THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE CIRCUIT COURT
The Honorable R. Markley Dennis, Jr. Circuit Court Judge
Opinion No. 2015-UP-039(S.C. Ct. App. Filed 1/21/2015)
Appellant Case No. 2013-002558
Case Number 07-GS-32-1387

THE STATE, ...RESPONDENT

v.

BRAD ALAN DAY, ...APPELLANT

RETURN TO PETITION FOR WRIT OF CERTIORARI

Tommy Evans, Jr.
Assistant General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
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Columbia, South Carolina 29250
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ATTORNEY FOR THE RESPONDENT

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STATEMENT OF THE CASE

The Respondent has no objection to the statement of the case presented by the Appellant.

ARGUMENT

The Court of Appeals did not err in determining that the Appellant's sentence was not completed so he is subject to a revocation of Community Supervision.

The Appellant seeks the Supreme Court to grant a writ of certiorari in order to review the decision of the Court of Appeals. On January 21, 2015, the Court of Appeals issued a non-published opinion affirming the decision of the Circuit Court regarding the revocation of the Appellant's community supervision. In review of this petition of certiorari none of the characteristics referenced in the Appellate Court rules allowing a writ of certiorari is revealed; therefore, this petition should be subject to denial.

The Respondent argues that the Court of Appeals was correct in affirming the decision of the Circuit Court regarding the revocation of community supervision. There exists no error in law; therefore, this decision should not be subject to review by the Supreme Court. The Supreme Court's authority to review the findings of the lower court is confined to the corrections of errors of law, unless it appears that the action of the circuit court amounted to a manifest abuse of discretion. *State v. Ellis,* 397 S.C. 576, 726 S.E.2d 5 (2012). Pursuant to South Carolina law any violation of Community Supervision must be brought before the Circuit Court. Upon verification of a willful violation, the court can revoke up to one year.[1] Upon completion of that year, the offender would be once again he responsible for the completion of two continuous years of community supervision.[2] The Respondent's allegations of the Appellant's violation of community

[1] If the department determines that a prisoner has violated a term of the community supervision program ..... a probation agent must initiate a proceeding in General Sessions Court. If the Court determines that a prisoner has willfully violated a term or condition of the community supervision program ..... the court may revoke the prisoner's community supervision and impose a sentence of up to one year. S.C. Code Ann. §24-21-560(C)(Supp. 2014).

[2] If a prisoner's community supervision is revoked by the court and the court imposes a period of incarceration for the revocation, the prisoner also must complete a community supervision program of up to two years as determined by the department pursuant to subsection (B) when he is released from incarceration. S.C. Code Ann. §24-21-560(D)(Supp. 2014).

supervision was brought before the Circuit Court. He was revoked one year, and will be responsible for a continuous two year period of community supervision before the program is completed. The Circuit Court was well within its jurisdiction to revoke the Appellant's community supervision. No action or decision made by the Circuit Court can be considered unlawful or a manifest abuse of discretion.

The Appellant was convicted of committing criminal sexual conduct with a minor in the second degree (CSC 2nd w/minor). At the time he committed this offense CSC 2nd w/minor was classified as a C-felony; therefore, a no parole offense.[3] He was sentenced to a ten year period of incarceration suspended upon the service of five years. Pursuant to South Carolina law the Appellant was required to serve eighty-five percent of his sentence, then released and placed on a community supervision program (CSP).[4] The Appellant violated CSP twice and given sentences of ninety days and one year. The Appellant now alleges that his sentence is completed, so he should no longer be on CSP. The Appellant argues that remaining on CSP goes against the intent of the legislature. The Appellant also argues that the lower Courts wrongfully overlooked the plain language of the law, so this case should go before the Supreme Court for review. In *State v. Blakney*, 410 S.C. 244, 763 S.E.2d 622 (Ct. App. 2014) the Court of Appeals affirmed the decision of the lower court on a case identical to the present case. They decided that pursuant to *Picklesimer v. State*, 388 S.C. 264, 695 S.E.2d 845 (2010), the lower court did not err in revoking the CSP. This court denied certiorari in *Blakney*, and should also deny in the present case.

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[3] For purposes of definition under South Carolina law a no parole offense means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment of twenty years or more. S.C. Code Ann. §24-21-100(Supp. 2014).

[4] Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, any sentence for a "no parole offense" as defined in Section 24-13-100 must include any term of incarceration and completion of a community supervision program operated by the Department of Probation, Parole and Pardon Services. S.C. Code Ann. §24-21-560 (Supp. 2014).

