

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
Appeal From Sanderburg County
Honorable J. Mark Hayes, Circuit Court Judge

RECEIVED
NOV 05 2018
SC Court of Appeals

THE STATE

RESPONDENT.

V.

KEVIN McDOWDERS

APPELLANT

APPELLATE CASE NO: 2018-000070

APPELLANT'S PRO SE MOTION TO
SUPPLEMENT INITIAL
BRIEF OF APPELLANT

MAY IT PLEASE THIS COURT, APPELLANT Kevin McDowers
Acting PRO SE, moves this Court to GRANT
LEAVE FOR APPELLANT to file a PRO SE Supplemental
BRIEF BASED UPON THE BELOW LISTED GROUNDS:

ON Oct 23 2018, Counsel VICTOR R. SEEGER
FILED INITIAL BRIEF ARGUING APPELLANT SHALL
RECEIVE CREDIT FOR TIME SERVED FROM THE
BEGINNING OF HIS FEDERAL SENTENCE.

THAT IS AN IMPROPER ARGUMENT

APPELLANT SHALL BE ENTITLED TO CREDIT
FOR TIME SERVED FROM MARCH 11, 2006..

AS PROMISED DIRECTLY FROM THE
SENTENCING JUDGE RIMMLEY DENNIS JR ON
TRANSCRIPT ATTACHED TO THIS MOTION.

(Pg 1 of 4)

APPELLANT ASSURES THIS IS A BINDING PLEA
DIRECTLY FROM THE JUDGE WHICH SHALL TAKE
PRECEDENT! APPELLANT MADE IT CLEAR I'VE
ALREADY SERVED (2 1/2 YEARS) UNTO FROM MARCH 11, 2006 -
UNTIL AUG 26, 2008) MAKING SENTENCE START DATE -
"CREDIT FOR TIME SERVED" FROM MARCH 11, 2006...

APPELLANT WAS ARRESTED MARCH 11, 2006, REMAINED IN
CUSTODY SINCE MARCH 11, 2006 (CONFERRED TO INSTANT BURBURY
SAME DAY! THEN ON MARCH 16, 2006, SARTANBURG
Detectives TIM TUCKER and Det Phil ESK, BROUGHT THE
APPELLANT to Crime Scene (APPELLANT CONFESSED TO CRIME
** ON MARCH 31, 2006 JUDGE THOMAS WALL **
ISSUES THE WARRANT TO BE SERVED UPON
APPELLANT (WHILE APPELLANT REMAINS IN CUSTODY)
* APPELLANT SHALL AT LEAST BE ENTITLED
TO "CREDIT FOR TIME SERVED" FROM
* MARCH 31, 2006. * APPELLANT WAS IN
TRIAL AUG 26, 2008 (ON A ACTUAL INNOCENCE CASE).
AND, ROBERT WALL ESQ AND SOLICITOR DANN BARNETT
PROPOSED A "NEGOTIATED PLEA OFFER" OF "CREDIT
FOR TIME SERVED" FROM MARCH 11, 2006, THEN
SENTENCING JUDGE ENFORCED NEGOTIATED PLEA ON
TRANSCRIPT CREDIT FOR TIME SERVED
SINCE MARCH 11, 2006!!

The Lower Court erred when it Failed to award
Appellant Credit For Time Served From March 11, 2006.

The "Sentencing Sheet States: this Sentence shall
be ran Concurrent with Federal Sentence, be given credit
for Time Served.

* THE SOLE ARGUMENT OF THE APPEAL IS:
SENTENCING JUDGE R. MCKEY DENNIS MADE
IT CLEAR ON TRANSCRIPT. IF I ACCEPT YOUR
PLEA "THIS IS WHAT ILL DO FOR YOU (A BIDDING
PLEA DIRECTLY FROM THE JUDGE HIMSELF).

GIVE YOU CREDIT FOR TIME ALREADY
SERVED: APPELLANT: IVE SERVED APPROX
TWO AND A HALF YEARS ALREADY. YOUR HONOR TR 6, II

On December 14, 2017, Robert Hall Failed to
Present Aug 26, 2008 PLEA TRANSCRIPT, SO
JUDGE JIMMY LAYES COULD NOT MAKE A PROPER
RULING. WITHOUT THE PLEA TRANSCRIPT WAS PROPERLY
PRESENTED, APPELLANT WOULD HAVE BEEN GRANTED
CREDIT FOR TIME SERVED FROM MARCH 11, 2006.

