STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

MAR 31 2017

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
Frank Addy, Jr., Circuit Court Judge
Case No.: 2014-GS-40-04681

Appellate Case No. 2016-002029

THE STATE, ... APPELLANT

v.

RAHEEM AQUIL, ... RESPONDENT

INITIAL REPLY BRIEF OF APPELLANT

Octavia Y. Wright
Legal Counsel

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

ATTORNEY FOR THE APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. **Did the circuit court err in terminating the Respondent's community supervision under the plain error standard of review?**

2. **Did the circuit court err in terminating the Respondent's community supervision pursuant to all relevant SC law and *State v. Scott*, 351 S.C. 584, 571 S.E.2d 700 (2002)?**

STATEMENT OF THE CASE

The Respondent was convicted of committing assault and battery of a high & aggravated nature (ABHAN) on October 2, 2014 by the Honorable Deandrea G. Benjamin. He was sentenced to a ten year period of incarceration suspended to five years of probation with credit for time served for seven months, GPS tracking for one year with random drug/alcohol screening and substance abuse counseling. This was a *concurrent* sentence with other charges noted on other indictments that included: Drugs/Manufacture, distribution, etc. cocaine base, 2nd offense; Courts/Intimidation of court officials, jurors, or witnesses; Assault & Battery, 1st degree; and Possession with Intent to Distribute Marijuana. Judge Benjamin also concurrently sentenced him to 30 days in the County Detention Center for Drugs/Possession of 28 g (1 oz.) or less of marijuana or 10g or less of hash, 1st offense. He was given credit for time served for seven months.

He violated his *probation* in June of 2015, and appeared before the Honorable Robert E. Hood on August 28, 2015. Judge Hood issued five orders that day to represent each of the five then current indictments that were relevant at that time. The charge of Drugs/Possession of 28 g (1 oz.) or less of marijuana or 10g or less of hash, 1st offense was no longer relevant as the Respondent had already served his 30 day sentence for that particular charge. Ultimately, Judge Hood revoked one year with credit for time already served, terminated *probation*, and converted the fines into a civil judgment. (Emphasis added.)

On October 2, 2015, the offender was released from SCDC and refused to sign his Community Service Program Certificate even though he understood that his entire sentence was taken into account in light of his violent charge for the indictment addressed in this appeal. In May of 2016, the Respondent violated *community supervision* and received an *Order of continuance on his community supervision* from the Honorable Clifton Newman. (Emphasis added.)

On September 22, 2016, the Respondent appeared before the Honorable Frank Addy, Jr. for another community supervision violation hearing. In this hearing, Judge Addy terminated Respondent's community supervision based upon statements made by the Respondent's attorney regarding Judge Hood's intent at his probation revocation hearing in August of 2015. In open court, the Appellant questioned whether terminating CSP was legal at least twice prior to the judge issuing his order. Tr. p. 4, lines 2-4 and 23-24. After this termination, the Appellant filed a notice of appeal before the Court of Appeals.

Per the requirements of SC Code §24-21-560(C), the Appellant would argue that a determination should have been made at the hearing whether the Respondent willfully violated community supervision instead of trying to determine Judge Hood's unwritten intent at a hearing held over a year ago. In addition, Judge Newman's Order of Continuation on Community Supervision issued a mere four months prior further solidified the Respondent's position as an offender being supervised on community supervision and *not* probation.

The Appellant would further argue that this matter is similar 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 subjected to a revocation regardless of whether he had been sentenced to probation. According to *Blakney*, the appellant had not yet served his total aggregate sentence. Thus, the court properly sentenced the appellant upon his violation of community supervision. The present Appellant requests the Court make the identical findings as previously made involving the Respondent and reverse the court's September 2016 decision. The brief of the Appellant supporting this argument follows.

ARGUMENTS

1. The Court did err in terminating the Respondent's community supervision under the plain error standard of review.

The Respondent attempts to defend his position based on an incorrect application of procedural rather than substantive review. Nevertheless, a post-trial motion isn't necessary to preserve an argument for appellate review when the issues have already been ruled upon such as in the case herein. See *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998).

Even assuming *arguendo* that there might be an issue of proper preservation, plain-error review applies. "To establish plain error, the appealing party must show that an error (1) was made, (2) is plain (i.e., clear or obvious), and (3) affects substantial rights." See *U.S. v. Lynn*, 592 F.3d 572, 577, U.S. Ct. of App., 4th Cir. (2010). Here, the Appellant can show through the arguments that are made here in that the error of the circuit court was made, that it was clear, and it affects substantial rights.

As noted by the Fourth Circuit Court of Appeals in *Lynn*, "...an appellate court may exercise its discretion to correct the error only if it "*seriously affects the fairness, integrity or public reputation of judicial proceedings*." (Emphasis added.) Therefore, this appellate court has the authority and full discretion to reverse and or remand the circuit court in order to protect the integrity and public reputation of the judicial process regarding this matter. Id. See also *U.S. v. Harris*, 470 Fed.Appx. 204, U.S. Ct. of App., 4th Cir. (2012), which reaffirms the *Lynn* ruling.

2. The Court did err in terminating the Respondent's community supervision pursuant to all relevant SC law and *State v. Scott*, 351 S.C. 584, 571 S.E.2d 700 (2002).

