

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Steven H. John, Circuit Court Judge

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MAR 05 2015
SC Court of Appeals

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

10-GS-26-01601

THE STATE,

RESPONDENT,

V.

UBALDO GARCIA,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

WANDA H. CARTER
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was filed on December 19, 2014, and denied by the Court of Appeals on February 3, 2015.

QUESTION PRESENTED

The Court of Appeals erred in denying petitioner time served credit while under house arrest because the amended time served credit statute that allows pre-trial detainees to receive credit for time accrued during house arrest legislated subsequent to petitioner's sentencing was remedial and procedural in nature and therefore applicable retroactively in petitioner's case.

STATEMENT OF THE CASE

Petitioner 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. Petitioner was represented by William I. Diggs at the plea proceeding, and Assistant Solicitor Bradley Coy Richardson appeared on behalf of the state. Judge John sentenced appellant to imprisonment for a period of ten years. R.1-18.

On February 9, 2012, a sentencing reconsideration hearing was convened at the Horry County General Sessions Court before Judge John. Petitioner was present at the hearing and represented by William I. Diggs, and Assistant Solicitor Nancy Cote appeared on behalf of the state. At the hearing, a motion for time served credit was entered based on petitioner's time spent on house arrest and GPS monitoring simultaneously as conditions of bail prior to the plea proceeding. Judge John denied petitioner's request for time served credit. R. 22-33.

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. App. 1 – 3. After briefing and oral arguments were heard, the Court of Appeals issued an opinion finding that neither the original time served credit statute nor the amended time served credit statute was applicable to petitioner's case. App. 4 – 6. Petitioner filed a petition for rehearing on December 19, 2014, which was denied on February 3, 2015. App. 7 - 11

This petition for writ of certiorari to review the Court of Appeals' decision in the case follows.

ARGUMENT

The Court of Appeals erred in denying petitioner time served credit while under house arrest because the amended time served credit statute that allows pre-trial detainees to receive credit for time accrued under house arrest legislated subsequent to petitioner's sentencing was remedial and procedural in nature and therefore applicable retroactively in petitioner's case.

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.

On December 14, 2011, petitioner pled guilty to trafficking in cocaine and was sentenced to ten years imprisonment. R. 4, l. 1 – R. 11, l. 9. On December 23, 2011, petitioner's counsel filed a motion to reconsider petitioner's sentence therein asking for time served to be given to him during “[his] time served under house arrest” and GPS monitoring simultaneously. R. 19. A sentencing reconsideration hearing into the matter was convened on February 29, 2012, after which time the trial judge denied petitioner's request for time served credit while under house arrest. R. 30, l. 12 – p. 31, l. 24.

On direct appeal, the issue raised was whether petitioner should have received credit for time served while on house arrest and ultimately the issue of the applicability of the amended time served credit statute to petitioner's case. The original time served credit statute under S.C. Code Ann 24-13-40, required that “full credit against the sentence must be given [to prisoners] for time served prior to trial and sentencing” in cases prisoners were actually confined in a penal facility

qualified for time served credit prior to trial. See State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004).

Petitioner's crime occurred on September 30, 2009. Petitioner pled guilty on December 14, 2011, when the original time served credit statute was in effect. Also, petitioner's resentencing hearing was held on February 29, 2012, when the original time served credit statute was in effect. However, the time served credit statute was amended on June 7, 2013, allowing for such credit to be given to pre-trial detainees "for any time spent under monitored house arrest." In response to petitioner's argument on direct appeal that he qualified for and was properly requesting time served credit for his time spent on house arrest prior to trial, the Court of Appeals ruled in effect that petitioner was properly denied time served credit under the original statute and that the amended time served credit statute did not apply retroactively in petitioner's case. The Court of Appeals held as follows:

As to [petitioner'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). App.

Clearly, the Court of Appeals erred in holding that neither the original time served credit statute nor the subsequent amended time served credit statute applied in petitioner's case.

ERROR PRESERVATION

At the outset, note that the time served credit issue in this case was preserved for appellate review. An issue is preserved for appellate review if it was raised to and ruled upon by the trial court, raised by the appellant, raised in a timely manner, and raised to the trial court with sufficient specificity. State v. Brown, 402 S.C. 119, 740 S.E.2d 493 (2013). In petitioner's "motion to reconsider [petitioner's] sentence," trial counsel's written motion regarding this issue follows:

That the Defendant, by and through his undersigned counsel, would request of the Court this 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. R.19.

Then, at the sentencing reconsideration hearing held on February 29, 2012, defense counsel's argument 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. [Petitioner] was on house arrest and he was on GPS monitoring,but I would submit that house arrest with the GPS monitoring,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...to allow him credit for time served under those circumstances.... R. 26, l. 11- R. 27, l. 11.

Also, it is clear that this issue was properly preserved based on the trial judge's comments made at the sentencing reconsideration hearing as follows:

[Trial counsel] has filed a Motion to Reconsider the Sentence in this matter, stating the grounds in the written motion that mitigating circumstances warrant a minimum sentence in this case, and the Defendant 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 sentencing, December 14, 2011. App. 23, l. 17 – 23.

Ultimately, the trial judge denied petitioner's request for time served credits while on house arrest by Order dated February 29, 2012. See R. 34. Therefore, the time served credit issue is properly preserved for appellate review. Note that petitioner's case is similar to the dilemma faced by this Court in State v. Brown, 402 S.C. 119, 740 S.E.2d 493 (2013). In Brown, supra, this Court ruled on a savings clause ambiguity and the retroactivity of the amended grand larceny statute (S.C. Code Ann. § 16-13-30 (2010) requiring goods stolen to be valued at \$2,000.00 or more) and addressed the issues "for the education of the bench and bar" despite preservation anomalies.

REMEDIAL

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). 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 petitioner'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

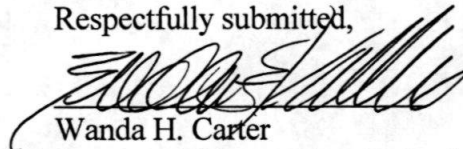
because of the trial judge's discretion in the matter since such credit "may" be given, which obviously means there must be some mode of procedure for a judge to follow (mini hearing at the very least) in in these cases.

This procedural aspect of the amended statute meant that it applied retroactively to petitioner'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 petitioner's sentence.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant this petition requesting review of the Court of Appeals' decision denying retroactivity of the amended time served credit statute to petitioner's case.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 5th day of March, 2015

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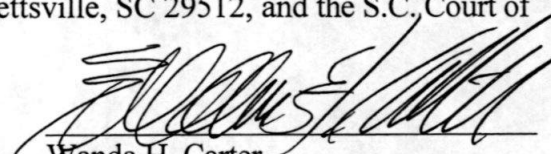
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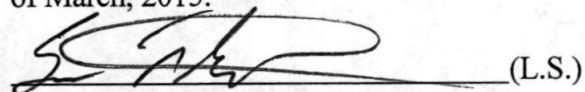
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Ubaldo Garcia #349072, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, and the S.C. Court of Appeals this 5th day of March, 2015.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of March, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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SC Court of Appeals

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

March 5, 2015

J. Benjamin Aplin, Esquire
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: The State v. Ubaldo Garcia

Dear Ben:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the South Carolina Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/smf

Enclosures

cc: Court of Appeals