THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM ADMINISTRATIVE LAW COURT

Case No. 2018-002013

Luther B. Marcus #218408, Appellant

vs.

South Carolina Department of Corrections, Respondent

FINAL BRIEF OF APPELLANT

Luther B. Marcus #218408
Lee C.I. F6A-1128
990 Wisacky Highway
Bishopville, South Carolina

Table of Contents

d) The Administrative Law Judge erred and abused his discretion when failed to credit Appellant with 562 days of time served he was original given on his 7 years concurrent split sentences,

5) Conclusion

Table of Authorities

Case Law **Page**

Statutes

Constitutional Provisions

Statement of issue on Appeal

Whether the Administrative Law Judge erred when he affirmed S.C. Department of Corrections decision were the substantial rights of the Appellant has been prejudiced, because the Administrative findings, inferences, conclusions, or decisions are, in violation of Constitutional or statutory provisions, affective by other error of law, clearly erroneous in view substantial evidence on the whole record, characterized by abuse of discretion?

Statement of Case

On March 16, 2010 Appellant was sentenced in Pickens County to 15 years on indictment #2010-GS-39-0445, Burglary Second Degree by his Honor Judge Welmaker.

On April 27, 2010 Appellant was sentenced in Oconee County on additional indictments #2009-GS-37-1190, 1192 and 1196, for counts of Burglary Second Degree for each of which he was sentenced to 15 years, suspended upon service of 7 years, with 5 years probation, Appellant was also sentenced to 7 years on Indictment #2009-GS-37-1191, for four counts of Safe Cracking and to 5 years on Indictment #2009-GS-37-1193, for four counts of Grand Larceny. All of these sentences were ordered to run concurrently with each other and with the 15 years Pickens County sentence received on March 16, 2010, with 562 days of time served credit by his Honor Judge Macaulay.

SCDC Records show Appellant completed the 7 year sentences for Indictments #2009-GS-37-1190, 1192, and 1196 on two different dates, October 12, 2012 and December 14, 2012. Also SCDC Records show Appellant was released from SCDC September 30, 2016 after making out the 15 year sentence from Pickens. On December 15, 2016 Appellant was arrested for Indecent Exposure, and On December 12, 2017 was convicted of that charge, Indictment #2017-GS-39-0183 and was sentenced to 3 years, thereafter Appellant was revoked in full on his April 27, 2010 sentences on Indictments #2009-GS-37-1190, 1192, and 1196 and was required to serve the remaining 8 years of these concurrent sentences. On April 12, 2018 Appellant filed a Step 1 Grievance, challenging the SCDC sentencing on the reinstated 8 year sentence. On April 19, 2018 Warden denied Appellant's Step 1 Grievance, Appellant filed a Step 2 Grievance on April 20, 2018, it was denied on May 22, 2018. Appellant filed his Notice of Appeal on June 4, 2018,

Appellant filed his Brief June 27, 2018, Appellant filed a "Motion to Amend Brief" August 23, 2018. On October 4, 2018 SCDC filed its Brief, On October 12, 2018 Appellant filed a Reply Brief, On October 22, 2018, SCDC filed a Reply to Appellant's Reply, On October 29, 2018 the Administrative Judge gave his order Affirming SCDC decision. On November 6, 2018 Appellant filed a Notice to Appeal in the Court of Appeals.

Standard of Review

"A Reviewing Court may reverse or modify the decision of the Administrative Law Court if the finding, conclusion or decision reached is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or is affected by error of law." ... original *Blue Ribbon Taxi v. S.C. Dept. of Motor Vehicles*, 670 SE 2d 674, 2008.

"This Court does not look merely at a particular clause in which a word may be used, but rather 'should look' at the word and its meaning in conjunction with purpose of the whole statement..." *S.C. Coastal Council v. S.C. Ethics Comm.*, 410 SE 2d 245

"However, this court reviews question of law "de nous." *State v. Whitner,* 732 SE 2d 861

Argument

A) The Administrative Law Judge erred when he failed to credit Appellant with time served for the period between completion of the 7 years concurrent split sentences, when the probationary period started until the completion of the concurrent 15 year Pickens sentence.