* COUNSEL VICTOR SEEGER MISTATED ARGUMENT
IN BRIEF (credit for time served from beginning of
his federal sentence). APPELLANT IS ENTITLED"
TO CREDIT FOR TIME SERVED FROM MARCH 11, 2006
THIS IS A BIDDING PLEA FROM THE JUDGE

APPELLANT HEREBY RELIES ON THE FOLLOWING CASE LAW IN SUPPORT OF THIS MOTION:

Boan v. State 388 S.C. 272, 695 S.E.2d 850 (2010) (A sentence in open court controls over a written sentencing order).

State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 391, 397 (1994).

United States v. Rinaldi, 988 F.2d 504, 506 (4th Cir. 1993).

Smith v. State, 413 S.C. 194 (2015)

Jordan v. State, 297 S.C. 52 (1988).

Therefore, the court's (K. Markley Davis Jr.) ORAL PRONOUNCEMENT THAT APPELLANT WAS ENTITLED TO CREDIT FOR THE TIME [he] SERVED DURING APPELLANT'S GUILTY PLEA HEARING CONSTITUTES AN UNAMBIGUOUS COURT ORDER.

Therefore, based upon the attached CREDENTIAL AUG 26 2008 PLEA TRANSCRIPT, APPELLANT MAKES THE COURT TO GRANT THE BELOW LISTED RELIEF:

RELIEF REQUESTED

WHEREFORE, APPELLANT MOVES THIS COURT TO GRANT APPELLANT'S PRO SE MOTION TO SUPPLEMENT DUEITAL BRIEF. AND ORDER APPELLANT'S SENTENCE BE UPDATED, AND REMANDED TO THE CIRCUIT COURT FOR RESSENTENCING, SPECIFICALLY TO MAKE IT CLEAR APPELLANT SHALL BE GRANTED CREDIT FOR TIME SERVED FROM MARCH 11, 2006, THIS IS BASED UPON A BOUNDING PLEA DIRECTLY FROM THE SENTENCING JUDGE HIMSELF, Schiata & Robert Hill, mainly THE SENTENCING JUDGE HIMSELF PROMISED APPELLANT.

Elected date permits at term the date as
TAM and Court Oct 31, 2018

K. M. Davis
Kevin M. Davis
PRO SE

STATE OF SOUTH CAROLINA)
COUNTY OF ~~YORK~~ SPARTANBURG)

COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,)
PLAINTIFF,)
VERSUS)
KEVIN McDANIELS,)
DEFENDANT.)

TRANSCRIPT OF RECORD
2008-GS-42-1743
2008-GS-42-1744
2008-GS-42-1745
2008-GS-42-1746

AUGUST 26, 2008
SPARTANBURG, SOUTH CAROLINA

BEFORE:

THE HONORABLE R. MARKLEY DENNIS, JR., JUDGE

APPEARANCES:

FOR THE STATE:
BARRY BARNETTE, ESQ., DEPUTY SOLICITOR
ANN MARIE THOMPSON, ESQ., ASSISTANT SOLICITOR

FOR THE DEFENDANT:
ROBERT HALL, ESQ., ASSISTANT PUBLIC DEFENDER

RECEIVED
JUN 07 2018
APPELLATE DEFENSE

PHYLLIS S. BARRETT
CIRCUIT COURT REPORTER

1 THE COURT: LISTEN TO THE SOLICITOR, NOW, AS SHE TELLS ME THE
2 FACTS. I'LL NEED TO ASK YOU SOME QUESTIONS ABOUT IT.

3 SOLICITOR, IF YOU WOULD, I'LL BE HAPPY TO HEAR FROM YOU NOW.

4 MS. THOMPSON: THANK YOU, YOUR HONOR. ON MARCH 11, 2006, THE

5 DEFENDANT WAS DETAINED IN RICHLAND COUNTY BASED ON SUSPICIOUS

6 ACTIVITY. HE'D BEEN ARRESTED FOR CDV. AFTER HIS ARREST, HE

7 ADMITTED TO THE RICHLAND COUNTY OFFICERS THAT HE BROKE INTO 132

8 SOUTHLAND AVENUE IN BOILING SPRINGS, THE HOME OF ONE AMY

9 KIMBRELL. SPARTANBURG COUNTY WAS THEN NOTIFIED.

10 THE DEFENDANT WAS THEN BROUGHT UP TO SPARTANBURG COUNTY

11 WHERE HE ADMITTED TO SPARTANBURG COUNTY OFFICERS THAT HE BROKE

12 INTO A HOUSE AT [REDACTED] IN CAMPOBELLO.

13 THE ITEMS TAKEN FROM THE FIRST HOUSEHOLD INCLUDED GUNS AND
14 WEAPONS, PERSONAL EFFECTS AND JEWELRY. AND THE SECOND HOME
15 INCLUDED JEWELRY, MONEY AND CAMERAS AND OTHER PERSONAL
16 EFFECTS.

