

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Lexington County
Edward W. Miller, Circuit Court Judge

NORMAN J. HAYES,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2012-209506

BRIEF OF PETITIONER

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ATTORNEYS FOR PETITIONER

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ISSUE PRESENTED

The PCR court erred in denying Petitioner's PCR application where the plain language of S.C. CODE ANN. § 24-13-40 and § 24-21-460 demands that pre-trial detention credit be awarded to all sentences when probation is terminated, thereby preventing the State from applying partial revocations from a split sentence differently than full revocations from a split sentence. In addition, both the original sentencing judge and the probation revocation judge ordered that Petitioner was entitled to 240 days of pre-trial detention credit thereby preventing the South Carolina Department of Corrections from denying Petitioner this credit for time already served.

STATEMENT OF THE CASE

Indictment and Plea Hearing

On April 5, 2004, Petitioner Norman J. Hayes was indicted by the Lexington County Grand Jury for possession with the intent to distribute (PWID) crack cocaine, first offense, and criminal conspiracy. App. 122, 129 – 130.

On June 10, 2004, Petitioner pled guilty to possession of crack cocaine and criminal conspiracy before the Honorable L. Casey Manning. App. 107, 131. Petitioner was represented by Kenneth M. Mathews. Judge Manning sentenced Petitioner to five years imprisonment suspended upon the service of time served and three years probation for each charge. The probationary sentences were to run concurrently. Petitioner was given credit for pre-trial detention of two hundred and forty (240) days pursuant to S.C. CODE ANN. § 24-13-40. App. 107, 131.

Petitioner did not appeal his guilty plea or sentence, and Petitioner's probation case was transferred to Richland County, his county of residence. Petitioner was subsequently charged with various probation violations. App. 122.

Probation Revocation Hearing

On July 30, 2010, a probation violation hearing was held before the Honorable G. Thomas Cooper. App. 1 – 7. Petitioner appeared *pro se*, and the State was represented by Probation Field Agent Marion Mack. Judge Cooper found that Petitioner violated the conditions of his probationary sentence and revoked the balance of Petitioner's five-year sentence, thus sentencing Petitioner to five years. App. 8.

On August 4, 2010, unbeknownst to Petitioner, Assistant Public Defender James H. May filed a motion to be appointed as Petitioner's counsel and a motion to reconsider

Petitioner's probation revocation. App. 9 – 10. Five days later, Petitioner filed a *pro se* notice of appeal with the South Carolina Court of Appeals on August 9, 2010. App. 38. Petitioner was incarcerated from July 30, 2010, through February 4, 2011.

Reconsideration Hearing

On February 4, 2011, a hearing on the motions for appointment of counsel and to reconsider Petitioner's probation revocation was held before Judge Cooper. App. 11 – 25. Judge Cooper granted the motion to appoint Mr. May as counsel and Petitioner's motion to reconsider. At the conclusion of the hearing, Judge Cooper reduced Petitioner's reinstated sentence from five years to a three-year revocation sentence. App. 24, ll. 5-6. After the hearing, Judge Cooper then issued a written Order amending Petitioner's probation revocation which reflected the reduced sentence of three years. In this Order, Judge Cooper also terminated probation. Finally, Judge Cooper gave Petitioner "credit for any pre-revocation hearing detention time" and noted that Petitioner had "previously served 240 days on this sentence." App. 26-27.

Notably, the State did not appeal Judge Cooper's Order, and thus, this Order becomes the law of Petitioner's case. Pursuant to the Order, the South Carolina Department of Corrections ("SCDC") reduced Petitioner's sentence to three years, but denied him credit for the 240 days of pre-trial detention despite a court order to this effect. App. 56, ll. 2-3.

Probation Revocation Appeal

On February 7, 2011, Appellate Defender Tristan M. Shaffer filed the initial brief of Appellant, arguing that Petitioner was denied his right to counsel at the probation revocation hearing. App. 28 – 37. The South Carolina Court of Appeals issued an order dismissing Petitioner's appeal on August 5, 2011, finding that Petitioner failed to appeal from Judge

Cooper's amended order and also finding that Petitioner's appeal was nevertheless moot because Judge Cooper granted the motion to appoint counsel and reduced Petitioner's reinstated sentence. App. 38 – 39.

