

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Benjamin H. Culbertson, Circuit Court Judge

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MAY 26 2017

SC Court of Appeals

Appellate Case No. 2016-001153

THE STATE, .....RESPONDENT

v.

KENNETH RAY BOYNTON, .....APPELLANT.

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**INITIAL BRIEF OF RESPONDENT**

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## TABLE OF CONTENTS

	<b>Page</b>
Table of Contents.....	i
Table of Authorities.....	ii
Respondent’s Statement of Issue on Appeal.....	1
Statement of the Case.....	2
Statement of Facts.....	4
 Argument:	
 The trial court properly imposed Appellant’s original sentence after determining he violated a condition of his suspended sentence by being terminated from the Horry County Adult Drug Court Program.....	       8
 Conclusion.....	 12

## TABLE OF AUTHORITIES

### Cases:

*State v. Perkins*, 378 S.C. 57, 661 S.E.2d 366 (2008) ..... 9, 10

### Statutes & Constitutions:

S.C. Const. art V, § 4 ..... 8

## **RESPONDENT'S STATEMENT OF ISSUE ON APPEAL**

Whether the trial court properly imposed Appellant's original sentence after determining he violated a condition of his suspended sentence by being terminated from the Horry County Adult Drug Court Program.

## STATEMENT OF THE CASE

Kenneth Ray Boynton (Appellant) was indicted at the June 2015 term of the grand jury for Horry County for distribution of heroin (2015-GS-26-2379), which was being prosecuted as a third offense based on his prior record. (Tr.p.3). He was represented by James C. Galmore, III, Esquire. Respondent (the State) was represented by Assistant Solicitor David Tyler Bratton, Esquire, of the Fifteenth Circuit Solicitor's Office. On September 16, 2016, Appellant appeared in the Horry County Courthouse before the Honorable Benjamin H. Culbertson and entered a guilty plea to distribution of heroin, first offense. He was sentenced to ten (10) years' imprisonment suspended pending his enrollment in and successful completion of level II drug court. (Tr.p.3; p.10-p.11; Indictment & Sentencing Sheet).

On January 20, 2016, Appellant appeared before the Honorable Kathy Ward, Judge of the Horry County Drug Court, at the Horry County Judicial Center, for a drug court termination hearing. He was represented by Robert Mills, Esquire, and Kenneth Massey, Esquire, and the State was represented by Assistant Solicitor Joshua D. Holford of the Fifteenth Circuit Solicitor's Office. On March 2, 2016, Judge Ward issued an order terminating Appellant from the drug court program. (Order dated March 2, 2016). Appellant filed several post-hearing motions challenging his termination from the program.

On May 23, 2016, Judge Culbertson convened a hearing on Appellant's motions in the Horry County Court of General Sessions. Appellant was present and was represented by Robert Mills, Esquire, Kenneth Massey, Esquire, and Keith A. Dame, Esquire. The State was again represented by Assistant Solicitor Holford. During the hearing, Appellant's attorneys explained each of his motions, his specific challenges to his termination from drug court, and the relief sought. The State responded to the arguments and Appellant was given an opportunity to

address the court. (May 23, 2016 Tr.p.3-p.22). At the conclusion of the hearing, Judge Culbertson denied Appellant's motion to reconsider or amend and concluded the ten-year sentence he originally imposed on September 16, 2015, was appropriate and final. (May 23, 2016 Tr.23-p.24). In a subsequent written order dated July 20, 2016, Judge Culbertson specifically held the original sentence was appropriate and should not be changed. (July 20, 2016 Order in a Criminal Case).

Appellant filed a notice of appeal from Judge Culbertson's ruling and subsequently submitted a brief in support of his appeal. This Brief of Respondent now follows.