17 THE COURT: MR. McDANIELS, THAT'S A BRIEF RECITATION. YOU
18 UNDERSTAND THAT?

19 MR. McDANIELS: YES SIR.

20 THE COURT: BUT YOU BELIEVE THE STATE'S PREPARED TO PROVE
21 THOSE FACTS WHICH THE SOLICITOR HAS JUST STATED TO ME; THAT IS,
22 CALL WITNESSES WHO WILL TESTIFY TO THOSE FACTS?

23 MR. McDANIELS: YES SIR.

24 THE COURT: AND YOU BELIEVE THAT ONCE A JURY HEARS THE ENTIRE
25 CASE THEY MOST PROBABLY WOULD FIND YOU GUILTY?

1 WILL FIND ME GUILTY BEYOND A REASONABLE DOUBT. IS THAT YOUR
2 UNDERSTANDING?

3 MR. McDANIELS: YES SIR, YOUR HONOR.

4 THE COURT: YOU HAVE BEEN OFFERED A BENEFIT OF WHICH YOU
5 WANT TO AVAIL YOURSELF AND AVOID A TRIAL. IS THAT TRUE?

6 MR. McDANIELS: YES SIR, YOUR HONOR.

7 THE COURT: AND THE BENEFIT IS A FIFTEEN-YEAR SENTENCE TO RUN
8 CONCURRENT.

9 MR. McDANIELS: WITH MY FEDERAL SENTENCE.

10 THE COURT: WITH YOUR FEDERAL SENTENCE.

11 MR. McDANIELS: YES SIR, YOUR HONOR.

12 THE COURT: YOU REALIZE AND UNDERSTAND THAT IN THE FUTURE,
13 NOTWITHSTANDING AN ALFORD PLEA, THAT THIS WILL BE ON YOUR RECORD
14 AND IT'S TREATED JUST THE SAME AS IF THE JURY WERE TO CONVICT YOU.
15 DO YOU UNDERSTAND THAT?

16 MR. McDANIELS: YES, YOUR HONOR.

17 THE COURT: UNDERSTANDING THAT ON INDICTMENT 2008-1743, WHICH
18 IS AN INDICTMENT THAT CHARGES YOU WITH BURGLARY IN THE FIRST
19 DEGREE, THAT IF I ACCEPTED THE PLEA I WOULD SENTENCE YOU TO FIFTEEN
20 YEARS, PLACE ON THE SENTENCING SHEET THAT IT IS TO RUN
21 CONCURRENTLY WITH YOUR FEDERAL SENTENCE, GIVE YOU CREDIT FOR
22 TIME THAT YOU'VE SERVED, WHAT IS YOUR PLEA? GUILTY UNDER ALFORD?

23 MR. McDANIELS: YES SIR, YOUR HONOR. NORTH CAROLINA VERSUS
24 ALFORD.

25 THE COURT: OKAY.

1 CONCURRENTLY. SO, THERE'S NO QUESTION THAT'S GONNA HAPPEN. DO
2 YOU UNDERSTAND THAT?

3 MR. McDANIELS: YES SIR, YOUR HONOR.

4 THE COURT: OKAY. I WISH THERE WAS SOME WAY I COULD
5 ACCOMPLISH WHAT THE VICTIM WANTS, BUT IT'S NOT, AND I'M SORRY. I
6 WISH IT WAS MORE THAT I COULD TO DO RESTORE EVERYTHING, BUT
7 THERE'S NOT.

8 I THINK THAT GIVEN ALL THE FACTS AND CIRCUMSTANCES IN THIS
9 CASE, AND GIVEN THE CANDOR THAT'S BEEN DEMONSTRATED ON BOTH
10 SIDES, THIS PROBABLY IS THE BEST RESOLUTION. AS WE TALKED
11 YESTERDAY, THE TRAUMA OF A TRIAL, AND TO GO THROUGH WITH IT
12 AGAIN, WITH WHAT YOU, THE TRAUMA THAT YOU'VE HAD TO ENDURE, TO
13 HAVE THAT AGAIN, I'M GLAD THAT YOU WON'T HAVE THAT. I THINK
14 THERE'S SOMETHING TO BE SAID FOR THAT AS WELL.

