

STATE OF South Carolina
In The Court of Appeal
Appeal from the Administrative Law Court
Administrative Law Judge H.W. Funderburk, JR

ALC CASE NO: 18-ALJ-04-0293-AP
Appellate CASE NO: 2018-002013

Luther BRIAN MARCUS, #218408,

Appellant

vs.

South Carolina Department of Corrections,
Respondent

Reply Brief of Appellant

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JAN 25 2019

SC Court of Appeals

Luther BRIAN MARCUS #218408
Lee Ct F6-A-1128
990 Wisacky Hwy
Bishopville S.C. 29010

Appellant

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STATUTES

24-13-40 B)

The Administrative Law Court erred and abuse its discretion when it concluded that SCDL had correctly calculated Appellant's sentences.

Argument

Here comes the Appellant with his reply to SCDL Initial Brief on Appellate Case no: 2018-002013. In SCDL Brief they argue Appellant probationary period for the Oconee sentences couldn't begin until the completion of the larger concurrent pickens 15 year sentence September 30, 2016, because prior to that date Appellant was in custody of SCDL and not available to be on probation in the community and SCDL argues Appellant produce no evidence to establish that his probation started at the completion of the Oconee's (7) year split sentences. (See Brief of Respondent page 5.) Also SCDL argues Appellant was not entitled to time served credit for this time period because Appellant was serving another sentence in SCDL custody during this time, SCDL came to this conclusion under S.C. Code 24-13-40 2) "when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense." Appellant states SCDL above mention arguments are incorrect and unconstitutional misapplication of law 24-13-40. Appellant's reasons stated as following;

In the Brief of respondent, SCDL HAS OMITTED the fact Appellant was in simultaneously in custody on all concurrent sentences, Oconee sentences and pickens sentence, His Honor Judge MAKAWAY Order the Oconee Split sentences concurrent with pickens "whether multiple sentences run concurrent, is a matter left to the sound discretion of the trial Judge.. (State v. Barton 481 SE2d 439") Appellant states his probation period had to start at the end of the (7) year Oconee sentences and was passing as he completed the larger pickens 15 year sentence, cause the Oconee sentences were concurrent with pickens, to construed and applied otherwise would make Oconee sentence consecutively to pickens sentence. Concurrent means at the same time there can't be anything partial about it. SCDL stated Appellant hasn't produce any evidence to establish his probation started at the completion of the 7 years sentence. Appellant state this is 'incorrect' in view of the whole Record. (See Sentence sheets Indictment nos; 2009-GS-37-1190, 2009-GS-37-1192 and 2009-GS-37-1196, SCDL completed priors for SCDL nos; S00007, S00008 and S00009). The disputed Issue is when the probation period started, Clearly by the Records it had to be October 12, 2012, December 14, 2012, NOT December 14, 2018 AS SCDL stated in their Brief. Now Appellant comes to SCDL argument that he can't received Time served Credit Due to S.C. Code

24-13-40 2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense. SCDL interpretation of this statute is wrong and their application of this statute is unconstitutional. 24-13-40 2) provision which applies to the construction of a second offense start-date, but as the court has demonstrated elsewhere "a second offense is an offense that occurs after release from a first offense OR possibly during the service of the first offense.. State v. Gordon 588 SE2d 105"), Additional OR multiple offenses are not second offense for the purpose of statutory construction without directly implicating the eighth amendment. Therefore 24-13-40 2) provision does not applied to this instant case. Since the Record Reveals no appropriate period of tolling, absconding or partial revocation OR continuance and that the appellant was not awaiting trial and sentence for a second offense, in fact appellant was already under sentence and serving concurrent sentences, he is entitled to time served credit for the period between the completion of the 7 years and the completion of the pickens (15) year sentence. "When a genuine ambiguity exists as a result of the proposed application of a penal statute to a given situation, the rule of lenity requires that the doubt must be resolved in the defendant favor.. Bryant v. State 683 SE2d 280") SCDL Argues appellant can not receive time served credit for the time period between

