

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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MAR 27 2015

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

Appellate Case No: 2015-000480

S.C. Supreme Court

State of South Carolina, Respondent,

v.

Ubaldo Garcia, Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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The Court of Appeals properly affirmed the trial court’s denial of Petitioner’s request for sentencing credit for the time he served under house arrest with GPS monitoring because a 2013 amendment to the South Carolina Code which allows such credit: (1) occurred after Appellant was sentenced, (2) is not retroactive, and (3) puts the award of credit exclusively in the sentencing judge’s discretion.....	6
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QUESTION PRESENTED

1. Whether the Court of Appeals properly affirmed the trial court's denial of Petitioner's request for sentencing credit for the time he served under house arrest with GPS monitoring where a 2013 amendment to the South Carolina Code which allows such credit: (1) occurred after Appellant was sentenced, (2) is not retroactive, and (3) puts the award of credit exclusively in the sentencing judge's discretion.

STATEMENT OF THE CASE

Ubaldo Garcia (Petitioner) 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. Respondent (the State) was represented by Bradley Coy Richardson of the Fifteenth Circuit Solicitor's Office. On December 14, 2011, Petitioner 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; p.38-p.40). Petitioner subsequently filed a motion to reconsider his sentence. (R.p.19). On February 29, 2012, Judge John convened a hearing on Petitioner's motion. Petitioner 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 Petitioner's motion. (R.p.34). Petitioner timely filed a notice of intent to appeal, and his conviction and sentence were affirmed in an unpublished opinion from the Court of Appeals. State v. Garcia, Op. No. 2014-UP-446 (S.C. Ct. App. filed December 10, 2014) (App.p.4-p.6). Petitioner submitted a timely Petition for Rehearing, the State filed a Return, and by Order filed February 3, 2015, the Petition was denied. (App.p.7-p.20). On March 5, 2015, Petitioner submitted a Petition for a Writ of Certiorari to this Court and now this Return on behalf of the State follows.

STATEMENT OF FACTS

After Petitioner 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 Petitioner said those facts were true and correct. (R.p.8, line 12-p.10, line 23). After asking Petitioner a series of questions, the court found there had been a substantial factual basis for the plea and found that Petitioner’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 Petitioner’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, Petitioner 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, Petitioner 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. Petitioner 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 Petitioner 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, Petitioner 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 that was attached to the house arrest did not create any exception to this rule and again declined Petitioner’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 Petitioner’s motion to reconsider. The court cited State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004) and

“denied the request for credit for time served while [Petitioner] was on home detention.”
(R.p.34).

CERTIORARI

Petitioner argues this Court should grant certiorari because the Court of Appeals erred in denying him credit for time served while under house arrest, where a subsequent legislative amendment would have allowed the award of such credit. He contends the Court of Appeals should have applied the 2013 amendment retroactively and, despite preservation anomalies, should at least have addressed the 2013 amendment for the education of the bench and bar. The State disagrees and submits the Court of Appeals properly affirmed the trial court’s denial of credit where the 2013 amendment was not retroactive and where the award of credit under that amendment would nevertheless have been optional or discretionary. Pursuant to Rule 242(b), SCACR, there are no “special and important reasons” for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this matter. Indeed, the Court of Appeals decision was a straightforward exercise of applying existing precedent to the particular facts and circumstances of Petitioner’s case. Thus, the State respectfully requests that Petitioner’s petition for a writ of certiorari be denied and dismissed.

ARGUMENT

The Court of Appeals properly affirmed the trial court's denial of Petitioner's request for sentencing credit for the time he served under house arrest with GPS monitoring because a 2013 amendment to the South Carolina Code which allows such credit: (1) occurred after Appellant was sentenced, (2) is not retroactive, and (3) puts the award of credit exclusively in the sentencing judge's discretion.

On appeal to the Court of Appeals, Petitioner argued 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. Petitioner contended 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." He claimed allowing credit for time served on home detention is a "new statutory mandate." The State responded by first noting the argument was not preserved for appellate review because it was neither raised to nor ruled upon by the trial court. In addition the State argued that, although not raised in his brief and therefore not before the Court, to the extent the Court of Appeals construed the argument to be a claim that the amendment to Section 24-13-40 should be retroactive, such an application would not have been proper under existing precedent. Finally, the State argued that even under the terms of the amended statute, the award of credit for time spent on monitored house arrest is entirely in the discretion of the trial court. Thus, the decision to deny such credit must be affirmed. Ultimately, the Court of Appeals agreed with the State's positions on the retroactive application of the amendment and the discretionary nature of the award, and affirmed the denial of credit. This holding is supported by the record and should be affirmed.

Argument is not preserved for Appellate Review

The State respectfully asks this Court to deny the petition for certiorari pursuant to Rules 208(b)(1), 208(b)(3), 221(a), & 242, 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 Petitioner in his petition for certiorari, was articulated for the first time in the petition for rehearing before the Court of Appeals. It was neither raised to nor ruled upon by the trial court and it was never specifically raised to the Court of Appeals in Petitioner's briefs. Indeed, Petitioner 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 was raised for the first time in Petitioner's petition for rehearing, it is not preserved for appellate review and should not be addressed by this Court on certiorari. See Kiawah Prop. Owners 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 the Court of Appeals 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 Petitioner's failure to raise the issue in the first place, and it should not prohibit dismissal of the issue as unpreserved. In any event, the State submits certiorari should be denied on the merits.

The 2013 Amendment should Not be Applied Retroactively

"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 Petitioner.

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 this 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.

Petitioner 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 Petitioner has turned the analysis of this issue on its head. The existing “right” was clearly defined by the pre-amendment statute, as interpreted by the Court of Appeals 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 Petitioner.

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, the Court of Appeals 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 this 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.

Petitioner 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 Petitioner.

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 Petitioner 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 Petitioner 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).

CONCLUSION

Based on the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court. If the Court grants the petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

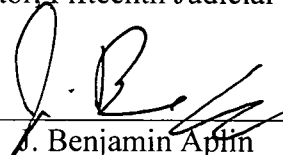
Respectfully submitted,

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Columbia, South Carolina
March 27, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM Horry County
Court of General Sessions
Steven H. John, Circuit Court Judge

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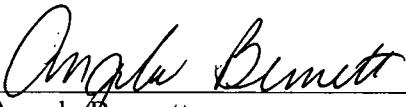
Ubaldo Garcia, Petitioner.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Return to Petition for a Writ of Certiorari*, dated March 27, 2015, on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Wanda H. Carter, Deputy Chief Appellate Defender
S.C. Commission on Indigent Defense
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I further certified that all parties required by Rule to be served have been served.
This 27th day of March, 2015.



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March 27, 2015

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MAR 27 2015

S.C. Supreme Court

RE: The State, Respondent, v. Ubaldo Garcia, Petitioner
Appellate Case No. 2015-000480

Dear Ms. Carter:

I am enclosing two (2) copies of the Return to Petition for a Writ of Certiorari in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Daniel E. Shearouse
(original and six copies enclosed)
Victim Services