15 I WILL ACCEPT THE NEGOTIATED SENTENCE. THE SENTENCE IS AS
16 FOLLOWS, MR. McDANIELS:

17 ON INDICTMENT 2008-1743, THE SENTENCE IS YOU BE COMMITTED TO
18 THE DEPARTMENT OF CORRECTIONS FOR A TERM OF FIFTEEN YEARS.

19 YOU'RE GIVEN CREDIT FOR TIME SERVED, AND THEY WILL MAKE THAT
20 COMPUTATION AT THE DEPARTMENT OF CORRECTIONS. THIS SENTENCE IS
21 ALSO TO RUN CONCURRENTLY WITH THE FEDERAL SENTENCE YOU'RE
22 PRESENTLY SERVING, AND I HAVE WRITTEN THAT ON THE SENTENCING
23 SHEET.

24 2008-1744, THE SENTENCE IS FIFTEEN YEARS. IT IS CONCURRENT.
25 YOU'RE GIVEN CREDIT FOR THE TIME THAT YOU'VE SERVED AND THE

CMT1100D
OMCOMITA

SCDC OFFENDER MANAGEMENT SYSTEM
COMMITMENT APPLICATION
CONVICTION SUMMARY

04/21/17
C056427

SCDC# > 254398

CURR LOC: KERSHAW

MCDANIELS, KEVIN WAYNE

SCDC CLASSIFICATION...: VIOLENT

OFFENDER TYPE: ADULT-STRAIGHT SENTENCE

~~INCORRECT~~

NUM	CONVICTION OFFENSE	INCARC YRS	SENT MO	SENT DYS	SENT DATE	SENT START	PROJ COMP	CONV STAT	VIO IND
* S00029	BURGLARY-1ST DEGREE	015	00	000	08/26/08	10/12/07	07/22/2020	ACT V	V
S00030	BURGLARY-2ND DEG/NON	015	00	000	08/26/08	10/12/07	09/12/2016	ACT N	N
S00031	GRAND LARCENY	005	00	000	08/26/08	10/12/07	09/01/2010	SER N	N
S00032	GRAND LARCENY	005	00	000	08/26/08	10/12/07	09/01/2010	SER N	N
S00021	FRAUD INSUFF FUNDS C	000	00	030	08/03/07	08/03/07	08/30/2007	SER N	N
S00043	GRAND LARCENY	008	00	303	07/27/07	07/27/07	08/15/2012	SER N	N
S00042	BREAKING INTO MOTOR	003	00	303	07/27/07	07/27/07	08/13/2009	SER N	N
S00041	PETIT LARCENY	003	00	303	07/27/07	07/27/07	08/13/2009	SER N	N
S00040	BREAKING INTO MOTOR	005	00	000	07/27/07	07/27/07	04/27/2010	SER N	N
S00039	PETIT LARCENY	005	00	000	07/27/07	07/27/07	04/27/2010	SER N	N
S00038	POSSESS STOLEN VEHIC	010	00	000	07/27/07	07/27/07	04/27/2013	SER N	N
S00037	GRAND LARCENY	010	00	000	07/27/07	07/27/07	04/27/2013	SER N	N
S00036	BREAKING INTO MOTOR	005	00	000	07/27/07	07/27/07	04/27/2010	SER N	N

PAGE: 0001

PF3-ADD PF4-MODIFY/REVOKE PF6-DISPLAY CONSEC PF9-DETAIN PF12-SUMREPT

FILED
CLERK OF COURT
ANGUS COUNTY
2017 SEP 27 AM 10:04
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Mark Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN MCDANIELS,

APPELLANT

APPELLATE CASE NO 2018-000070

INITIAL BRIEF OF APPELLANT

VICTOR R SEEGER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT

The lower court erred when it failed to award Appellant the time-served credit he was entitled to where Appellant and the state agreed Appellant would receive credit for time-served from the beginning of his federal sentence, and where the plea judge pronounced on the record that he would get credit for that time-served4