## STATEMENT OF FACTS

On September 16, 2016, Appellant appeared before the Honorable Benjamin H. Culbertson on a charge of distribution of heroin, third offense. He was represented by James C. Galmore, III, Esquire. Respondent (the State) was represented by Assistant Solicitor David Tyler Bratton, Esquire, of the Fifteenth Circuit Solicitor's Office. Appellant was sworn by the clerk and Mr. Galmore advised the judge that Appellant wished to plead guilty to the lesser included offense of distribution of heroin, first offense. (Tr.p.4). Appellant then answered a series of questions from the court to ensure he was entering his guilty plea knowingly and voluntarily. (Tr.p.4-p.8). Judge Culbertson noted the State was recommending a term of imprisonment suspended upon successful completion of drug court. He said to Appellant: "As long as you complete drug court then the case will be reopened and the charges against you will be dismissed. However, if you fail to complete drug court then you will simply go and serve the suspended sentence, and the issue of your guilt or innocence or the sentence to be imposed will no longer be before the Court because you're pleading guilty and you're being sentenced at this time. Do you understand that?" Appellant answered, "Yes, sir." (Tr.p.6, line 13-p.7, line 8) (emphasis added).

Appellant testified he was pleading guilty to the crime because he committed the crime. The solicitor then briefly described the facts of the offense, explaining that on January 15, 2015, in the Myrtle Beach section of Horry County, Appellant sold heroin to a confidential informant working for the Drug Enforcement Unit. Appellant agreed. (Tr.p.8, lines 6-22). Appellant's counsel offered facts in mitigation, noted Appellant's appreciation for the solicitor recommending drug court, and asked the judge to accept the recommendation. Appellant then personally expressed appreciation to the individuals responsible for getting him into the program. (Tr.p.8, line 22-p.10, line 2). The solicitor described Appellant's prior record and commented:

“I hope [Appellant] takes advantage of this very generous offer because if Ms. DeBusk fails him out of drug court he already knows his sentence.” (Tr.p.10, lines 4-16) (emphasis added). Judge Culbertson adopted the recommendation of the State and sentenced Appellant to ten (10) years’ imprisonment “suspended pending [Appellant’s] enrollment and hopefully successful completion of level II drug court.” (Tr.p.10-p.11).

The day of the proceeding, Appellant and his attorney signed a three-page document detailing the rules for the Horry County level II drug court program. Those rules included the following provision:

I understand that the Judge has the authority to impose sanctions for any violation of the rules. Further, the Judge can terminate my participation in the program at any time and if so, that I will begin serving my sentence immediately. I understand that all decisions of the Judge are final and may not be appealed.

(September 16, 2016, 15<sup>th</sup> Circuit Drug Court Program Rules and Guidelines) (emphasis added).

Appellant initialed this provision and every other paragraph in the agreement and then signed an acknowledgement that he read the agreement, had it fully explained to him, and agreed of his own free will to waive certain rights and enter the program. (September 16, 2016, 15<sup>th</sup> Circuit Drug Court Program Rules and Guidelines).

Appellant was later served with notice of a termination hearing and on January 20, 2016, he appeared before Judge Ward for a violation hearing. He had received a list of examples why he was being considered for termination, and at the hearing the court gave him an opportunity to respond to each example and explain why he should not be terminated. (Notice of termination hearing for Kenneth Boynton, 15D150119; May 23, 2016 Tr.p.3). On March 2, 2016, Judge Ward issued an Order determining Appellant had “failed to comply with the requirements of the Horry County Drug Court and, therefore, is disqualified from remaining a participant of the Drug

Court.” Judge Ward further ordered that Appellant “is hereby dismissed from the Horry County Drug Court, that he is REMANDED to the custody of the South Carolina Department of Corrections for the execution of the sentence imposed by the Honorable Benjamin Culbertson on September 16, 2015 (that sentence being 10 years).” (Order dated March 2, 2016).