Relevant facts: On April 27, 2010 Appellant was sentenced on Indictments #2009-GS-37-1190, 1192, and 1193 to (15) Years, suspended upon service of (7) Years with (5) Years Probation, all of which was to run concurrent with each other, plus credited with (562) days of time served, the sentences were to run concurrent with the (15) year Pickens sentence. All sentences were back dated to November 5, 2008, this was specifically Order by Honorable Judge Macaulay. (see "Exhibits A3, B3, C3").

SCDC Records show the completion dates of the 7 year split sentence being on two different dates, October 12, 2012 and December 14, 2012, since these sentences are concurrent with Pickens sentence, the probationary period began at the completion of the 7 year split sentence. On September 30, 2016 after serving a total of (7) years (11) months Appellant was released from SCDC after maxing out the Pickens (15) year sentence to continue serving the probation of the Oconee Split sentences. On December 15, 2016 Appellant was arrested for Indecent exposure and probation violation. (see "Exhibit E") On December 12, 2017 the Appellant was found guilty of Indecent Exposure, he received 3 years for it and was revoked in full on the Oconee split sentences. (see "Exhibits A1, 2; B1, 2; C1, 2; E)

Appellant asserts he is entitled to time served credit for the period between the completion of Oconee 7 years, to the completion of the Pickens 15 year sentence while his probationary period of the Oconee 7 years was passing and Appellant was being confined in a

Penal Institution, under S.C. Code 24-13-40 "B) when the commencement of the service of the sentence follows revocation of probation, the computation of the time served must be calculated from the date of the commencement of the service of the sentence." In every case in computing time served by a prisoner, full credit against a sentence must be given for time served prior to trial and sentencing.

In Judge Funderburk's Order affirming SCDC decision to deny Appellant time served credit for above-mention period. His Honor based this off the following erroneous inferences. He stated on page 5 of his order, that both parties agree probation began on September 30, 2016, that is incorrect, Appellant has maintained through his grievances and appeal, the probationary period began at the completion of the 7 years. His Honor stated the completion dates of the 7 years to the completion date of the Pickens 15 year sentence was not relevant, because Appellant was not entitled to time served credit during this period, based off these conclusions...S.C. Code 24-13-40 (2) when a prison is serving a sentence for one offense and awaiting trial and sentence for a second offence in which case he shall not receive credit for time serve"... He also stated an inmate is not entitled to credit for time served following expiration of incarceration portion of a split sentence, while he is still serving a sentence for a separate offense, the Appellant cannot receive time served" while serving a sentence for a second offense and awaiting trial or sentencing for a second offense." The language from statute is clear and applies in this case. Appellant states this conclusion is in error and a unreasonable Interpretation of Statute 24-13-40 for these reasons;

Appellant was already under sentences imposed by the courts, Pickens March 16, 2010 and Oconee April 27, 2010, Oconee sentences were order concurrent with the Pickens sentence. Appellant was in the legal custody of SCDC. "Intent of Trial Judge is controlling in determining

whether a sentence runs concurrent or consecutively with a prior sentence... *Tant v. S.C. Department of Corrections*, 759 SE 2d (2014) "Concurrent sentence means a prisoner is given the privilege of having each day served be consider as service of more than one sentence..."*Maxey v. Manning*, 244 S.C. 320 Furthermore, if you construed statute 24-13-40 in the manner as Judge Funderfurk, SCDC, and denied Appellant time served credit, it would be basically turning a concurrent sentence into a consecutive one, thereby extending the Appellants criminal sentence. "There can be no doubt the length of an inmate incarceration implicates a constitutional Liberty Interest. 14 Amend. US Cons. *Tant v. SCDC*, 759 SE 2d 398" when the terms of the statute are clear and unambiguous, the court must apply them according to literal meaning, without resort to subtle or force construction to limit or expand the statute operation, when a statute is penal in nature, it must be construed strictly against the state, in favor of the defendant. *State v. Blackmon*, 403 SE 2d 660; *Kerr v. State*, 547 SE 2d 494

