THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
APPEAL FROM ADMINISTRATIVE LAW COURT

Administrative Law Judge H. W. Funderburk, Jr.

ALC Case No. 18-ALJ-04-0293-AP

Case No. 2018-002013

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SC Court of Appeals

Luther B. Marcus #218408, Appellant

vs.

South Carolina Department of Corrections, Respondent

FINAL REPLY BRIEF OF APPELLANT

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Statement of issue on Appeal

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

Argument

Here comes the Appellant with his reply to SCDC Initial Brief on Appellate Case No. 2018-002013. In SCDC Brief they argue Appellant's probationary period for the Oconee sentences couldn't began until the completion of the larger concurrent Pickens 15 year sentence September 30, 2016, because prior to that date Appellant was in custody of SCDC and not available to be on probation in the community and SCDC argues Appellant produced 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 SCDC argues Appellant was not entitled to time served credit for this time period because Appellant was serving another sentence in SCDC Custody during this time, SCDC 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 SCDC above mention arguments are incorrect and unconstitutional misapplication of law 24-13-40. Appellant's reasons stated as following:

In the Brief of Respondent, SCDC has omitted the fact Appellant was in simultaneously in custody on all concurrent sentences, Oconee sentences and Pickens sentences. His Honor Judge Macaulay Ordered 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 SE 2d 439 Appellant states his probation period had to start at the end of the (7) year Oconee sentences were concurrent with Pickens, to construe 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. SCDC stated Appellant hasn't produced any evidence to establish his probation started at the completion of the 7 year sentence. Appellant states this is incorrect in view of the whole record. (see Sentence sheets Indictment No.'s: 2009-GS-37-1190,

2009-GS-37-1192 and 2009-GS-37-1196, SCDC completed priors for SCDC No.'s: 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 SCDC stated in their Brief.

Now Appellant comes to SCDC 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 a second offense. SCDC 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 SE 2d 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 apply 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 defendants favor..." *Bryant v. State*, 683 SE 2d 280) SCDC argues Appellant cannot 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 sites (*Blakeney v. State*, 529 SE 2d 9) Appellant states he is entitled for

credit because 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 US Supreme Court has held parolee is still in custody..." *Jones v. Cunningham*, 371 US 236 "A probationer is shacked by those same restraints with his conditions of probation..." *State v. Franks*, 281 SE 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, because Appellant already received this Jail Time Credit when he came to SCDC 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, SCDC cites "*Hayes v. State*, 777 SE 2d 6), to back this conclusion up, as this Court is aware this interpretation is wrong and under" *Hayes v. State*, 777 SE 2d 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 ruled 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 explains 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. SCDC has stated Appellant's arguments are without merit, as the Appellant has shown this claim is incorrect, because of SCDC 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 misapplication 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's decision and award Appellant with proper time served credit.

Done this **12th**, Day of **May**, 2019

Respectfully submitted,

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