PCR Application and Evidentiary Hearing

On September 27, 2011, Petitioner filed an application requesting post-conviction relief (PCR), alleging that his sentence exceeded the maximum authorized by law or that his sentence had expired because he was not given full credit against his probation revocation sentence for 240 days of time served for pre-trial detention. App. 40 – 47. Because the PCR application raised a time sensitive issue regarding sentence calculation, the State agreed to schedule an expedited evidentiary hearing in lieu of filing a formal return. An evidentiary hearing was held before the Honorable Edward W. Miller on November 30, 2011. App. 48 – 106. Petitioner was represented by Tristan M. Shaffer, and the State was represented by John Benjamin Aplin, Assistant Chief Legal Counsel of the South Carolina Department of Probation, Parole, and Pardon Services, and Assistant Attorney General Kaelon E. May. App. 48. Petitioner and Michael John Stobbe, of the SCDC records department, testified at the evidentiary hearing. App. 52-95.

Stobbe testified that he was the branch chief of release and records management at the SCDC. App. 52, ll. 15-23. In sum, Stobbe's testimony was that the SCDC views Petitioner as having two separate sentences: (1) a theoretical maximum sentence; and (2) an incarceration sentence. Based on this rationale, Stobbe maintained that the SCDC takes the position that awarding Petitioner pre-trial detention credit toward his three-year incarceration sentence would be awarding Petitioner credit twice since Petitioner also received pre-trial detention credit toward his theoretical five-year maximum sentence. App.

Stobbe's testimony also indicated that when Judge Cooper revoked Petitioner's probation in full and reinstated Petitioner's sentence of five years, the SCDC did subtract the pre-trial detention time served of 240 days from the five-year sentence giving Petitioner an incarceration sentence of four years and 125 days. App. 54, ll. 2-5.

However, when Judge Cooper reduced Petitioner's sentence to three years following the motion to reconsider, thus partially revoking Petitioner's probation instead of revoking it in full, the SCDC was no longer willing to subtract the 240 days of pre-trial detention from the three-year sentence. According to Stobbe: "So the 240 days reduced [Petitioner's] total sentence from five years to four years and 125 days. The 240 days was not subtracted from the three years" App. 55, l. 16 – 56, l. 3.

Stobbe also testified:

A: So the 240 days . . . previous time, the only previous time there is is the initial five-year sentence.

So the 240 days has got to come off the five years. It can't be subtracted from three years. The three-year sentence didn't exist until February of 2011.

Q: How is that not true for every sentence that someone serves prior to trial?

A: Because not everybody has split sentences. If you had a flat ten-year sentence and you were in jail for 240 days, whatever date your sentence date is, we would subtract 240 days from it, and that would become your sentence start date.

But [Petitioner] had a split sentence. He was five years suspended on time served and X-number of years probation

. . .

But in essence if he is given time or credit for time previously served,

it couldn't possibly be subtracted from the three years because he has already previously served it. It's already been subtracted from the five years.

App. 64, l. 16 – 65, l. 17.

Stobbe further stated that Petitioner could not get credit for the 240 days on the three-year sentence because Petitioner “already has had that credit because the 240 days reduced the five years to 4 years, 125 days.” App. 69, ll. 5-11.

Post-Hearing Memoranda

Following the evidentiary hearing, the PCR court granted PCR counsel's request to submit post-hearing memoranda. PCR counsel submitted a memorandum in support of post-conviction relief on December 7, 2011, and the State submitted a memorandum in opposition to such relief on January 3, 2012. App. 107 – 116. PCR counsel then submitted a reply memorandum on January 19, 2012. App. 117 – 120.