Relevant Facts.....4

Discussion.....6

CONCLUSION.....9

TABLE OF AUTHORITIES

Cases

<u>Boan v. State</u> , 388 S.C. 272, 695 S.E.2d 850 (2010)	7
<u>Gideon v. Wainwright</u> , 372 U.S. 335 (1963).....	7
<u>In re M.B.H.</u> , 387 S.C. 323, 692 S.E.2d 541 (2010).....	3
<u>Jordan v. State</u> , 297 S.C. 52 (1988)	6
<u>Negron-Almeda v. Santiago</u> , 528 F.3d 15 (1st Cir. 2008).....	8
<u>North Carolina v. Alford</u> , 400 U.S. 25 (1970).....	2, 4, 5
<u>Santobello v. New York</u> , 404 U.S. 257 (1971).....	6
<u>Smith v. State</u> , 413 S.C. 194 (2015)	6
<u>State v. Slocumb</u> , 412 S.C. 88, 770 S.E.2d 436 (Ct. App. 2015)	3
<u>State v. Thrift</u> , 312 S.C. 282, 440 S.E.2d 341 (1994).....	6
<u>State v. Vick</u> , 384 S.C. 189, 682 S.E.2d 275, (Ct. App. 2009).....	3
<u>State v. Wilson</u> , 345 S.C. 1, 545 S.E.2d 827 (2001).....	3
<u>Townsend v. Burke</u> , 334 U.S. 736 (1948)	7
<u>Travelers Idem. Co. v. Bailey</u> , 557 U.S. 137 (2009)	8
<u>United States v. Chavful</u> , 781 F.3d 758 (5th Cir. 2015).....	6
<u>United States v. Ringling</u> , 988 F.2d 504 (4th Cir. 1993).....	6
<u>United States v. Roman</u> , 121 F.3d 136 (3rd Cir. 1997)	6
<u>United States v. Spallone</u> , 399 F.3d 415 (2d Cir. 2005)	8
<u>United States v. Taylor</u> , 77 F.3d 368 (11th Cir. 1996)	6
<u>United States v. Tucker</u> , 404 U.S. 443 (1972).....	7

Other Authorities

Black's Law Dictionary (10th ed. 2014)	7
--	---

STATEMENT OF ISSUE ON APPEAL

Whether the lower court erred when it failed to award Appellant the time-served credit he was entitled to where Appellant and the state agreed Appellant would receive credit for time-served from the beginning of his federal sentence, and where the plea judge pronounced on the record that he would get credit for that time-served?

STATEMENT OF THE CASE

In March of 2008, the Spartanburg County Grand Jury indicted Petitioner McDaniels for one count of burglary first degree, one count of burglary second degree, and two counts of grand larceny, indictments #2008-GS-42-1743, 1744, 1745, 1746. R.*.

On August 26, 2008, Petitioner appeared before the Honorable R. Markley Dennis, Jr. and entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to all four charges. Tr. 1; Tr. 2, ll. 7 – 8 (August 26, 2008 Plea Hearing Transcript). Robert Hall represented Petitioner. Id. Barry Barnette and Marie Thompson represented the state. Id.

Pursuant to negotiations with the state, Judge Dennis sentenced Petitioner to fifteen years' imprisonment for burglary first degree, fifteen years' imprisonment for burglary second degree, and five years' imprisonment concurrent for each grand larceny charge. Tr. 19, l. 17 – 20, l. 11 (August 26, 2008 Plea Hearing Transcript). These charges were to run concurrent with Appellant's federal sentence. Id. Also pursuant to the negotiated agreement with the state, Judge Dennis awarded Appellant time-served credit to begin when his federal sentence commenced. Id.; Tr. 5, l. 17 – 7, l. 9 (August 26, 2008 Plea Hearing Transcript).

However, Appellant was not granted the time-served credit that judge promised him he would receive. Tr. 5, l. 17 – 6, l. 2; R.*.

This appeal follows.

STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009)(quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is “bound by the trial court’s factual findings unless they are clearly erroneous.” Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court “does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court’s ruling is supported by any evidence.” State v. Slocumb, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015). “A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support.” In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

ARGUMENT

The lower court erred when it failed to award Appellant the time-served credit he was entitled to where Appellant and the state agreed Appellant would receive credit for time-served from the beginning of his federal sentence, and where the plea judge pronounced on the record that he would get credit for that time-served.

