STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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OCT 19 2015
SC Court of Appeals

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

Case No. 2014-000306

THE STATE, ...RESPONDENT

v.

BRAD ALAN DAY, ...APPELLANT

INTIAL BRIEF OF RESPONDENT

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 THE RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. **Has the circuit court erred in revoking the Appellant's sentence by one year and ordering him to continue with community supervision thereafter pursuant to *State v. Picklesimer*, 388 S.C. 264, 695 S.E.2d 845 (2010).**

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. Upon completion of this five year period of incarceration, the Appellant was released and placed on community supervision. In February of 2012, the Appellant violated community supervision and received a ninety day revocation. He violated again in June of 2012, and appeared before the Honorable R. Markley Dennis who 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 originally sentenced to probation, the five year incarceration period has been served; therefore, not subject to a revocation. On January 21, 2015, this Court issued an unpublished opinion affirming the decision of the Circuit Court.[1]

The Appellant served his one year period of incarceration and upon release was again placed on community supervision. He again violated supervision and appeared before the Honorable Donald B. Hocker to answer to this violation. Upon the conclusion of this hearing, Judge Hocker determined the Appellant willfully violated community supervision. The lower court revoked community supervision and ordered the Appellant serve a one year period of incarceration.

Upon this revocation the Appellant filed another notice of appeal before this Court. Within this subsequent appeal, the Appellant argues that this revocation was unlawful due to his sentence expiring upon the conclusion of his five year period of incarceration. This is the exact argument

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

previously presented to this Court. This Court previously decided to affirm the decision of the lower Court.

The Respondent would further argue that this matter is directly identical to the South Carolina Court of Appeals decision in *State v. Blakney,* 410 S.C. 244, 763 S.E.2d 622 (S.C. Ct. App. 2014). In *Blakney,* this Court ruled that the Circuit Court did not err in deciding that the Appellant violated community supervision, and be subject to a revocation. The Appellant not being sentenced to probation is irrelevant. According to *Blakney*, the Appellant had not yet serve his total aggregate sentence; therefore, the Court properly sentenced the Appellant upon the violation of community supervision. The Respondent request the Court make the identical findings as previously made involving the Appellant, affirming the decision of the lower court. The brief of the Respondent supporting this argument follows.

ARGUMENT

1. **The Court did not err in revoking community supervision since the Appellant had yet to complete his sentence.**

The Appellant was convicted of committing a CSC 2nd w/minor. He was a sentenced to a ten year period of incarceration suspended upon the service of five years. The sentencing Court did not order a period of probation. At the time of the Appellant's conviction, CSC 2nd w/minor carried a maximum sentence of twenty years, which classifies it as a C-Felony. Therefore, CSC 2nd w/minor is classified as a no parole offense.[2] Due to this classification it was mandatory that the Appellant serve at least eighty-five percent of his sentence. The South Carolina Code of Laws specifically state:

> Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed,

[2] 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 for twenty years or more. S.C. Code Ann. §24-21-100 (Supp. 2001).

> a prisoner convicted of a no parole offense as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, including a prisoner serving time in a local facility pursuant to a designated facility agreement authorized by Section 24-3-20, is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the prisoner has served at least eighty-five percent of the actual term of imprisonment imposed.

S.C. Code Ann. §24-13-150 (Supp. 2014).

Pursuant to South Carolina law the Appellant was required to serve eighty-five percent of his sentence, or forty-two months. Upon release from incarceration the Appellant was required to serve a two year period of community supervision.[3] The Appellant twice violated community supervision requiring him to appear in General Sessions Court.[4] Due to this being his third violation, the Appellant argued that he has completed his sentence; therefore, there exist no additional time that could be subject to a revocation. The Appellant is responsible for either successfully completing community supervision, or serving the remaining portion of his original ten year sentence. He continues to be responsible for community supervision, or incarceration upon a violation.

The Appellant argues that most cases have a three-part split sentence, incarceration suspended sentence, and probation. However, he argues that his sentence is an anomaly due to the fact there was only two parts, there was no probation included. The Respondent argues that the Court was aware that pursuant to *Dawkins,*[5] the Appellant would either serve his sentence or

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[3] 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).

[4] If the department determines that a prisoner has violated a term of the community supervision program and the community supervision should be revoked a probation agent must initiate a proceeding in General Sessions Court. S.C. Code Ann. §24-21-560(C)(Supp. 1995).