Order of Dismissal

On January 30, 2012, Judge Miller ruled in his Order of Dismissal that “[Petitioner's] PCR Application should be denied and dismissed because he has failed to carry his burden of proof.” App. 121 – 127. The PCR court first found that Petitioner's “original sentence was a ‘split sentence’ of five (5) years imprisonment suspended upon the service of ‘time served’ and three (3) years probation.” According to the PCR court, the time served was Petitioner's “pre-sentence detention of two hundred and forty (240) days, and pursuant to Section 24-13-40, he was given credit for that time by being released directly from sentencing to probation.” App. 124.

Additionally, the PCR court found, “[A]t the subsequent violation hearing, the probation revocation judge simply noted that [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. 124. The PCR court also found, “The ‘Form 9’ certainly does not suggest otherwise.” App. 124. The PCR court further 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. 124 – 125.

Furthermore, the PCR court found that “under § 24-13-40, in the case of a split sentence, time served prior to trial should not be used to calculate the amount of time a probationer must serve on a reinstated sentence, because the pre-trial detention time was already awarded to satisfy the time served portion of the split sentence.” App. 125. The PCR court also ruled that “in [Petitioner’s] case, it appears the Form 9 simply acknowledges the 240 days he previously served on the five (5) year original sentence. It does not award an additional 240 days to be taken off the three (3) year re-instated portion of the five (5) year sentence.” App. 126.

PCR Appeal

Petitioner appealed the Order of Dismissal, and on October 15, 2012, Petitioner filed his Petition for Writ of Certiorari to the South Carolina Supreme Court. This Court granted the Petition for Writ of Certiorari and ordered briefing on June 18, 2014.

ARGUMENT

The PCR court erred in denying Petitioner's PCR application where the plain language of S.C. CODE ANN. § 24-13-40 and § 24-21-460 demands that pre-trial detention credit be awarded to all sentences when probation is terminated, thereby preventing the State from applying partial revocations from a split sentence differently than full revocations from a split sentence. In addition, both the original sentencing judge and the probation revocation judge ordered that Petitioner was entitled to 240 days of pre-trial detention credit thereby preventing the South Carolina Department of Corrections from denying Petitioner this credit for time already served.

In this case, Judge Manning sentenced Petitioner on his possession and conspiracy charges and gave Petitioner a sentence of five years suspended upon the service of time served. Judge Manning also gave Petitioner "credit for time served pursuant to S.C. CODE § 24-13-40" and noted that Petitioner had previously served 240 days. App. 131.

At a probation violation hearing before Judge Cooper on July 30, 2010, Judge Cooper found that Petitioner violated the conditions of his probationary sentence and revoked the balance of Petitioner's five-year sentence. App. 8. Judge Cooper subsequently granted the motion to reconsider Petitioner's probation revocation on February 4, 2011. App. 11 – 25. Judge Cooper then issued an Order reducing the length of Petitioner's reinstated sentence to three years imprisonment and terminated probation. App. 26 – 27. Judge Cooper also gave Petitioner "credit for any pre-revocation hearing detention time" and noted that Petitioner had "previously served 240 days on this sentence." *Id.*

Notably, the State did not appeal Judge Cooper's Order, and thus, this Order becomes the law of Petitioner's case. *See, e.g., Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 714 S.E.2d 869 (2011) (stating an unchallenged ruling, right or wrong, becomes the law of the case); *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000) (observing where the appealing party does not challenge a ruling, it becomes the

law of the case and will not be considered by this Court). Pursuant to the Order, the SCDC reduced Petitioner's sentence to three years, but denied him credit for the 240 days of pre-trial detention, despite both a court order to this effect and despite the statutory requirements that Petitioner be given credit for this time. App. 56, ll. 2-3.

"Section 24-13-40 of the South Carolina Code (2007) mandates prisoners receive credit for the time they served prior to trial unless one of two exceptions exist, either: (1) the prisoner was an *escapee* or (2) the prisoner was already serving a sentence on a *different* offense. Because the language of section 24-13-40 is mandatory, a judge cannot deny a defendant credit for time served prior to trial unless one of the two exceptions applies." *See State v. Boggs*, 388 S.C. 314, 316, 696 S.E.2d 597, 598 (Ct. App. 2002) (citation omitted) (emphasis added).

