

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County
Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERIC MCCALL,

APPELLANT

Appellate Case 2018-000969

INITIAL BRIEF OF APPELLANT

TRISTAN M. SHAFFER

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

When the initial sentencing sheets are silent on whether the suspended time is to run concurrent or consecutive, can the Circuit Court decide to run the sentences consecutive at a probation revocation hearing?

STATEMENT OF THE CASE

On December 1, 2017 Appellant waived presentment and plead guilty to two counts of Domestic Violence Second Degree before the Honorable Frank Addy. R.* (DV Sentencing Sheets). Appellant was represented by Chelsea McNeill and the State was represented by Margaret Boykin. Plea Tr. 1

On each charge Defendant was sentenced to three years suspended on the service of four years of probation with credit for 54 days. R.* (DV Sentencing Sheets).

On April 26, 2018, Defendant entered a plea of guilty to resisting arrest and was sentenced to 1 year before the Honorable Frank R. Addy. R.* (Resisting Arrest Sentencing Sheet). Appellant was represented by Chelsea McNeill and the State was represented by Margaret Boykin. Probation Tr.1. This conviction was a violation of Defendant's probation. Judge Addy revoked Appellant's probation and sentenced Defendant to 6 years on the probation violation. Probation Tr. 15, ll. 3-5.

On May 3, 2018, Appellant moved for reconsideration of his sentence. R.* (Defendant's Motion).

The Court denied the motion to reconsider in a written order dated May 7, 2018. R.* (Order Denying Reconsideration).

This appeal follows.

ARGUMENT

- I. When the initial sentencing sheets are silent on whether the suspended time is to run concurrent or consecutive, it was error for the Circuit Court to run the sentences consecutive at a probation revocation hearing.

Relevant Facts

At his plea hearing on the domestic violence charges, the court stated the following:

THE COURT: On each of the domestic violence charges 24 what I've done, Mr. Spearman, is I've sentenced you to three 25 years. I have suspended those on the service of 54 days which you've already done. I've put you on probation for four years on each of those charges. Conditions of probation will be substance abuse counseling, random drug testing, and I'm requiring either marriage counseling between you and your wife if she's willing to participate, or if she's not included to participate, I'm requiring batterers treatment of you.

Plea Tr. 5, l. 22—6, l. 7. The sentencing sheets did not have either concurrent or consecutive boxes checked. R*(DV Sentencing Sheets).

In the motion for reconsideration, Appellant argued that the Court did not have the authority to in effect modify the sentences to run consecutive at a probation revocation hearing. R*(Motion to Reconsider, 3).

In the order denying the motion to reconsider, the circuit court found the following:

Accordingly, whether any subsequent revocation resulted in concurrent or consecutive time was at the discretion of the judge who handled the revocation.

R*(Order Denying Reconsideration).

The original sentence was suspended concurrent prison time.

There is longstanding authority that two sentences shall be concurrent unless there is a specific finding to the contrary. *See State v. Finley*, 219 S.C. 278, 282, 64 S.E.2d 881, 882 (1951) (“The rule of law is well settled that two or more sentences of a defendant to the same place of confinement run concurrently, in the absence of specific provisions in the judgment to the contrary, and, where a defendant is already in execution on a former sentence, and the second sentence does not state that the time is to commence at the expiration of the former, the sentences will run concurrently, in the absence of a statute providing for a different rule.”).

Appellant’s suspended sentence should be viewed as concurrent. The sentencing sheets do not indicate that the suspended time was consecutive. R* (DV Sentencing Sheets). Moreover, during the plea hearing the judge never specifically stated that the sentences are to be ran consecutively.

Although Judge Addy does make the comment of “you’ve got a total of six years over your head”¹, this is the type of ambiguous comment which is insufficient to alter the sentence. *See State v. DeAngelis*, 257 S.C. 44, 49, 183 S.E.2d 906, 909 (“When sentences are vague and indefinite the terms will run concurrent.”). Moreover, the sentencing sheets do not indicate that the sentence shall run consecutive. *Cf. Tant v. South Carolina Dept. of Corrections*, 408 S.C. 334, 759 S.E.2d 398 (2014) (“The Department contends our [*Boan v. State*, 388 S.C. 272, 695 S.E.2d 850 (2010)] decision adopted the majority rule that an oral pronouncement controls. We disagree.”).

Therefore, based on long standing law the sentences are presumed to be concurrent. *See Finley, supra*.

When considering the probation revocation matter, the Court did not have the power to effectively alter the sentence by ordering it to run consecutive.

During a probation revocation hearing, the Court's power is limited to the following:

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...

S.C. Code § 24-21-460 (emphasis added). The circuit court may not modify the sentence rather the circuit court can only revoke part or all of the sentence.

As stated above, the original sentence should be seen as concurrent rather than consecutive. The circuit court clearly² believed it had the authority to alter the sentence from concurrent to consecutive. The statute does not give the judge this authority in a probation revocation hearing. S.C. Code § 24-21-460; *see also, State v. Warren*, 392 S.C. 235, 238, 708 S.E.2d 234, 235 (Ct. App. 2011) ("Generally, a trial judge is without authority to consider a criminal matter once the term of court during which judgment was entered expires.") . Therefore, the judge's sentence for the probation revocation was controlled by an error of law and should be reversed.

¹ Plea Tr. 10, ll. 23-24.

² Judge Addy's order stated, "Accordingly, whether any subsequent revocation resulted in concurrent or consecutive time was at the discretion of the judge who handled the revocation." R*(Order Denying Reconsideration).

CONCLUSION

For the foregoing reasons Appellant respectfully requests that this Court remand the case for resentencing.

Respectfully submitted,



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This 13th day of November, 2018.

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Appeal from Laurens County
Frank Addy, Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

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V.

REGINALD SPEARMAN,

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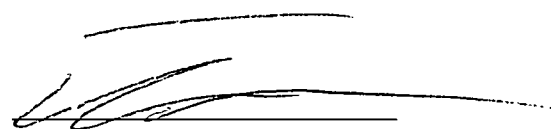
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Certificate of Service

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I certify that on this day, I have served a copy of the following on Respondent:

1. Petition to File the Initial Brief and Designation of Matter Out of Time;
2. Initial Brief of Appellant; and
3. Designation of Matter.


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