The Respondent was convicted of committing assault and battery of a high & aggravated nature (ABHAN). As outlined herein, he was sentenced to a ten year period of incarceration suspended upon the service of five years of probation. At the time of the Respondent's conviction, assault

and battery of a high & aggravated nature carried a maximum sentence of twenty years, which classifies it as a C-Felony. Therefore, assault and battery of a high & aggravated nature is classified as a no parole offense.[1] Due to this classification, it was mandatory that the Respondent serve at least eighty-five percent of his sentence. The South Carolina Code of Laws specifically states:

> Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, 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 or Section 24-3-30, 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(A) (Supp. 2014) and *State v. Scott*, 351 S.C. 584, 589, 571 S.E. 2d 700, 702 (2002).

Pursuant to South Carolina law, the Appellant in the *Scott* case was required to serve eighty-five percent of his sentence. Upon release from incarceration the Appellant was required to serve a two year period of community supervision.[2] The Appellant twice violated community supervision requiring him to appear in General Sessions Court.[3] Due to this being his third violation in conjunction with a previous probation violation, the Appellant argued that his whole case had been terminated and that he should not be on community supervision; therefore, there exists no additional time that could be subject to a revocation. Similar to the *Scott* decision, the

---

[1] 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. §24-13-100 (Supp. 2001).

[2] 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).

[3] 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).

Respondent here 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 and the court is precluded from terminating his community supervision program as the South Carolina Supreme Court held in *Scott*. *Id.*

The Respondent argues that Judge Hood terminated his probation and his entire case after he served his one year revocation for a probation violation based on what he thought was the judge's intent at the time. However, he does not recognize the fact that community supervision and probation are *two totally separate programs of supervised release*. The Appellant argues that pursuant to *Dawkins,*[4] the Respondent should either serve his sentence or complete community supervision. He will no longer serve any probation as that is what was terminated and *not* his community supervision. (Emphasis added.)

The Respondent appears to believe that he must not be on supervision because he no longer has a probationary term to serve. This argument has been previously made and has failed in accordance with *State v. Picklesimer,* 388 S.C. 264, 694 S.E.2d 845 (2010). 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.

Once again, this case is similar 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

[4] Defendant's 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).

> "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 Respondent received a ten year sentence suspended upon the service of five years of probation. According to *Picklesimer, Blakney,* and *Scott*, the total sentence was ten years, so the Respondent is responsible for either successfully completing community supervision, or the remaining unserved portion of the ten year sentence.

3. The Statute requires the Respondent to remain on community supervision until he has successfully completed the program or his full original sentence.

The Respondent argued that his sentence was completed since his probationary sentence was terminated. He argues that he was only responsible for serving the suspended five year probationary portion. The South Carolina Code of Laws specifically states:

> The maximum aggregate amount of time a prisoner may be 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).

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 Respondent's entire sentence on his no parole offense is ten years. He cannot receive continuous revocations past 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 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 Respondent 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 Respondent is now responsible for completing community supervision since he completed his one year period of incarceration for a previous probation violation.

Additionally, SC Code §24-13-210(E) states that those who max out the active part of their sentence are "considered upon release to have served the entire term for which he was sentenced ***unless*** the person is required to complete a community supervision program pursuant to SC Code §24-21-560. If [community supervision completion is required], he *must* complete his sentence as provided in §24-21-560 *prior* to discharge from the criminal justice system." (Emphasis added.) The Appellant requests this Court to recognize that the Respondent has not served his entire active term of incarceration until he completes his community supervision and that the circuit court lacked the authority to terminate the Respondent's community supervision pursuant to *Scott*, *Id.* at 589 and §24-13-210(E).

CONCLUSION

The most recent lower court of September 2016 committed an error in determining that the Respondent's entire sentence and his community supervision should be terminated. As this Court has done before on similar cases and in particularly in accordance with the *Scott* decision, the Appellant respectfully requests this Honorable Court to vacate and remand the decision of the

lower court's September 2016 Order for the circuit court to determine whether the Respondent violated the conditions of his community supervision and consider any violation in accordance with SC Code §24-21-560(C).

Respectfully submitted,

Octavia Y. Wright
Legal Counsel

South Carolina Department of Probation,
Parole, and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

Attorney for the Appellant

Columbia, South Carolina
March 29, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
Frank Addy, Jr., Circuit Court Judge
Case No.: 2014-GS-40-04681

Appellate Case No. 2016-002029

THE STATE, ... APPELLANT

RAHEEM AQUIL, ... RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within *Initial Reply Brief of Appellant* dated March 29, 2017, on Respondent this 29th day of March, 2017, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

John Strom, Appellate Defender
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, S.C. 29211-1589

I further certify that all parties required by Rule to be served have been served.

Dawn K. Nichols
Executive Assistant

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

State of South Carolina

Department of Probation, Parole and Pardon Services

HENRY McMASTER
Governor

JERRY B. ADGER
Director

2221 DEVINE STREET, SUITE 600
POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.state.sc.us/ppp

March 29, 2017

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street- 5th Floor
Columbia, South Carolina 29201

RE: The State v. Raheem Aquil

Dear Ms. Kitchings:

Enclosed please find the original and a copy of Appellant's Initial Reply Brief in the above referenced matter, along with proof of service.

Thank you for your assistance in this matter.

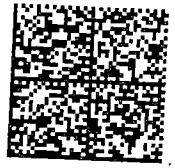
Sincerely,

Octavia Y. Wright
Legal Counsel

OYW:dn
Enclosures

cc: John Strom, Appellate Defender

State of South Carolina
Department of Probation, Parole, and Pardon Services
2221 DEVINE STREET, SUITE 600, POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250



U.S. POSTAGE PITNEY BOWES
ZIP 29205 $ 001.82⁰
02 1W
0001388679 MAR. 30. 2017

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street- 5th Floor
Columbia, South Carolina 29201

RECEIVED
MAR 31 2017
SC Court of Appeals