STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Lexington County
Court of Common Pleas
The Honorable Edward W. Miller, Circuit Court Judge

Opinion No. 5335 (S.C. Ct. Ap. Filed July 29, 2015)
Appellate Case No. 2012-209506
2011-CP-32-3630

NORMAN J. HAYES,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner hereby certifies that the petition for rehearing was made, and that the Court of Appeals denied the petition for rehearing on October 8, 2015.

STATEMENT OF ISSUES ON APPEAL

I. **Did the Court of Appeals erroneously reverse the PCR court's determination that a probationer who serves a split sentence is not entitled to receive double credit for time served prior to trial?**

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Petitioner at the April term of General Sessions for Criminal Conspiracy (2004-GS-32-1203) and Possession of Crack Cocaine—First Offense (2004-GS-32-1645). (App.pp.128-31). After the State called the case, Petitioner pled guilty as charged. On July 10, 2004, the Honorable Casey Manning sentenced Petitioner to concurrent terms of five years imprisonment suspended upon the service of time served (two-hundred and forty days) and three years probation for each charge. Petitioner did not appeal.

Petitioner's probation case was transferred to Richland County, his county of residence. Petitioner was subsequently charged with various probation violations. On July 30, 2010, a probation violation hearing was convened in Richland County before the Honorable G. Thomas Cooper. Petitioner proceeded pro-se. (App.pp.1-8). Judge Cooper revoked Petitioner's probation and reinstated the five year suspended sentence. (App.p.8).

On August 9, 2010, Petitioner served and filed a pro se notice of appeal with the South Carolina Court of Appeals; however, on August 4, 2010, five days before filing the notice of appeal, Richland County Public Defender James May, Esquire, filed a motion to be appointed as counsel and a motion to reconsider the probation revocation. (App.p.9-10).

On February 4, 2011, Judge Cooper convened a hearing on the pending motions. Petitioner was present and was represented by James May, Esquire. John Benjamin Aplin, Esquire, of the Department of Probation, Parole, and Pardon Services appeared on behalf of the State. (App.pp.11-27). Judge Cooper granted the motion to appoint James May as counsel and heard arguments on the motion to reconsider. Judge Cooper ruled to reduce the length of Petitioner's reinstated sentence to three years and terminated probation. The revocation order noted, "The [Petitioner] has previously served 240 days on this sentence. (split sentence time and/or prior partial revocation time)." (App.pp.26-7). On August 5, 2011, Tristan Shaffer,

Esquire, of the office of Appellate Defense withdrew Petitioner's notice of appeal. (App.pp.38-39).

Petitioner filed an Application for post-conviction relief (PCR) on September 27, 2011 (App.pp.40-7). A hearing was convened at the Lexington County Courthouse on November 30, 2011. (App.pp.49-106). Petitioner was present and represented by Tristan M. Shaffer, Esquire. Kaelon E. May, Esquire, of the South Carolina Attorney General's Office and Mr. Aplin, represented Respondent.

At the PCR hearing, Petitioner alleged his sentence exceeded the maximum authorized by law because he had not been given full credit against his probation revocation sentence for two-hundred and forty days of time served prior to trial. Michael Stobbe of the South Carolina Department of Corrections testified. (App.pp.52-92). Additionally, Petitioner testified. (App.pp.92-6).

The Honorable Edward W. Miller denied relief in an order dated January 30, 2012. (App.pp.121-7). The PCR Judge found:

> The fact that a Judge presiding over a subsequent probation violation matter may choose to re-instate less than the entire suspended sentence and terminate probation, does not modify the "sentence" imposed by the original sentencing Judge. In fact, once the sentencing court's order became final, the probation Judge would not be permitted to alter the sentence that was handed down.

(App.pp.124-5). The PCR Judge found that in the present case, "the original sentence was a split sentence of five years imprisonment suspended upon the service of time served and three years probation. The time served was [Petitioner's] pre-sentence detention of two hundred and forty days, and pursuant to Section 24-13-40, he was given credit for that time by being released directly from sentencing to probation." (App.p.124). The PCR Judge further found "the probation revocation Judge simply noted [Petitioner] had previously served 240 days on this

sentence, but did not, and should not have awarded double credit for the 240 days under Section 24-13-40 of the South Carolina Code, or any other provision." (App.p.124).

The PCR Judge found "the revocation of probation and reinstatement of a portion or all of the original sentence is not a new 'sentence' in and of itself." (App.p.125). Thus, the PCR Judge ruled, "in the [Petitioner's case], it appears the Form 9 simply acknowledges the 240 days he previously served on the five year original sentence. It does not award an additional 240 days to be taken off the three year re-instated portion of the five year sentence." (App.pp.125-6).