September 30, 2016 (his release from SCDC) and December 15, 2016 (his arrest for indecent exposure) cause Appellant was not in pre-sentencing confinement and has not been charged with another offense SCDC cites (Blakeney v. State 529 S.E.2d 9) Appellant states he is entitled for credit cause probation is an act of grace to one already convicted of a crime at trial in South Carolina full protection of Due process of law, a proceeding of revocation is more in the nature of an extension of the original sentence. "The U.S. Supreme Court has held parolee is still in custody.. Jones v. Cunningham 371 US 236!!" "A probationer is shackled by those same restraints with his conditions of probation.. State v. Franks 281 S.E.2d 277!!")

Also SCDC argues Appellant cannot receive time served credit 162 days for the time between December 15, 2016 (his arrest for indecent exposure) and May 26, 2017 (the date he was served with probation warrants) where the Jail Time Report for SCDC Transfer dated December 12, 2017 shows Appellant was arrested for indecent exposure and probation violations, logical sense would tell you a hold was placed on Appellant at that time, under "Blakeney v. State.) Appellant is entitled to time served from the time a hold was placed.) Therefore Appellant is entitled to the 162 days of time served credit. Last SCDC argues Appellant cannot receive 562 days of time served credit he was given

on his original Oconee split sentences, cause appellant already received this Jail time credit when he came to SCDX in April of 2010, and because appellant has received credit then he is not entitled to the 562 days on the 8 year suspended sentence after probation revocation, SCDX cites Hayes v. State 777 SE2d 6 to back this conclusion up, as this court is aware this interpretation is wrong and under "Hayes v. State 777 SE2d 6 appellant is entitled to this 562 days of time served credit after a probation revocation hearing even if this time has been given once, because as this court has Rule in Hayes v. State to do otherwise would contradict 24-13-40 B) when the commencement of the sentence follows the revocation of probation, the computation of the time served shall be reckoned from the date of the commencement of the service of the sentence, In every case full credit shall be given for time served prior to trial and sentencing, this court also explain this statute did not make a distinction for split sentences, thus under the plain language of the statute, we find the pre-trial detention time should apply against a probation revocation whenever a probationer receives a split sentence." Therefore the appellant is entitled to the 562 days of time served credit. SCDX has stated appellant arguments are without merit, as the appellant has shown this claim is incorrect, because of SCDX misapplication

of statute 24-13-40 B) and the unconstitutional application of statute 24-13-40 2), Appellant has suffered substantial prejudice from a due process violation that was the outcome of an mis application of state law. Appellant has not been given all of the time served credit to which he is entitled for his current sentences, and his sentences has not been correctly calculated.

conclusion

For the foregoing reasons, this court should reverse the Administrative law court decision and award Appellant with proper time served credit.

Respectfully submitted
By: ~~Luther~~ B Marcus

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JANUARY 22, 2019

STATE OF South Carolina
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Administrative Law Judge H.W. Funderburk, JR

ALC CASE NO: 18-ALJ-04-0293-AP
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Certificate of Service

JAN 25 2019

SC Court of Appeals

Undersigned Appellant hereby certifies that on this date, he mailed a copy of the Reply Brief to Respondent SCDC, address as follows: Christina Bigelow, Deputy General Counsel, Office of General Counsel, SCDC, Post Office Box 21787, Columbia, S.C. 29221

January 22, 2019

S, Luther B Marcus
Luther Brian Marcus #218408
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January 22, 2019

Jenny A. Kitchings
Clerk of Court
Court of Appeals
P.O. Box 11629
Columbia S.C. 29211

RE: Luther B Marcus #218408 V. SCDL **RECEIVED**
Appellate Case no: 2018-002013
Appellants Reply Brief

JAN 25 2019
SC Court of Appeals

Dear Ms. Kitchings,

Enclosed please find appellants Reply Brief, along with proof of service, also a Designation matter on appeal in the above matter. Appellant would like to apprise this court to state he did not receive the brief of respondent until January 16, 2019 in case of time limit issue.

Sincerely,

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JAN 25 2019

SC Court of Appeals

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