[5] Defendant five year probation sentence was discharged after he successfully completed a community supervision program (CSP); penal statute governing CSP's stated that a defendant should be discharged from his sentence after completion of CSP. *State v. Dawkins*, 352 S.C. 162, 573 S.E.2d 783 (2002).

complete community supervision. He will never serve any probation; therefore, placing him on probation would be futile.

The Appellant argues this case is different than *State v. Picklesimer,* 388 S.C. 264, 694 S.E.2d 845 (2010), due to the fact he was not given a probationary term. He is of the position that *Picklesimer* does not apply due to this reason. This argument was previously made and failed. In *Picklesimer*, the Appellant was on probation; however, the *Picklesimer* decision never mentions a mandatory probationary sentence must exist for the aggregate sentence to apply. According to *Picklesimer,* an original sentence is defined as, the total aggregate suspended and unsuspended portions of a circuit court sentence. *Picklesimer*, at 268.

This case is identical to *Blakney,* where this Court determined,

> The existence of a term of probation for the prisoner in *Picklesimer* did not make its holding any less applicable to CSP revocations that do not involve a term of probation. The identification of the "original sentence" employs the same uncomplicated analysis in both situations. We read *Picklesimer's* interpretation of section 24-21-560(D) as applying to all CSP revocations, whether or not the individual subject to a CSP is also subject to a term or regular probation.

Blakney, at 251.

The Appellant received a ten year sentence suspended upon the service of five years. According to *Picklesimer, Blakney,* and the Appellants own previous unpublished decision, the total sentence was ten years, so the Appellant is responsible for either successfully completing community supervision, or the remaining unserved portion of the ten year sentence.

2. The Statute allows the Appellant to remain on community supervision until he has successfully completed the program or his full original sentence.

The Appellant is of the opinion that his sentence was completed since he was not given a probationary sentence. He argues that he was only responsible for the unsuspended five year portion. The South Carolina Code of Laws specifically state:

> The maximum aggregate amount of time a prisoner maybe required to serve when sentenced for successive revocations may not exceed an amount of time equal to the length of incarceration imposed limited by the amount of the time remaining on the original "no parole offense." 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. 2013).

The Appellant argues that the statute does not allow for the suspended portion to be included within the revocation period, we disagree.

If the Court looks at the entire statute, it states that successive revocations may not exceed an amount of time remaining on the original, "no parole offense." The Appellant's entire sentence on his no parole offense is ten years. He cannot receive continuous revocations pass the ten year period, because he cannot be incarcerated beyond the amount of his original sentence. In *Picklesmier,* the Court ruled that the total sentence handed down by the Court includes both the suspended and unsuspended portions of the original sentence. *Id.*, at 268.

The Appellant argues that the original term of incarceration does not include the unsuspended portion of his sentence. The original term of incarceration and the original sentence are not the same. The statute clearly states that the term of incarceration cannot go beyond the time remaining on the original sentence. The original term of incarceration, does not include the suspended portion of the sentence. The original period of incarceration, would be excluded from any violation because it has already been served. The statute and *Picklesimer* state that the length

of incarceration is limited by the amount of the time remaining on the original "no parole offense." The total sentence includes the suspended and unsuspended portion, or in this case ten years. The lower court was correct in revoking the one year. The Appellant would have to complete community supervision or his ten year sentence in one year increments. Since his total sentence is ten years he has yet to complete either; therefore, the Appellant should be subject to this revocation and community supervision once he has completed this one year period of incarceration. The Respondent request this Court affirm the decision of the lower court.

CONCLUSION

The lower court committed no error in determining that the Appellant violated community supervision, thereby, revoking one year. As this Court has done twice before on identical cases, including one involving the Appellant, the Respondent respectfully request this Honorable Court again affirm the decision of the lower court.

Respectfully submitted,

Tommy Evans, Jr.
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Columbia, South Carolina
October 12, 2015

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THE STATE,.... .....RESPONDENT

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant to counsel for Respondent, certify that I have served the within Initial Brief and Designation of Matter dated October 12, 2015, on Appellant this 12th day of October, 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
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October 12, 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 copy of Respondent's Initial Brief and Designation of Matter 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

TE:dn

Enclosures

cc: Wanda H. Carter

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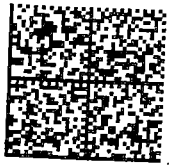

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