to the relevant sentence as follows: "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." S.C. Code Ann. § 24-13-40 (Supp. 2013) (amended by Act No. 34, eff. June 7, 2013).

Appellant argues that this amendment to § 24-13-40 means Higgins can no longer be controlling on the issue of whether to bestow time served credit on home detention pretrial detainees. Indeed, he claims allowing credit for time served on home detention is a "new statutory mandate." (Brief of Appellant, p.9). The State disagrees, at least insofar

as the application of Higgins to this appeal, and submits Appellant's argument should be denied and dismissed on several grounds. First, this argument is not preserved for appellate review because it was neither raised to nor ruled upon by the trial court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). Indeed, it could not have been raised to the trial court because the amendment occurred after appellant was convicted and sentenced. At the time of Appellant's plea and sentence, Higgins controlled the trial court's decision to deny credit for time served on house arrest, and that decision should be affirmed.

Second, although not raised in his brief and therefore not before the Court, to the extent this Court construes Appellant's argument to be a claim that the amendment to Section 24-13-40 should be retroactive, the State disagrees. South Carolina case law makes it clear that amendments to statutes are not retroactive unless the Legislature says they are. "Generally, 'statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision in the enactment or clear legislative intent to the contrary.'" Wiesart v. Stewart, 379 S.C. 300, 303, 665 S.E.2d 187, 188 (Ct. App. 2008). "Statutes that are remedial or procedural in nature, however, operate retroactively. A statute is remedial and applies retroactively when it creates new remedies for existing rights or enlarges rights of persons under disability." Id. In Wiesart, this Court found the 1996 amendment to § 23-3-430 was procedural in nature because it created a requirement that the trial court make a specific finding on the record regarding whether a person convicted of indecent exposure should register as a sex offender, rather than creating a new right. Id.

In Edwards v. State Law Enforcement Div., 395 S.C. 571, 720 S.E.2d 462 (2011), the Supreme Court examined how to determine whether a statutory amendment is to be applied retroactively. “It is a well-settled rule of statutory construction that absent 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.” Id. at 579, 720 S.E.2d at 466. After finding no explicit provision by the General Assembly that the amendment in question was to apply retroactively, the Court turned its focus to whether it was remedial or procedural. Following the Court’s logic in Edwards, finding no explicit provision that the amendment is to apply retroactively, this Court must determine whether it is remedial or procedural. A statute is remedial when it creates new remedies for existing rights or enlarges rights of persons under disability, and is procedural if it sets out a mode of procedure for a court to follow, or ‘prescribes a method of enforcing rights.’ Wiesart, 379 S.C. at 303, 665 S.E.2d at 188; Edwards, 395 S.C. at 580, 720 S.E.2d at 466. Here, the amendment does not create a new remedy for an existing right, nor does it set out a mode of procedure for courts to follow. Rather, by providing that house arrest time may be used to calculate time served, the amendment creates a new obligation or imposes a new duty. Id. In Edwards, the Court found the amendments to the sex offender registry statute to provide that if a sex offender received a pardon for which he was required to register, he must reregister and may not be removed from the registry except in certain enumerated circumstances did “not create a new right, but instead impose[d] an obligation which did not exist prior to the amendments.” Edwards, 395 S.C. at 579, 720 S.E.2d at 466. Similarly, the amendment in this case imposed an obligation by making house arrest part of time-served calculation.

Therefore, it should be construed prospectively, not retroactively. Accordingly, the amendment does not apply to Appellant.

Finally, even under the terms of the amended statute, the award of credit for time spent on monitored house arrest is discretionary rather than mandatory. Unlike credit for time served prior to trial and sentencing in a penal institution, which “must be given,” credit for time spent on monitored house arrest “may be given.” S.C. Code Ann. § 24-13-40 (Supp. 2013). Because the award of the credit sought by Appellant was entirely in the discretion of the trial court, the decision to deny such credit must be affirmed. This is particularly true where the trial judge was given uncontested information that Appellant had violated the conditions of his house arrest. Compare Higgins, 357 S.C. at 383, 593 S.E.2d at 181 (noting there was no evidence Higgins violated the conditions imposed in his release order). For all of the foregoing reasons, the State submits Appellant’s first contention is without merit and should be dismissed.

S.C. Code § 24-13-40: Pre-2013 Amendment

Appellant argues he “qualified for time served credit due to the added GPS condition of bail placed upon him while under house arrest because this curtailed his liberty rights, which in turn meant that his home detention coupled with GPS monitoring as condition of bail resulted in a status equivalent to that of a prisoner confined to a penal facility and fit well within the prerequisites to receive time served credit under Higgins.” He claims the GPS monitoring “elevated him,” “raised him to a sphere beyond,” or “catapulted him” beyond house arrest to the level of a prisoner. (Brief of Appellant, p.7-p.8). The State disagrees.

Higgins clearly held that: (1) the statutory term: “time served” as employed in the statute governing computation of credits against a sentence did not include time spent under house arrest; and (2) Higgins was not entitled to credit against his sentence for time spent under house arrest while released on bond. Higgins, 357 S.C. at 382, 593 S.E.2d at 180. Like Higgins, Appellant spent time under house arrest/home detention while released on bond. Thus, pursuant to Higgins, Appellant was not entitled to “time served” credit against his sentence for this time. The imposition of GPS monitoring did absolutely nothing to “elevate” or further intensify the liberty restrictions already imposed by the home detention itself, which prohibited Appellant from leaving his home “except for purposes of going to and from work and/or school, for medical treatment, and to attend church services.” Instead, GPS monitoring merely provided a means to monitor and enforce those restrictions. Appellant relies in part on State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) and several cases cited therein in support of his argument, however Dykes addressed imposition of GPS monitoring independent of home detention or house arrest, and therefore is inapplicable to the circumstances of Appellant’s case. For these reasons, the State submits Appellant’s second contention is without merit and should be dismissed.

Due Process

Appellant argues that “GPS monitoring works to deprive a person of his or her liberty” and therefore, due process demands a hearing before GPS may be imposed as a condition of bail. He contends his placement on GPS monitoring without a hearing violated his right to due process. The State submits this argument is not preserved for appellate review and is wholly without merit.

Appellant did not raise this “due process” argument during the guilty plea proceeding and the trial court certainly did not rule on any due process claim; therefore, it is not preserved for appellate review. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). In any event, Appellant consented to the conditions of home detention and GPS monitoring in conjunction with a reduction in the amount of his bond. Had he not consented to the GPS monitoring, he would have been given a hearing on his motion to reconsider bond and any modified or newly imposed conditions. Therefore, the State submits Appellant’s due process argument is without merit and should be dismissed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.


Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

BY:



J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
March 11, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Steven H. John, Circuit Court Judge

Appellate Case No. 2012-209447

THE STATE,.....RESPONDENT

v.

UBALDO GARCIA, JR.,.....APPELLANT.

CERTIFICATE OF COUNSEL

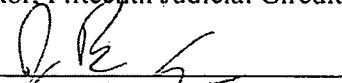
The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b),
SCACR.

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

BY:


J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
March 11, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Steven H. John, Circuit Court Judge

Appellate Case No. 2012-209447

THE STATE,RESPONDENT

v.

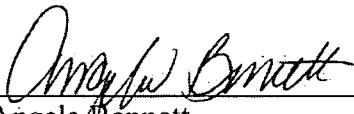
UBALDO GARCIA, JR.,APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated March 11, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Wanda H. Carter, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served.
This 11th, day of March, 2014.



Angela Bennett

Administrative Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727