On July 29, 2015, the South Carolina Court of Appeals issued a published opinion reversing the PCR Court's finding that SCDC properly applied Appellant's credit for time served. State v. Hayes, 2015 WL 4549207 (July 29, 2015). The State submitted a petition for rehearing *en banc* to address: (1) whether the plain language of Section 24-13-40 of the South Carolina Code (Supp. 2014) requires Appellants 240 days credit for time served be applied to his three year probation revocation, where Appellant's 240 days credit for time served has already been applied to his original sentence of five years imprisonment. The petition for rehearing was denied on October 8, 2015. The Petition for Certiorari follows.

STANDARD OF REVIEW

In a post-conviction relief (PCR) action, the PCR applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The findings of the PCR court will not be upheld when they are not supported by probative evidence. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996); Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

ARGUMENT

I. The Court of Appeals erroneously reversed the PCR court's determination that a probationer who serves a split sentence is not entitled to receive double credit for time served prior to trial.

Respondent submits the Court of Appeals misapprehended the plain language of Section 24-13-40 of the South Carolina Code when holding that the statute requires the pre-trial detention time be applied against the probation revocation sentence whenever a probationer receives a split sentence. Section 24-13-40 of the South Carolina Code provides the following:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when . . . (b) the commencement of the service of the sentence follows the revocation of probation, . . . the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

S.C. Code Ann. § 24-13-40 (Supp 2014). The Court of Appeals conflated the concepts of a plea judge's original sentence with a probation judge's revocation. Section 24-13-40 deals with sentences. The only sentence given to Respondent is the five year total sentence imposed by the plea judge. The three year revocation is not a "sentence" under the under S.C. Code Section 24-13-40. The testimony at the PCR hearing was clear – SCDC recognizes Respondent's credit for 240 days towards his five year sentence. As such, the most time the probation revocation judge

could have reinstated was four years and 125 days. A partial revocation of three years is only a portion of the four years and 125 days Respondent had left to serve. Because the probation judge only reinstated three years, Respondent could theoretically still be required to serve one year and 125 days of incarceration.[1]

Under the Court of Appeal's holding, an offender who is partially revoked, continued on probation, then violates again, could receive double, if not triple credit for his pretrial detention because the statute mandates the award of owed credit at each revocation proceeding. For example, consider a defendant who has previously served one year of pretrial detention time at the date of the imposition of the sentence. The Plea Judge sentences defendant to five years suspended upon time served and five years' probation. Assuming the defendant then violated his probation and his probation was revoked one year, under the Court of Appeals holding in this case, the defendant would not have to return to the department of corrections, despite his probation violation. The legislature could surely not have intended such an absurd result.

Furthermore, Petitioner respectfully submits that the Court of Appeal's misinterpreted the effect of the revocation order itself. Respondent served 240 days prior to his guilty plea, and when the plea court sentenced Respondent, the plea court gave him credit for this time served. Then, when Respondent's probation was revoked, the probation court reinstated three years of the suspended portion of the sentence. The Form 9 revocation order indicated Respondent had previously served 240 days of the sentence. The 240 days previously served is not applied to the three year sentence imposed at the probation revocation hearing. Rather, it already applied toward Respondent's original sentence of five years' imprisonment. Cf. Gates v. Wallace, 278

[1] The State recognizes that the Probation Revocation judge terminated probation. However, the State submits that the early termination of probation does not modify the original five year total sentence.

S.C. 214, 294 S.E.2d 41 (1982) (holding appellant is not entitled to credit for time served prior to the revocation of the suspended sentence when computing parole eligibility).

Although unpublished, the South Carolina Court of Appeals previously found in Martin v. SCDC that Martin was not entitled to 562 days credit towards his five year sentence imposed at his probation revocation hearing. Martin v. SCDC, Op. No. 2010-UP-367 (Ct. App. filed July 14, 2010) (Shearouse Adv. Sh. No. 28 at 6). Martin pled guilty and the plea judge sentenced Martin to ten years suspended upon time served with five years' probation. Id. The Court of Appeals reversed the Administrative Law Court's finding that Martin was entitled to 562 days credit against his five year sentence imposed at his revocation hearing. Id. In so doing, The Court of Appeals noted "the 562 days previously served is not applied to the five-year sentence imposed at the probation revocation hearing" because it had previously been applied towards Martin's original sentence of ten years imprisonment. Id. Similar to Martin, Respondent should not receive credit for 240 days against his three year sentence imposed at his probation revocation hearing because the 240 days credit has already been applied towards his five year original sentence.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant the petition and allow full briefing of the issue.

Respectfully submitted,

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ATTORNEYS FOR THE PETITIONER

November 13, 2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Petition for Writ of Certiorari and Appendix**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Laura R. Baer, Esquire
SC Commission of Indigent Defense
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This 13th day of November, 2015

CAROLINE COLLINS
LEGAL ASSISTANT