

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

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JAN 20 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

KENNETH RAY BOYNTON,

APPELLANT

APPELLATE CASE NO 2016-001153

AMENDED INITIAL BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the Horry County Drug Court/Probate Judge had jurisdiction to impose appellant's ten (10) year suspended sentence?

STATEMENT OF THE CASE

On September 16, 2015, appellant appeared before the Honorable Benjamin H. Culbertson, in Horry County Court of General Sessions and pled guilty to distribution of heroin. The State recommended ten (10) years suspended to drug court level II. Judge Culbertson followed the sentencing recommendation of the State. James C. Galmore, III, Esquire was plea counsel. David Tyler Bratton, Esquire was the assistant solicitor.

On March 2, 2016, the Honorable Kathy Ward of the Horry County Drug Court and a local probate judge issued an order dismissing appellant from the Drug Court and remanding him to the department of correction to serve his ten (10) year sentence. On March 7, 2016, a motion to alter or amend was submitted to the Drug Court asking it to dismiss as moot the claims against appellant and the sentence imposed by it. In the alternative, it asked that appellant's case be remanded to the Horry County Court of General Sessions for sentencing under the original charges. Respondent filed a reply dated March 14, 2016.

On May 23, 2016, a hearing was held before the Honorable Benjamin H. Culbertson in the Horry County Court of General Sessions. Appellant was represented by Kenneth Massey, Esquire, Robert Mills, Esquire, and Keith A. Dame, Esquire. Joshua David Holford, Esquire represented the State.

Judge Culbertson denied the motion for reconsideration or to alter the sentence.

This appeal follows.

ARGUMENT

The Horry County Drug Court/Probate Judge had no jurisdiction to impose appellant's ten (10) year suspended sentence.

The order of dismissal from the drug court/probate judge in this case dismissed appellant from the drug court because he “failed to comply with the requirements.” He was remanded “to the custody of the South Carolina Department of Corrections for the execution of his sentence.”

In State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) the Court wrote “that subject matter jurisdiction is the power of court to hear and determine cases of the general class to which the proceedings in question belong.” 363 S.C. at 100, 610 S.E.2d at 498. Further, “a defendant may for the first time on appeal raise the issue of the trial court’s jurisdiction to try the class of the case of which the defendant was convicted.” 363 S.C. 101-102, 610 S.E.2d at 499.

In State v. Perkins, 378 S.C. 57, 661 S.E.2d 366 (2008) the Court noted that the drug court there recommended the defendant’s termination. After a hearing, “the trial court issued an order terminating Appellant from the Program and imposing his original sentence.” 378 S.C. at 59, 661 S.E.2d at 367 (emphasis supplied). The Court also held that the “decision of whether a defendant has violated a condition of his suspended sentence rests within the sound discretion of the trial court.” 378 S.C. at 61, 661 S.E.2d at 368 (emphasis supplied).

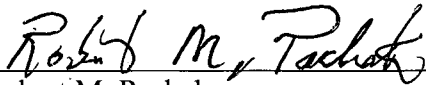
In State v. Perkins above, the Court noted in footnote 1 that the defendant in that case was sanctioned 18 times while in the drug program. Appellant in this case had an addiction problem. The solicitor recommended the drug court and the trial court agreed. Appellant only violated 5 times. (May 23, 2016 Tr. p. 8, ll. 9-17) Appellant said he only failed twice because the authorities would not wait the required 72 hours before retesting him. (May 23, 2016 Tr. p. 20, ll.

1-14) Appellant was 55 years old, with lymph node cancer, and had severe intestinal issues. (May 23, 2016 Tr. p.8, ll. 9-16) He was also HIV positive which came because of a blood transfusion. (May 23, 2016 Tr. p.21, ll. 22-23)

According to State v. Perkins, the drug court/probate judge did not have jurisdiction to remand appellant's case to the department of corrections to serve his ten (10) year suspended sentence. That is up to the court of general sessions that imposed the original suspended sentence to determine in its discretion what sentence should be imposed. A general sessions court should not be obligated to follow what a drug court/probate judge decides to do. That is in the jurisdiction of the original sentencing court.

CONCLUSION

Appellant's case should be remanded for resentencing without any deference to what the probate judge did. Drug courts should be instructed that they have no jurisdiction to be involved in sentencing matters.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of January, 2017.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) September 16, 2015 Guilty Plea Transcript;
- (3) Order of Dismissal from Drug Court and Order of Remand to the SCDC and Release of Holds;
- (4) Defendant's Motion to Alter/Amend Judgment and Order; Motion to Vacate; Motion to Remand;
- (5) May 23, 2016 Hearing on Defendant's Motion;
- (6) May 27, 2016 Notice of Appeal;
- (7) July 11, 2016, Amended Notice of Appeal;
- (8) July 11, 2016, Rule 203(d) Guilty Plea Explanation;
- (9) December 21, 2016, letter explaining no written order after the May 23, 2016 hearing.

I certify that this designation contains no matter which is irrelevant to this appeal.

January 20, 2017.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Amended Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Kenneth R. Boynton, #192112, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 20th day of January, 2017.

Robert M. Pachak
Robert M. Pachak
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of January, 2017.

Christian Ford (L.S)
Notary Public for South Carolina
My Commission Expires: March 1, 2026