Furthermore, Section 24-21-460 of the South Carolina Code provides:

Upon such arrest the court, or the court within the venue of which the violation occurs, shall cause the defendant to be brought before it and may revoke the probation or suspension of sentence and shall proceed to deal with the case as if there had been no probation or suspension of sentence except that the circuit judge before whom such defendant may be so brought shall have the right, in his discretion, to require the defendant to serve all or a portion only of the sentence imposed. Should only a portion of the sentence imposed be put into effect, the remainder of such sentence shall remain in full force and effect and the defendant may again, from time to time, be brought before the circuit court so long as all of his sentence has not been served and the period of probation has not expired.

S.C. CODE ANN. § 24-21-460 (2010).

Statutory interpretation is a question of law. *See Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) (citing *Catawba Indian Tribe of S.C. v. State*, 372 S.C.

519, 524, 642 S.E.2d 751, 753 (2007)). "We are free to decide a question of law with no particular deference to the circuit court." *Id.* at 524, 642 S.E.2d at 753. "A statute's language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself." *State v. Gaines*, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008).

Here, the plain language of § 24-13-40 required the SCDC to include Petitioner's pre-trial detention credit in its computation for time served of his three-year sentence. *See* § 24-13-40 (providing: "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.") (emphasis added); *see also Gaines*, 380 S.C. at 33, 667 S.E.2d at 733 ("Whenever possible, legislative intent should be found in the plain language of the statute itself."). Notably, the two exceptions under § 24-13-40 that allow denial of pre-trial detention credit are not applicable to the instant case.

Furthermore, there is nothing in the plain language of the statute that supports SCDC's erroneous application § 24-13-40. The SCDC believes it is in compliance with § 24-13-40 by giving Petitioner 240 days of credit toward his maximum sentence of five years if probation was fully revoked but disallowing credit toward his incarceration sentence of three years upon partial revocation of probation. App. 54, ll. 2-5; 55, l. 16 – 56, l. 3; 64, l. 16 – 65, l. 17. However, there is nothing in the language of the statute to indicate that it should be selectively only applied to full revocations rather than partial revocations of split sentences.

If the SCDC applied the same interpretation of § 24-13-40 that it applied in Petitioner's case to inmates with full probation revocations from split sentences it would

lead to an absurd result (e.g., longer sentences than authorized by law).¹ See § 24-21-460 (finding in probation revocation cases, the probation court may require [the probationer] to serve all or a portion only of the original sentence if the period of probation has not yet expired). Consequently, the State has no authority for applying § 24-13-40 differently in partial revocations with a split sentence than in full revocations with a split sentence. See *State v. Johnson*, 396 S.C. 182, 189, 720 S.E.2d 516, 520 (Ct. App. 2011) (finding “courts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention.”) (citation omitted).

In addition, under the facts of this case, both Judge Manning in his original sentencing of Petitioner and Judge Cooper in his sentencing of Petitioner after revoking probation, each ordered that Petitioner was to be given credit for time in the amount of 240 days. App. 26-27; 131.

The State contends, and the PCR court ruled in its Order of Dismissal, that neither the PCR judge nor Judge Cooper as the probation revocation judge had any authority to alter Judge Manning’s original sentence by giving Petitioner pre-trial detention credit of 240 days to the reinstated three-year sentence. However, Judge Cooper’s Order giving Petitioner credit for 240 days of pre-trial detention time does not alter Judge Manning’s original sentencing order where Judge Manning himself ordered

¹ See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (holding “interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”); see also *Hodges v. Rainey*, 341 S.C. 79, 91, 533 S.E.2d 578, 584 (2000) (citation omitted) (“However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature ...”).

that Petitioner would be given credit for time served of 240 days pursuant to § 24-13-40. App. 131. Therefore, the PCR court erred in finding that Judge Cooper could not alter Judge Manning's sentence where Judge Cooper in fact did not alter Judge Manning's sentence and simply gave Petitioner 240 days credit for time served which Judge Manning also gave Petitioner in his original sentence. Moreover, where § 24-13-40 requires that full credit against the sentence must be given for time served prior to trial and sentencing, Judge Cooper was not altering Judge Manning's original sentencing order but adhering to the statutory mandate.