Relevant Facts

Appellant pled pursuant to Alford, after negotiating his sentence with the state. Tr. 2, ll. 14 – 15; Tr. 5, ll. 12 – 25 (August 26, 2008 Plea Hearing Transcript). Appellant was particularly concerned that his sentence for the aforementioned charges would run concurrent with his federal sentence, and that he received time-served credit for the period he served on his federal sentence already. Tr. 3, ll. 17 – 21; Tr. 5, ll. 7 – 10 (August 26, 2008 Plea Hearing Transcript). Plea counsel expressed to the plea court Appellant's unwillingness to accept the state's plea offer until the day of the trial. Tr. 7, l. 17 – 8, l. 2 (August 26, 2008 Plea Hearing Transcript).

Judge Dennis found Appellant understood the significance of an Alford plea. Tr. 16, ll. 12 – 20 (August 26, 2008 Plea Hearing Transcript). Judge Dennis accepted Appellant's Alford plea and negotiated sentence. Tr. 19, l. 15 – 20, l. 11 (August 26, 2008 Plea Hearing Transcript).

During the colloquy, Appellant explained the time-served credit portion of his negotiated plea agreement. Tr. 6, ll. 1 – 2 (August 26, 2008 Plea Hearing Transcript). On indictment 2008-1743, for first degree burglary, Appellant stated the time-served credit he and the state agreed that he was entitled to, without objection. Tr. 5, l. 17 – 6, l. 2 (August 26, 2008 Plea Hearing Transcript). R.*.

THE COURT: Understanding [you are charged with] burglary in the first degree, that if I accepted [Appellant's Alford plea], I would sentence you to fifteen years, place on the sentencing sheet that it is to run concurrently with your federal

sentence, *give you credit for time that you've served*, what is your plea? Guilty under Alford? (emphasis added)

Appellant: Yes, sir Your Honor. North Carolina v. Alford, *supra*.

THE COURT: Okay.

Appellant: I've served approximately two and a half years already, your honor. Id.

A nearly identical exchange took place regarding Appellant's Alford plea to second degree burglary as well. Tr. 6, ll. 3 – 12 (August 26, 2008 Plea Hearing Transcript) R.*. Specifically, Judge Dennis explicitly gave Appellant credit for time served. Id.

Judge Dennis further implicitly assured Appellant that his time-served credit was a condition contained within the negotiated sentence and put on the record, when Judge Dennis, after explicitly stating Appellant would get his time-served credit, asked Appellant if there were any other promises made outside the record of the plea hearing that induced Appellant to make an Alford plea. Tr. 12, ll. 19 – 23 (August 26, 2008 Plea Hearing Transcript) R.*. Since the details of Appellant's time-served credit were put on the record of the plea hearing, the time-served credit was made part of the negotiated sentence. App. 5, l. 17 – 6, l. 2 August 26, 2008 Plea Hearing Transcript); R.*. Thus, Appellant was entitled to the “two and a half years” of “time that [Appellant had] served,” because that was explicitly stated on the record as a condition of the negotiated plea agreement. Tr. 6, ll. 1 – 25 (August 26, 2008 Plea Hearing Transcript) R.*.

On December 14, 2017, Appellant had a sentencing hearing in front of the Honorable J. Mark Hayes. Tr. 1 (December 14, 2017 Sentencing Hearing Transcript) R.*. Derrick Bruce Balsa represented the state. Id. Robert B. Hall represented Appellant. Id. Appellant argued that he was entitled to credit for time served from March 31st, 2006. Tr. 10 (December 14, 2017 Sentencing Hearing Transcript) R.*.

Judge Hayes filed an order that denied Appellant's sentencing motion. Judge Hayes stated, "Due to the circumstances surrounding the reduced plea and lack of information or explanation of the negotiations the Court lacks confidence to not interfere with the original intent of the parties." Tr. 1. (Order Denying Jail Credit) R.*.

Discussion

"The central question about [a] plea agreement is what are its terms, which is a legal question." State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994). "A constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262 (1971). (see also: United States v. Ringling, 988 F.2d 504, 506 (4th Cir. 1993) holding that plea bargains rest on contractual principles, and each party should receive the benefit of its bargain.)¹

In Smith v. State, 413 S.C. 194 (2015) the South Carolina Supreme Court affirmed the Court of Appeals reversal of Smith's post-conviction relief hearing denial. Id. at 195. The Court held that the state breached the plea agreement with Smith when it recommended the maximum sentence at the plea hearing, after the state promised Smith it would remain silent during sentencing. Id. Defense counsel's failure to object to the breach of the guilty plea agreement constituted reversible error. Id. at 196.