The Appellant argued that pursuant to South Carolina law the suspended portion should not be included in a CSP revocation. The South Carolina Code of Laws specifically states: "the prisoner must not be incarcerated for a period longer than the original sentence. The original term of incarceration does not include any portion of a suspended sentence." S.C. Code Ann. §24-21-560(D)(Supp. 2014). In *Picklesimer* this Court decided that the total sentence handed down by the Court includes both the suspended and unsuspended portions of the original sentence. *Picklesimer,* at 268. Due to this decision the entire portion that must be included in the Appellant's CSP revocation, includes the entire ten year sentence, not just the five year incarcerated portion. The Circuit Court was correct in revoking one year, a decision which was properly upheld by the Court of Appeals.

The Appellant also argues that the original sentence does not include any portion of the suspended sentence, that his total sentence was five years which he has already served. He makes the argument that this case distinguishes from *Picklesimer,* due to the fact in *Picklesimer,* the Appellant was given a probationary sentence. Recently in *Blakney*, the Appellant made an identical argument, the Court of Appeals decided that this situation is not distinguishable from *Picklesimer*. The total aggregate sentence includes both the suspended and unsuspended portions, regardless if the suspended portion does not include probation.

Before the Court of Appeals, the Appellant argued that the sentencing judge wished for the Appellant to serve no more than five years. The Appellant argued that if he wished for him to serve more time he would have given him a longer sentence. The Appellant was convicted of committing CSC 2nd w/minor, an offense that carries a maximum sentence of twenty years; however, there exists no minimum. The sentencing judge could have given him a straight five-year sentence, but he was sentenced to a ten year sentence, with five years incarceration. The sentencing judge

possibly failed to sentence the Appellant to a probationary period due to the South Carolina Supreme Court decision of *State v. Dawkins*, 352 S.C. 162, 573 S.E.2d 783 (2002). In *Dawkins*, this Court decided that a Defendant is discharged from a sentence after the successful completion of CSP, including any probationary term. Due to this decision, the Appellant would either successfully complete CSP which would discharge probation, or complete his ten year sentence in one-year increments. It could be possible that the sentencing court never sentenced probation due to the fact he would never serve it, a probationary sentence would be meaningless.

The Appellant also argues that forcing him to remain on CSP causes him to serve his sentence beyond his original sentence, which is not the intent of the legislature. The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Mid-State Auto Auction of Lexington, Inc. v. Altman,* 324 S.C. 65, 476 S.E.2d 690 (1996). It is the opinion of the Appellant that the above referenced statute does not allow him to remain on CSP past the five year incarcerated period. In *Picklesimer,* this Court, and later interpreted by the Court of Appeals in *Blakney*, that the "original sentence, includes, both the suspended and unsuspended portions of a circuit court sentence." *Blakney,* at 250, *quoting*, *Picklesimer,* at 270. The Appellant was convicted and given a ten year sentence on October 29, 2007; therefore, he should not remain on CSP past October 29, 2017. Under no circumstances shall a defendant be incarcerated or forced to participate in mandatory CSP or residual probation stemming from the same conviction, outside of the time given by the trial judge in the original sentence. *Id.* This does not mean that the Appellant should not be on CSP past the incarcerated portion of his sentence, it means that he cannot remain on CSP past the length of his "original sentence" which in this case is ten years.

Pursuant to the South Carolina Appellant Court rules, the Court must consider certain reasons prior to the granting certiorari. The reasons that will be considered is: 1) Where there are

novel questions of law; 2) Where there is a dissent of the Court of Appeals; 3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; 4) Where substantial constitutional issues are directly involved; and, 5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242 (b)(1-5), SCACR. The Appellant has not satisfied any of the above referenced criteria regarding the granting of a writ of certiorari. This petition should be subject to dismissal, and the decision of the Court of Appeals be maintained without interruption.

CONCLUSION

For all the reasons set forth above, the Respondent submits this Court should deny the Petition for Writ of Certiorari and allow the case to remain as properly decided by the Court of Appeals. If the Court grants this Petition the Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

Tommy Evans, Jr.
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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Return to Petition for Writ of Certiorari,* on Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record this 23rd day of March, 2015:

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

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

Dawn K. Nichols
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March 23, 2015

The Honorable Daniel E. Shearouse
Clerk of the S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: State v. Brad Day

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari for filing in your office. By copy of this letter we are serving opposing counsel with this Return today.

Sincerely,

Tommy Evans, Jr.
Assistant General Counsel

Enclosures

cc: Lara Caudy, Esquire