The State also argues, and the PCR court ruled in its Order of Dismissal, that the 240 days of pre-trial detention time was already awarded to Petitioner to satisfy the time served portion of the split sentence. While Judge Manning did sentence Petitioner to five years imprisonment provided upon the service of time served that the balance of the sentence would be suspended, Judge Manning in that same order also mandated that Petitioner be given credit for the 240 days of time served pursuant to § 24-13-40. App. 131. Judge Manning's explicit instruction that Petitioner be given credit for the 240 days of pre-trial detention time should be given effect. At a minimum, there may be an ambiguity in Judge Manning's sentencing order, but it has long been established that "[a]mbiguity or doubts relative to a sentence should be resolved in favor of the accused." *State v. DeAngelis*, 257 S.C. 44, 50, 183 S.E.2d 906, 909 (1971); *see also Tant v. South Carolina Dep't of Corr.*, No. 2012-206988, 2014 WL 2208277, at *4, 6 (S.C. Sup. Ct. May 28, 2014). In addition, the plain language of § 24-13-40, which requires that full credit against the sentence must be given for pre-trial detention, controls Judge Manning's sentencing order such that the statutory mandate still applies.

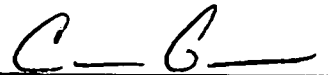
Accordingly, the PCR court erred in denying Petitioner's PCR application where the plain language of § 24-13-40 and § 24-21-460 demands that pre-trial detention credit be awarded to all sentences when probation is terminated, thereby preventing the State from applying partial revocations from a split sentence differently than full revocations from a split sentence. *See Gaines*, 380 S.C. at 33, 667 S.E.2d at 733 ("Whenever possible, legislative intent should be found in the plain language of the statute itself."); *see also Johnson*, 396 S.C. at 189, 720 S.E.2d at 520 (finding "courts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention.") (citation omitted).

In addition, both Judge Manning and Judge Cooper instructed in their sentencing orders that Petitioner be given credit for the 240 days of pre-trial detention. If there are any doubts as to Judge Manning's intention, those doubts should be resolved in favor of Petitioner and result in the 240 days credit to Petitioner. Furthermore, the statutory language of § 24-13-40 should control Judge Manning's sentencing order. Finally, Judge Cooper did not alter Judge Manning's sentencing order by giving Petitioner 240 days credit for pre-trial detention where Judge Manning himself gave this credit to Petitioner and Judge Cooper was complying with the requirements of § 24-13-40. Petitioner was therefore illegally held by the SCDC for 240 days where he should have been entitled to pre-trial detention credit for those 240 days.

CONCLUSION

For the reasons set forth herein, Petitioner Norman J. Hayes respectfully requests this Court to grant post-conviction relief and hold that Petitioner was entitled to credit for the 240 days he served in pre-trial detention and was thus held illegally by the South Carolina Department of Corrections for 240 days.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of July, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Lexington County
Edward W. Miller, Circuit Court Judge

NORMAN J. HAYES,

PETITIONER,

V.


STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2012-209506

CERTIFICATE OF SERVICE

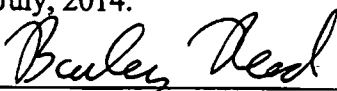
I certify that a true copy of the brief of petitioner, in this case has been served on John W. Whitmire, Esquire, this 18th day of July, 2014 at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and to Norman Hayes at 401 Westwood Avenue, Columbia, SC 29203



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of July, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2012-209506

Norman J. Hayes, Petitioner,

v.

State of South Carolina, Respondent.

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ISSUE ON APPEAL

The PCR Judge made a sound ruling that the Probation Revocation Judge neither had the intent nor the authority to grant credit for two hundred and forty days time served upon reinstating three years of incarceration for a sentence of five years incarceration suspended upon the service of time served of two-hundred and forty days incarceration and probation because the credit had already been given by the Sentencing Judge.

