

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
Donald B. Hocker, Circuit Court Judge

RECEIVED
JUL 24 2015
SC Court of Appeals

Case No. 2014-000306

THE STATE,RESPONDENT

v.

BRAD A. DAY,APPELLANT

MOTION TO DISMISS

Tommy Evans, Jr.
Assistant General Counsel

**South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250**

ATTORNEY FOR RESPONDENT

STATEMENT OF THE CASE

The Appellant was convicted of committing criminal sexual conduct with a minor in the second degree (CSC 2nd w/minor). He was sentenced to a ten year period of incarceration suspended upon the service of five years. The Appellant was released from incarceration on community supervision. The Appellant violated community supervision, and received a ninety day revocation in February, 2012. Then in June, 2012 the Appellant appeared before the Honorable R. Markley Dennis due to another violation the community supervision. Upon the conclusion of this hearing Judge Dennis revoked one year.

After this revocation, the Appellant filed a notice of appeal before the Court of Appeals. Within this appeal the Appellant argued that since he was not given a probationary sentence, community supervision can only be revoked for the five year incarceration portion, not the entire ten year sentence. On January 21, 2015, this Court filed an unpublished opinion affirming the decision of the Circuit Court.¹

The Appellant served his one year period of incarceration and was released again on Community Supervision. He once again violated community supervision. On January 13, 2014, another violation hearing was held before the Honorable Donald B. Hocker. Upon conclusion of this hearing Judge Hocker determined that the Appellant willfully violated community supervision. He revoked community supervision and ordered a one year period of incarceration.

Upon revocation of his community supervision the Appellant filed another notice of appeal before the Court of Appeals. Within this appeal the Appellant argues that this revocation is unlawful due his sentence expiring after his five year incarceration. The exact argument made previously before this court in the Appellant's prior appeal.

¹ *State v. Day*, Appellate Case No. 2013-002558

The Respondent now files this motion to dismiss due to this Court having previously decided the Circuit Court did not err in deciding the Appellant had not yet served his entire sentence. The Appellant made this identical argument previously before this court against the identical Respondent. This matter has been decided by this Court previously; therefore, this appeal should be subject to dismissal due to res judicata. The Respondent's motion defending their argument follows.

ARGUMENT

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999)(emphasis added); *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C.188, 417 S.E.2d 569 (1992). Under the doctrine of res judicata, “[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” *Plum Creek, supra, quoting, Hilton Head Center of South Carolina Inc. v. Public Service Comm'n South Carolina*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)

To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and, (3) adjudication of the issue in the former suit. *Plum Creek, supra; Reidman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 419 S.E.2d 217 (1992); *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986).

Here this Court had found that the Circuit Court has not erred in determining the Appellant has yet to serve his complete sentence, so community supervision was still subject to revocation. This case was between the identical parties arguing the identical subject matter, previously decided by this Court.

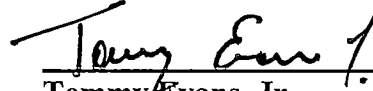
In the previous case the Appellant argued that his sentence was suspended with no probation to follow, so the five year incarceration period is his entire sentence. He argues this period has already been served; therefore, the court cannot revoke community supervision. In his previous appeal this Court ruled that in *State v. Picklesimer*, 388 S.C. 264, 268 S.E.2d 845 (2010) the Supreme Court decided that a prisoner cannot be incarcerated for a period longer than his original sentence, which includes both the suspended and unsuspended portions. In the Appellant's previous decision, this court also applied *State v. Blakney*, 410 S.C. 244, 763 S.E.2d 622 (Ct. App. 2014) which this Court ruled that *Picklesimer*, applies to all community supervision program revocations, whether or not the individual subject to a community supervision is also subject to a term of regular probation. *Blakney*, at 626.

This Court has already ruled that the Circuit Court did not err in revoking the Appellant community supervision, regardless if he was given probation. This is the identical subject matter, with the identical parties in a previous litigation already decided by this Court. Therefore, this case should be dismissed subject to res judicata.

CONCLUSION

For all the foregoing reasons the State respectfully request this Court dismiss this appeal due to it raising the identical subject matter of a previous decision made by this Court. This appeal should be dismiss pursuant to the doctrine of res judicata.

Respectfully submitted,



Tommy Evans, Jr.
Assistant General Counsel

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and Pardon Services
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ATTORNEY FOR THE RESPONDENT

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
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Donald B. Hocker, Circuit Court Judge

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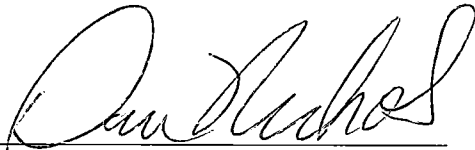
v.

BRAD A. DAY,.....APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant to counsel for Respondent, certify that I have served the within Motion to Dismiss and Motion for Extension dated July 21, 2015, on Appellant this 21st day of July, 2015, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esq.
South Carolina Commission on Indigent Defense
P.O. Box 11589
Columbia, SC 29211-1589


Dawn Nichols
Executive Administrative Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
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State of South Carolina
Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
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Director

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SC Court of Appeals

July 21, 2015

The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

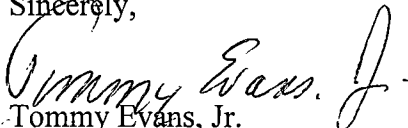
Re: The State v. Brad Day

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Respondent's Motion to Dismiss and Motion for Extension in the above referenced case, along with proof of service.

Thank you for your cooperation in this matter.

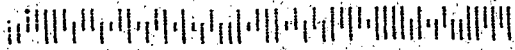
Sincerely,


Tommy Evans, Jr.
Assistant General Counsel

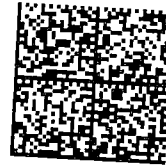
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Enclosures

cc: Wanda H. Carter



State of South Carolina
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