To construed statuted 24-13-40 (2) "citation omitted" as has Judge Funderburk and SCDC, is to implied this section limits a Trial Judge authority run a sentence concurrent with a prior sentence. "Whether multiple sentences should run concurrently or consecutively is a matter left to the sound discretion of the trial judge...." *State v. Barton*, 481 SE 2d 439

Judge Funderburk cited (*Blakeney vs. State*, 529 SE 2d 2000, stating that the court in *Crooks v. State*, 485 SE 2d 374, held time served in 24-13-40 means the time during which a defendant is in pre-trial confinement and charge with the offense for which he is sentenced, so long as he is not serving time for a prior conviction.) The circumstances does not apply to Appellant's case for two reasons: as Appellant has already mentioned, he was already under sentence imposed by the courts, when his shorter Oconee sentence was completed, his probationary period started and he had to complete the longer concurrent Pickens sentences. The

defendant in "*Crooks* 485 SE 2d" was on supervised furlough when he committed another offense. Judge Funderbuck also implies Appellant's probationary period cannot run concurrent with Pickens (15) year sentence Indictment #2010-GS-39-0445, therefore Appellant is not entitled to time served on is not entitled to time served credit on the Oconee split sentences for this time period. Appellant states this conclusion is in error. The court in "*State v. Crouch*, 585 SE 2d 288 stated Statutory law authorizes the circuit court to suspend the imposition or the execution of a criminal sentence, and place defendant on probation and in this case the court vacated the defendant Newberry County probation, because it had expired, it expired while running concurrently with other sentences, while defendant was in SCDC custody, therefore the court has recognized a probation sentence can run concurrent with a incarcerated sentence" Appellant would like to point to this Honorable Court, if the Oconee sentences were a straight (15) year sentence, instead of being a suspended sentence, then Appellant would of already maxed it out, with it not being a no-parole offense with "good time 24-13-210" "work credit 24-13-230" and time off in "suspended cases 24-13-220", Appellant would have had only to do (7) years (10) months on a (15) year sentence. Appellant is not making a attack on his conviction just an observation.

"The suspended and unsuspended portion is the defendant's original sentence." 24-21-560 (D) *State v. Picklesimer*, 695 SE 2d 845 The court in "*Higgins v. State*, 357 S.C. 2004...Indicated legislative intent to award sentencing credits to those who spent time in a penal institution" Since Appellant was still incarcerated after the completion of Oconee (7) years and probation was running concurrent with Pickens sentence, Appellant is entitled to approximately 1508 days time served.

Argument

B) The administrative Law Judge erred when he failed to credit Appellant with time served for probation, specifically between September 30, 2016 to December 15, 2016.

In Judge Funderburk's Order affirming SCDC decision to deny Appellant time served credit, the Judge stated the Appellant cannot receive time served time for this period, Because "Appellant" a defendant cannot serve time toward a sentence for an offense prior to being charge with a offense and confined for it awaiting trial. Appellant's case is different for a number of reasons, it's a concurrent split sentence, Appellant has been under sentence and serving it for a while, he hasn't been a free citizen during this time. Appellant states under Judge Funderburk reasoning a defendant could serve (4) years (11) months on (5) years probation from a (8) year suspended sentence and violated the probation, and still end up serving (8) years without any time served credit, this would be absurd result and a violation of "24-21-440" the period of probation or suspension of sentence shall not exceed a period of (5) years." The Court in *Ellis v. State*, 726 SE 2d 5 stated probation, suspension of the sentence is clearly a part of a criminal defendant "term of imprisonment". Could also be a violation of a defendant 14 Amend. Cons. Right. "A probationer has a protected Liberty Interest..." *State v. Allen*, 634 SE 2d 653 For these reasons, Appellant is entitled to time served credit for this period, approximately 76 days.

Argument

C) The Administrative Law Judge erred when he failed to credit Appellant with time served from his arrest December 15, 2016 to May 26, 2017 when he was finally served with probation warrant.

