

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Lexington County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRAD A. DAY,

APPELLANT

APPELLATE CASE NO. 2014-000306

INITIAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The circuit court judge erred in revoking appellant's sentence by one year on February 5, 2014, and ordering him to continue with community supervision thereafter under authority of State v. Picklesimer¹ because appellant's original sentence issued in 2007 had expired after five years (ten years suspended upon the service of five years); and thus the rule in Picklesimer, which addressed traditional three-part split sentences where probation sentences were issued, was inapplicable to appellant's two-part sentence as appellant did not receive a probation sentence and was therefore no longer eligible for revocations or community supervision at the close of the year 2013.

¹ 388 S.C. 264, 695 S.E.2d 845 (2010).

STATEMENT OF THE CASE

Appellant Brad A. Day pled guilty to second degree criminal sexual conduct with a minor during the October 2007² term of the Lexington County General Sessions Court before Judge Kenneth Goode. Appellant was sentenced to imprisonment for a period of ten years, suspended upon the service of five years. Appellant was released from prison on April 29, 2011, and entered into a community supervision program on September 12, 2011.

Thereafter, appellant's sentence was revoked twice for community supervision violations: a ninety-day revocation in February 2012, and a one-year revocation in June 2012. On January 31, 2014, a community supervision revocation hearing was held on appellant's behalf at the Lexington County General Sessions Court before Judge Donald B. Hocker. Appellant was represented by David M. Mauldin at the hearing, and Agent Baker appeared on behalf of SCDPPP. On February 5, 2014, Judge Hocker issued an Order revoking one year of appellant's sentence and ordering that he continue participating in a community supervision program after serving out his revocation sentence.

Appellant appealed Judge Hocker's Order. This brief follows.

² Appellant pled guilty on October 29, 2007.

ARGUMENT

The circuit court judge erred in revoking appellant's sentence by one year on February 5, 2014, and ordering him to continue with community supervision thereafter under authority of State v. Picklesimer³ because appellant's original sentence issued in 2007 had expired after five years (ten years suspended upon the service of five years); and thus the rule in Picklesimer, which addressed traditional three-part split sentences where probation sentences were issued, was inapplicable to appellant's two-part sentence as appellant did not receive a probation sentence and was therefore no longer eligible for future revocations or community supervision at the close of the year 2013.

In State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010), the Court held that the defendant's sentence of ten years, suspended upon the service of five years, and five years probation meant that his sentence could be revoked multiple times and that he could be re-enrolled into a community supervision program multiple times per S.C. Code Ann § 24-21-560 until his original sentence expired. The Picklesimer Court went on to define an original sentence as a sentence that consists of the suspended sentence and the unsuspended sentence, which results when three-part split sentences are handed down. Also, the Picklesimer Court held that an inmate cannot be forced to participate in community supervision "outside of the time given by the trial judge in the original sentence which encompasses both the suspended [sentence] and [the] unsuspended portion of the sentence." Therefore, according to Picklesimer, a defendant will either successfully complete his community supervision or continue in his community supervision due to sentencing revocations until the end of the original sentence.

³ 388 S.C. 264, 695 S.E.2d 845 (2010).

Appellant's case is an anomaly in that he was not required to serve a probation sentence as part of a suspended sentence because he had no probation sentence attached to his sentence. In other words, petitioner did not receive the traditional three-part split sentence that included an unsuspended sentence, and a suspended sentence, and a probation sentence. Appellant's case was comprised of two parts only, i.e., ten years suspended upon the service of five years (without an added probation sentence). Hence, appellant's original sentence was a five year sentence, and appellant, who was sentenced in 2007, had already served his five-year sentence by 2014 and was no longer subject to additional revocations or community supervision. Thus, Picklesimer applied not to appellant's case. Appellant's probation revocation counsel explained the issue as follows:

I would distinguish [appellant's] case from [Picklesimer's]... in that...the sentence there was ten years suspended on five years and five years probation, and [Picklesimer's] failure to complete a two year term of community supervision satisfactorily. He basically did the five years day for day without the two year community supervision term..[but]..[i]t was the Department's position [that Picklesimer] had the probationary sentence to follow, and the Court agreed with that determination. Here there is no probationary sentence to follow, and we believe the five year satisfied the sentence.

The original term of incarceration does not include any portion of a suspended sentence, and that is that statute.

The original term of incarceration here was five years...that the term of ten years would be satisfied by service of five years, without future obligation such as probation. Tr.5, lines 14-25; Tr. 6, lines 8-9; Tr.6, lines 22-25.

Subsequently, probation revocation counsel for appellant submitted the following Rule 203, SCACR, explanation in support of appellant's direct appeal:

Pursuant to Rule 203(B)(iv), [counsel] asserts that he does have a good faith basis to appeal the [circuit] court's ruling

that [appellant] had not satisfied his sentence and was still required to participate in the community supervision program. [Appellant] was originally sentenced to ten years suspended on the service of five years. There was no probation term ordered to follow the five years. [Appellant] had served more than five years on the sentence. Tr. ____.

The circuit court judge who presided over the revocation and community supervision issues at the hearing ruled ultimately by Order that the total sentence handed down in appellant's case was ten years, and that the ten-year sentence was the original sentence, and that appellant had not completed his original sentence as of the 2014 one-year revocation and order for continued community supervision. Tr. _____.

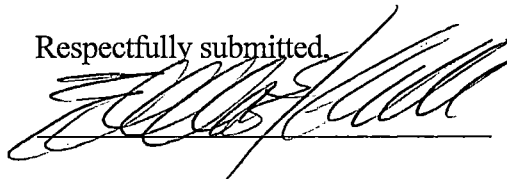
To the contrary, appellant's two-part sentence of ten years, suspended upon the service of five years, was tantamount to an original sentence of five years as no probation sentence was attached. Since appellant's sentence was not a three-part Picklesimer style sentence, appellant was not subject to future revocations or community supervision after the year 2013.

Therefore, the circuit court judge erred in issuing a revocation in appellant's case and ordering community supervision in its February 5, 2014 Order because appellant's original sentence of five years had already expired.

CONCLUSION

Based on the foregoing argument, the circuit judge's revocation and community supervision Order should be vacated.

Respectfully submitted,



Wanda H. Carter,

ATTORNEY FOR APPELLANT

This 7th day of July, 2015.

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Donald B. Hocker, Circuit Court Judge

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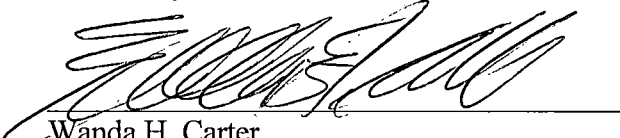
V.

BRAD A. DAY,

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CERTIFICATE OF SERVICE

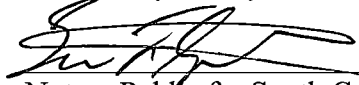
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Brad A. Day, at 905 Glenn Street, West Columbia, SC 29169, this 7th day of July, 2015.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of July, 2015.

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