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, 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 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, and John Benjamin Aplin, Esquire, of the South Carolina Attorney General's Office 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, 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).

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “‘any evidence’ of probative value” exists to sustain the PCR Judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel’s performance was deficient. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel’s deficient performance must have prejudiced the Petitioner such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

The PCR Judge made a sound ruling that the Probation Revocation Judge neither had the intent nor the authority to grant credit for two hundred and forty days time served upon reinstating three years of incarceration for a sentence of five years incarceration suspended upon the service of time served of two-hundred and forty days incarceration and probation because the credit had already been given by the Sentencing Judge

Petitioner argues the post-conviction relief (hereinafter "PCR") court erred in denying Petitioner's PCR application where the plain language of S.C. Code 24-13-40 and S.C. Code 24-21-460 demands that pre-trial detention credit be awarded to all sentences when probation is terminated, thereby preventing the state from applying partial revocations from a split sentence differently than applying full revocations from a split sentence. However, the PCR Judge correctly ruled that it was neither the Probation Revocation Judge's intent nor within the Probation Revocation Judge's authority to award Petitioner two hundred and forty days credit for time served on the Probation Judge's partial reinstatement of three years for the five year term of imprisonment.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). A statute should be read as a whole. Id. Further, "[s]tatutes which are part of the same legislative scheme should be read together." Great Games, Inc. v. S.C. Dep't of Revenue, 339 S.C. 79, 84, 529 S.E.2d 6, 8 (2000). "Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning." Mid-State Auto, 324 S.C. at 69, 476 S.E.2d at 692.

The PCR Judge correctly applied S.C. Code 24-13-40. The code section reads "the computation of time served by prisoner under sentences imposed by the courts of state must be

calculated from the date of imposition of the sentence.” The code section further reads that when 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. S.C. Code Section 24-21-460 vests authority in the Probation Revocation Judge upon probation and/or suspended sentence to impose any part or all of the remainder of the active sentence.

In the instant case, the original sentence was a “split sentence” of five year term of imprisonment suspended upon the service of time served and three years probation. The “time served” was the Petitioner’s pre-sentence detention of two hundred and forty days. Pursuant to S.C. Code 24-13-40, Petitioner was given credit for that time by being released directly from sentencing to probation. At the subsequent violation hearing, the Probation Revocation Judge simply noted that the Petitioner had previously served two hundred and forty days on this sentence, but did not, and should not have awarded double credit for the two hundred forty days under Section 24-13-40 of the South Carolina Code, or any other provision.

Furthermore, 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 “total 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. In State v. Best, this Court held that the expiration of a term of Court of General Sessions, the Circuit Court Judge loses subject matter jurisdiction of a case finally determined during that term. State v. Best, 257 S.C. 361, 370 186 S.E.2d 272, 276 (1972). State v. Davis further expounds upon Best’s framework. See State v. Davis, 375 S.C. 12, 649 S.E.2d 197 (Ct. App. 2007) (In Davis, the Court of Appeals ruled the Probation Revocation

Judge lacked the subject matter jurisdiction to alter the Sentencing Judge's pronouncement by imposing a new condition, that Davis be required to register on the sex offender registry list when the Sentencing Judge specifically ordered that Davis not be required to register as a sex offender.).

In the present case, no Circuit Court Judge had the authority to give additional credit for two-hundred and forty days time served when reinstating a three year term of imprisonment out of a possible five year term of imprisonment as a result of Petitioner's probation violation. The Probation Revocation occurred several years after the Sentencing Judge lost the jurisdiction to alter his pronouncement. Petitioner was sentenced to five years imprisonment suspended on two hundred and forty days' time served. Simply, the Probation Revocation Judge lacked the authority to reinstate just three years of Petitioner's sentence and discount time served prior to the Sentencing Judge's pronouncement. The suspension of the five year sentence to time served was specifically attached to the Sentencing Judge's pronouncement. Furthermore, any discount of time served on the reinstated three year sentence would create an unintended and inequitable windfall for Petitioner.