In Jordan v. State, 297 S.C. 52 (1988) our Supreme Court held that the solicitor reneging on his promise to neither recommend nor oppose a probationary sentence breached the plea agreement Jordan had with the state and entitled Jordan to either specific performance of the plea

¹ Other jurisdictions have ruled that a court must decide whether the government's conduct is consistent with the parties' reasonable understanding of the agreement. See: United States v. Roman, 121 F.3d 136 (3rd Cir. 1997); United States v. Chavful, 781 F.3d 758 (5th Cir. 2015); United States v. Taylor, 77 F.3d 368 (11th Cir. 1996).

agreement or a new trial. Id. at 53. The Court gave no credence to the trial court's explanation that it did not consider the state's opposition to Jordan receiving a probationary sentence when it sentenced Jordan to a term of imprisonment. Id. at 52 – 53.

In United States v. Tucker, 404 U.S. 443 (1972) the United States Supreme Court affirmed the Appellate Court's decision that the lower court's reliance on Tucker's prior convictions, that were later found to be obtained in violation of Gideon v. Wainwright, 372 U.S. 335 (1963), during sentencing, required a remand for reconsideration of the sentence imposed. Id. The Court held that, "we deal here... with a sentence founded at least in part upon misinformation." Id. at 447.

In Tucker, the Court relied on its decision in Townsend v. Burke, 334 U.S. 736 (1948) which stated that a "prisoner... sentenced on the basis of assumptions concerning his criminal record [that] were materially untrue... is inconsistent with due process of law, and such a conviction cannot stand." Id. at 740 – 741. Accordingly, the Tucker Court stated, "the record in the present case makes evident that the sentencing judge gave specific consideration to the respondent's previous [unconstitutional] convictions before imposing the sentence upon him." Tucker, at 447.

In Boan v. State, 388 S.C. 272, 695 S.E.2d 850 (2010) our Supreme Court held that an unambiguous pronouncement of a sentence in open court controls over a written sentencing order. Id. at 276, 695 S.E.2d at 852. The Court held, "a trial's fairness is compromised when a trial judge increases a defendant's sentence outside his presence." Id. at 277, 695 S.E.2d at 852.

An order is defined as, "a written direction or command delivered by a government official, esp. a court or judge. The word generally embraces final decrees as well as interlocutory directions or commands." ORDER, Black's Law Dictionary (10th ed. 2014). Order is also termed

a “court order” or “judicial order.” Id. A sentence issued in open constitutes a written direction or command delivered by a judge. Therefore, the court’s oral pronouncement that Appellant was entitled to “credit for the time [he] served,” during Appellant’s guilty plea hearing constituted an unambiguous court order. Tr. 5, l. 17 – 6, l. 13 (August 26, 2008 plea hearing).

In Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009), the United States Supreme Court held that, “where the plain terms of a court order unambiguously apply... they are entitled to their effect.” Id. at 151; See Negron-Almeda v. Santiago, 528 F.3d 15, (1st Cir. 2008). Moreover, “a court must carry out and enforce an order that is clear and unambiguous on its face.” United States v. Spallone, 399 F.3d 415, 421 (2d Cir. 2005).

In the instant case, the reason for ruling in against Appellant’s sentencing motion did not address the dispositive issue in Appellant’s case, namely the parties’ intention regarding the negotiated sentence at the time of the plea hearing. Judge Dennis made an explicit pronouncement in open court during Appellant’s guilty plea hearing that Appellant was entitled to time-served credit. Tr. 5, l. 17 – 6, l. 13 (August 26, 2008 Plea Hearing Transcript). Appellant explicitly referred to the time-served credit that he and the state negotiated when he stated, “I’ve served approximately two and a half years already.” Tr. 6, ll. 1 – 2 (August 26, 2008 Plea Hearing Transcript) R.*. That amount of time-served credit was not objected to by the state.

Therefore, the sentencing hearing court erred when it denied Appellant’s motion to alter his sentence to reflect the proper sentence that was intended by Appellant, the state, and the plea hearing judge.

CONCLUSION

By reason of the foregoing arguments, Appellant requests that this court vacate his current sentence and remand his case to the circuit court for resentencing.

Victor R. Seeger

Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of October, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable J. Mark Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN MCDANIELS,

APPELLANT

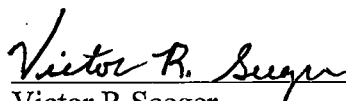
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) August 26, 2008 Plea Hearing Transcript, Tr. 1 – 8;
- (3) August 26, 2008 Plea Hearing Transcript, Tr. 12;
- (4) August 26, 2008 Plea Hearing Transcript, Tr. 16;
- (5) August 26, 2008 Plea Hearing Transcript, Tr. 19 – 20;
- (6) December 14, 2017 Sentencing Hearing Transcript, Tr. 1;
- (7) December 14, 2017 Sentencing Hearing Transcript, Tr. 10;
- (8) Order Denying Jail Credit, Tr. 1.