On March 7, 2016, Mr. Massey filed a document on Appellant’s behalf captioned as a “Motion to Alter or Amend Judgment and Order,” a “Motion to Vacate,” and a “Motion to Remand,” in which he asked the drug court to alter or amend its judgment by dismissing as moot the claims against him and the sentence imposed by the court and by vacating the order and judgment, or alternatively to remand the case to the Court of General Sessions for sentencing under the original charges by way of altering, amending, or reopening the case. On March 10, 2016, Mr. Mills filed a document on Appellant’s behalf captioned as a “Motion to Reconsider Termination from Horry County Drug Court,” asking the drug court to schedule another hearing in this matter to allow Appellant to present more evidence concerning the reasons he should be allowed to continue in the program. (March 10, 2016 Motion to Reconsider Termination). On the same date, Mr. Mills filed a document on Appellant’s behalf captioned as a “Motion to Reconsider Sentence,” asking that his original sentence be reconsidered and amended by Judge Culbertson. (March 10, 2016 Motion to Reconsider Sentence). On March 14, 2016, the State filed a written reply asking the drug court to summarily deny and dismiss all of Appellant’s motions. (March 14, 2016 Reply to Defendant’s Motions).

On May 23, 2016, Appellant appeared before Judge Culbertson in the Horry County Court of General Sessions to address those motions. Appellant was present and was represented by Robert Mills, Esquire, Kenneth Massey, Esquire, and Keith A. Dame, Esquire. The State was again represented by Assistant Solicitor Holford. During the hearing, Appellant’s attorneys

explained each of his motions, his specific challenges to his termination from drug court, and the relief sought. The State responded to the arguments and Appellant was given an opportunity to address the court. (May 23, 2016 Tr.p.3-p.22). At the conclusion of the hearing, Judge Culbertson denied Appellant's motion to reconsider or amend and concluded the ten-year sentence he originally imposed on September 16, 2015, was appropriate and final. (May 23, 2016 Tr.23-p.24). In a subsequent written order dated July 20, 2016, Judge Culbertson specifically held as follows:

After hearing arguments from both the defense and the State, this Court denied all of the defense's motions. This Court found that the original sentence was appropriate and should not be changed. This Court found that it could not or would not overrule or reconsider the Drug Court Judge's determination to terminate the defendant from Drug Court. Finally, this Court found that it could not or would not send this case back to Drug Court, and in essence force the Drug Court to accept a defendant back that had already been terminated in the Drug Court Judge's discretion after a full hearing on the merits of said termination in Drug Court. The original sentence of ten (10) years was imposed after the defendant's unsuccessful completion and subsequent termination from Horry County Drug Court.

(July 20, 2016 Order in a Criminal Case).

## ARGUMENT

**The trial court properly imposed Appellant's original sentence after determining he violated a condition of his suspended sentence by being terminated from the Horry County Adult Drug Court Program.**

Appellant contends the Horry County drug court did not have jurisdiction to impose his ten-year suspended sentence; however, he ignores the subsequent order in which Judge Culbertson ratified the drug court's decision in this regard. The Court of General Sessions undoubtedly had jurisdiction to reinstate Appellant's previously suspended sentence, thus, Appellant's appeal must fail and this Court should affirm his conviction and sentence.

The South Carolina Constitution provides that:

The Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system. He shall appoint an administrator of the courts and such assistants as he deems necessary to aid in the administration of the courts of the State. The Chief Justice shall set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system. . . . The Supreme Court shall make rules governing the administration of all the courts of the State. Subject to statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts.

S.C. Const. art V, § 4. On November 19, 2014, pursuant to this authority given by the Constitution, former Chief Justice Jean H. Toal issued an administrative order assigning Judge Ward to preside over the Horry County Adult Drug Court Program. (Order issued November 19, 2014). The Order provides:

Pursuant to this assignment, the Honorable Kathy Ward may preside over probation revocations, motions and other proceedings related to a defendant's participation in the Horry County Adult Drug Court Program for the Fifteenth Judicial Circuit. Additionally, she may impose sanctions for violations of the conditions of the Adult Drug Court Program. Sanctions may include, but are not limited to, public service work, additional treatment, issuance of a bench warrant, or termination of participation in the Adult Drug Court Program.

(Order issued November 19, 2014) (emphasis added). This November 19, 2014 administrative order has remained in effect since its issuance.