In Judge Funderburk's Order affirming SCDC decision to deny Appellant with time served credit for this time period, he stated he agree with SCDC, that Appellant was not entitled to time served credit for this period, because Appellant was not charged with the offense until May 26, 2017, when Appellant was served with probation warrant.

The Appellant admits the warrant was served on May 26, 2017, but states a hold was placed on him for probation violation on December 15, 2016 (See "Exhibit E") In "*Blakeney v. State,* 529 SE 2d 9...the defendant was entitled for time served credit when hold was placed" under statute 24-13-40. "In every case in computing time served by a prisoner, full credit against must be given for time served prior to trial and sentencing." Therefore when the hold was placed for probation violation he was in fact being charged for it, the sentence was a reinstated suspended sentence, this court has rule in "*Hayes v. State*, 777 SE 2d... that a defendant is entitled to time served credit, after probation revocation for a split sentence." Judge Funderburk stated SCDC is confined to the face of sentencing sheets "*Tant v. SCDC*, 759 SE 2d 398" Appellant states this is true unless there is ambiguity in the sentencing sheets, there are two sets of revocation form 9 for each of three indictments (see "Exhibits A1, 2, 3; B1, 2, 3; C1, 2, 3) For these reasons Appellant is entitled to time served credit.

As you can see by Exhibits A1-2; B1-2; C1-2, there are two different remainder of sentences to be served, on one set of revocation form 9, it states (8) years on the other set it

states (15) years, then it states Appellant has served (7) years initial SCDC time, how can these revocation form 9 not be ambiguous. The question in Appellant's mind is which set of revocation form 9 did SCDC use to calculate Appellant's sentence, clearly by this reason the calculations are in error, Appellant is entitled to approximately 162 days of time served.

Argument

D) The Administrative Law Judge erred and abused his discretion when he failed to credit Appellant with 562 days of time served he was originally given on his 7 year concurrent split sentences.

In Judge Funderburk's Order affirming SCDC decision not to credit Appellant with any time served, he noted on page 1 that all Oconee 7 years split sentences on Indictment #2009-GS-37-1190, 1192, and 1196 were to run concurrent with each other, with credit for 562 days of time served. (see "Exhibits A3, B3, C3) On page 8 he noted that Appellant cites "*Hayes v. State*, 777 SE 2d 6", and that the court agrees that an inmate can receive credit for time served against a reinstated sentence following a probation revocation but the Judge failed to credit Appellant with the 562 days of time served on his reinstated 8 year sentence follows revocation of probation, the computation of the time served must be calculated from the date of commencement of the service of the sentence. "The statute does not make a distinction for split sentences, thus under the plain language of the statue, we find the pre-trial detention time should apply against a probation revocation, whenever a probationer receives a split sentence..." *Hayes v. State*, 777 SE 2d 6 His Honor Funderburk had the authority to credit Appellant with the 562 days of time served under 1-23-380 ----------failed to exercise it." An abuse of discretion occurs when the trial court ruling is based upon an error of law... *Fontaine v. Peitz*, 354 SE 2d 565 "Failure to exercise discretion is an abuse of discretion...*State v. Smith*, 280 SE 2d 200 The mere recital of the discretion decision is not sufficient to bring into operation a determination that discretion was exercised, *State v. Smith*, 280 SE 2d 200

Therefore the Administrative Law Judge abused his discretion and erred as matter of law, when he denied Appellant time served credit on his reinstated (8) year suspended sentence. The denial prejudiced Appellant because there was evidence on the record of everything Appellant stated in his arguments. (See "Exhibits A1-3; B1-3; C1-3; D, E, F) and under statute 24-13-40 Appellant is entitled to time served credit.

CONCLUSION

By reasons of the foregoing arguments Appellant requests that this case be reversed and Appellant awarded the proper time served credit.

Done this 13th Day of May 2019

Respectfully submitted,

Luther B Marcus

Luther B. Marcus #218408

Lee C.I. F6A-1128

990 Wisacky Highway

Bishopville, South Carolina