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

October 23, 2018.



Victor R Seeger

Appellate Defender
South Carolina Commission on Indigent
Defense

Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330
ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Mark Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

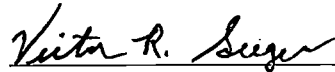
V.

KEVIN MCDANIELS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the 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 Kevin Wayne McDaniels, #254398, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 23rd day of October, 2018.



Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of October, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 26, 2028



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 23, 2018

Mr. Kevin Wayne McDaniels, #254398
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

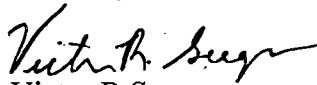
Re: Your appeal

Dear Mr. McDaniels:

Enclosed please find a copy of the Initial Brief of Appellant in your case, which I have filed with the South Carolina Court of Appeals.

Please contact me if you have any questions.

Sincerely,


Victor R Seeger
Appellate Defender

VRS/csb

Enclosure

Kevin W. McDaniel 2254398
McLarnock Carr Dist F2A181
386 Resemont Way
McLarnock SE 29899

RECEIVED

NOV 05 2018

SC Court of Appeals

CERTIFICATE OF MAILING

I, Kevin McDaniel, Certify that I have mailed
the enclosed: APPELLANTS PRO-SE MOTION TO
SUPPLEMENT INITIAL BRIEF OF APPELLANT
AND ORIGINAL AUG 26, 2008 TRANSCRIPT OF RECORD
LT. JUDGE R. MARLEY DENNIS PROMISING CLEO TO FOR TIME
SERVED FROM MARCH 11, 2016

mailing such to the below listed address
on the 31st day of Oct 2018.

TO: S.C. COURT OF APPEALS
CLERK OF COURT
1015 Sumter Street
Columbia SE 29211

TO: J. Benjamin Aplin
SR ATTORNEY GEN OFFICE
1000 Assembly St Rm 519
Columbia SE 29201

TO: Division of Appellate Defense
C/O Greer Seeger
P.O. Box 11589
Columbia SE 29210

Kevin W. McDaniel
Kevin McDaniel
(PRO-SE)

I declare Under Penalty of Perjury
the above is true and correct

Dated: Oct 31, 2018

Kevin W. McDaniels # 254399
McCormick Court West Fall 191
386 Redemban Way
McCormick Se 29899

Oct 31, 2018

RECEIVED

NOV 05 2018

SC Court of Appeals

S.C. Court of Appeals
Clk. Clerk of Court
1015 Sumter Street
Columbia Se. 29211

RE: The State v. Kevin McDaniels Case # 2018-000070
FILING ATTACHED 'APPELLANT'S PROSE MOTION TO
SUPPLEMENT INITIAL BRIEF OF APPELLANT AND
TRANSCRIPT OF RECORD - AUG 26, 2008.


Dear Clerk:

PLEASE FIND ENCLOSED A PROSE MOTION AND
SUPPORTING AUG 26, 2008 TRANSCRIPT. AUG 26, 2008

ATTORNEY VICTOR SEEBER FILED A BRIEF AND
MISTAKEN SENTENCE STATE ONE 'CREDIT-FOR
TIME SERVED DATE...

THE CREDIT-FOR TIME SERVED DATE SHALL BEGON
MARCH 11, 2006 AS PROMISED BY SENTENCING
JUDGE HIMSELF. PLEASE CLOCK THE ENCLOSED IN
PREVIOUSLY TO Chief Judge James Edward Lockery SO HE
CAN MAKE A ACCURATE RULING. CREDIT-FOR TIME
SERVED FROM MARCH 11, 2006!!

THANK YOU SO MUCH!
HAVE A BLESSED DAY!
Dated: Oct 31 2018


Kevin W. McDaniels
(PRO SE)

KEW [REDACTED] 98
McCormick Court JST FA 101
386 REDEMPTION WAY
McCormick SC 29899

RECEIVED
NOV 10 1978
SC Court of Appeals

South Carolina Court of Appeals
PO. CLERK OF COURT
1015 SUMNER STREET
COLUMBIA, S.C. 29211

LEGAL MAIL