Our Supreme Court recognized this general authority when it considered the propriety of a defendant's termination from the Thirteenth Circuit Drug Court Program in Greenville County and the trial court's imposition of his original sentence. *State v. Perkins*, 378 S.C. 57, 661 S.E.2d 366 (2008). The Court noted:

Several counties across the State have implemented Drug Court Programs similar to the Thirteenth Circuit Drug Court Program. These Programs are aimed at rehabilitating the participant and helping him overcome addiction, but the specific manner in which each Drug Court Program operates varies. For example, under the procedures of other Programs, a social worker, a magistrate, or a Drug Court team member may terminate the participant from the Program.

*Id.* at 60, 661 S.E.2d at 367-68.

The *Perkins* Court noted that the trial court's imposition of a defendant's original sentence after being terminated from drug court deprives the defendant of a conditional liberty interest and thereby entitles him to due process rights. *Perkins*, 378 S.C. at 60-61, 661 S.E.2d at 368. It went on to state: "Therefore, like any other defendant who is subject to the imposition of a suspended sentence, we conclude that a Drug Court Program participant is entitled to notice and a hearing to determine whether he has violated the conditions of his suspended sentence before his sentence may be imposed." *Id.* at 61, 661 S.E.2d at 368. The Court concluded:

Accordingly, while we hold that it is inappropriate for the courts to review whether a participant was *properly* terminated from a Drug Court Program, the participant is entitled to a hearing to determine whether he was in fact terminated from a Drug Court Program (i.e., whether the defendant violated a condition of his suspended sentence) before his sentence may be imposed.

*Perkins*, 738 S.C. at 61, 661 S.E.2d at 368. In a footnote, the *Perkins* Court also stated: “We note that although magistrates, social workers, or Drug Court team members in other Programs determine whether to terminate the participant, these bodies do not have the authority to impose the suspended sentence. A terminated participant should always be afforded a hearing before the proper tribunal with the authority to impose the suspended sentence.” *Perkins*, 378 S.C. at 61 n.3, 661 S.E.2d at 368 n.3.

As noted in the November 19, 2014 Order, Judge Ward was given the authority to terminate a participant from the Horry County Adult Drug Court Program as one of her available sanctions; therefore, Appellant’s termination from the Drug Court Program was lawful and proper and is not subject to review by this Court. Although Judge Ward further ordered that Appellant “is REMANDED to the custody of the South Carolina Department of Corrections for the execution of the sentence imposed by the Honorable Benjamin Culbertson on September 16, 2015,” Appellant was subsequently afforded a hearing before Judge Culbertson before that order/directive was ultimately ratified by the tribunal with authority to impose the suspended sentence.

Appellant argues the Horry County drug court had no jurisdiction to remand his case to the department of corrections to serve his ten-year suspended sentence because it was up to the Court of General Sessions that imposed the original sentence to determine, in its discretion, what sentence should be imposed. He complains that the Court of General Sessions should not be obligated to follow what a drug court decides to do. (Brief of Appellant, p.4). Here, however, Judge Ward lawfully terminated Appellant from the Horry County Adult Drug Court Program and ordered his remand to the department of corrections for service of the sentence suspended by Judge Culbertson. Judge Culbertson then held a hearing, ratified Judge Ward’s order, and

imposed the original ten-year sentence. There is no basis for reversal of Appellant's termination from drug court or for reversal of Judge Culbertson's reinstatement and imposition of Appellant's ten-year sentence. Appellant was provided due process and his conviction and sentence should be affirmed.

## CONCLUSION

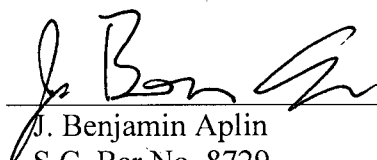
For all of the foregoing reasons, the State respectfully requests that Appellant's termination from the Drug Court Program and the reinstatement and imposition of his suspended sentence be affirmed.

Respectfully submitted,

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Columbia, South Carolina  
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**PROOF OF SERVICE**

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I, Keely Carter, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter*, both dated May 26, 2017, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Robert M. Pachak, Esquire  
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I further certified that all parties required by Rule to be served have been served. This 26<sup>th</sup> day of May, 2017.

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