Petitioner's argument rests upon a fatal interpretation that the Probation Revocation Judge ordered that Petitioner receive two hundred and forty days credit for time served. To the contrary, Probative evidence supports the PCR Judge's sound rejection of Petitioner's interpretation. The PCR Judge found that the Probation Revocation Judge simply noted that Petitioner "had previously served 240 days on this sentence." (App. p. 26-27). Notably, the Probation Revocation Judge gave Petitioner credit "for *pre-revocation hearing* detention time on current probation violation." (App. p. 26-27). As explained by Michael Stobbe ("hereinafter "Stobbe") "if the South Carolina Department of Probation, Parole, and Pardon Services had

issued a warrant for [Petitioner] and he was incarcerated pending his probation revocation hearing, we would have given that credit towards the three-year incarcerative sentence that the sentencing document of February 4, 2011, indicates.” (App. p. 72 lines 11-20). For example, if Petitioner had been arrested on a probation warrant and sat in jail for thirty days before he came in front of the Probation Revocation Judge he would have received thirty days credit against his three year incarcerative sentence.

Additionally, the Form 9 signed by the Probation Revocation Judge gives him the option to apply additional conditions to Petitioner’s sentence. In the instant case, the Probation Revocation Judge additionally ordered “convert restitution and fine to civil judgments.” (App. p. 26-27). Had the Probation Revocation Judge intended to give Petitioner an additional two hundred and forty days credit towards his three year incarcerative sentence he could have added that additional condition onto the form. (App. p. 74 line 22—p. 75 line 8).

Furthermore, Petitioner’s reliance on State v. Boggs is inapposite to the present case. See State v. Boggs, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010) (Where the Court of Appeals ruled the Sentencing Judge erred in not giving Boggs credit for time served because the Sentencing Judge intentional ignored the code section’s mandate.). In the present case, the Sentencing Judge correctly complied with Section 24-13-40. Here, the issue the PCR Judge ruled on was whether a subsequent Circuit Court Judge can alter the Petitioner’s sentence. For reasons explained above, the PCR Court did not err in denying Petitioner’s PCR Application.

Likewise, Petitioner argues SCDC’s application of S.C. Code 24-13-40 by giving Petitioner two hundred and forty days credit towards his maximum five year total sentence but disallowing credit toward his three year incarcerative sentence is erroneous. Petitioner argues if SCDC applied this interpretation of S.C. Code 24-13-40 to inmates with *full* probation

revocations from split sentences it would lead to an absurd result (e.g., longer sentences than authorized by law). (Brief of Petitioner p. 12-13). However, Petitioner fails to comprehend that if his probation was revoked in full (five years) then he would receive two hundred and forty days credit from his five year term of incarceration reducing the remaining incarcerative sentence necessary to satisfy the total sentence. As explained by Stobbe, Petitioner's probation was revoked in full on July 30, 2011, prior to his motion for reconsideration. (App. p. 53 lines 16-21). As a result of Petitioner's probation being revoked in full, SCDC subtracted the two hundred and forty days credit from the five year total sentence. (App. p. 53 line 22—p. 43 line 5). As calculated by SCDC, Petitioner would have been required to serve four years and one hundred and twenty five days. (App. p. 53 line 16—p. 54 line 5). Therefore, Petitioner's argument that SCDC's interpretation of S.C. Code 24-13-40 as applied to inmates whose probation is revoked in full would lead to longer sentences than originally intended is flawed.

In the alternative, if this Court were to determine that the Probation Revocation Judge improperly amended Petitioner's sentence and sentenced him to a "new" three year total sentence, Petitioner would still not be entitled to two hundred and forty day pre-trial detention credit. Instead, under S.C. Code 24-13-40 Petitioner would only be entitled to credit for time served on the pre revocation hearing detention time as Petitioner began service time on his "new" three year total sentence when the probation revocation warrant was issued.

CONCLUSION


For the reasons stated above, this Court should affirm the post-conviction relief court's denial of post-conviction relief.

Respectfully submitted,

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October 10, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

NORMAN J. HAYES,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

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

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This 10th day of October, 2014



CAROLINE KAISER
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