STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STACARDO GRISSETT,

APPELLANT

APPELLATE CASE NO. 2018-001525

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the revocation judge err by refusing to give Appellant credit for the nearly two hundred days he served in custody between when he was served with the community supervision violation warrant and his revocation hearing where the judge revoked Appellant's community supervision, since credit for time served was mandatory pursuant to S.C. Code Ann. § 24-13-40 and the judge's refusal to provide credit for time served allowed Appellant's sentence for the revocation to exceed the one year maximum permitted by S.C. Code Ann. § 24-21-560(C)?

STATEMENT OF THE CASE

A Richland County grand jury indicted Appellant on April 15, 2009 for strong armed robbery, kidnapping, and second degree lynching. R. 31-36. On September 16, 2010, Appellant pled guilty as indicted before the Honorable L. Casey Manning. R. 37-39. Assistant Solicitor L. Eden Hendrick represented the state, and Tynika Claxton represented Appellant. R. 37-39. Appellant was sentenced to ten years for strong armed robbery, ten years for second degree lynching, and eight years for kidnapping. R. 37-39. The judge ordered the sentences be served concurrently. R. 37-39.

On August 1, 2017, after serving eighty-five percent of his sentence, Appellant was released from incarceration and enrolled in a community supervision program (CSP). R. 26. On November 1, 2017, Appellant was arrested for violating the terms and conditions of his CSP. R. 26. On May 18, 2018, Appellant appeared before the Honorable Clifton B. Newman for a CSP violation hearing. R. 1. Agent Amanda King appeared on behalf of the Department of Probation, Parole, and Pardon Services (the Department). R. 1. Zoe Bruck represented Appellant. R. 1.

At the conclusion of the hearing, Judge Newman found Appellant violated the terms and conditions of his CSP and revoked the remainder of Appellant's CSP. R. 11, ll. 3-15. However, the judge refused to give Appellant credit for the 198 days he had spent in custody since his arrest on the violation warrant. R. 11, l. 7 – 14, l. 8; R. 16-17.

On May 24, 2018, Appellant filed a motion to reconsider arguing he was entitled to credit for time served pursuant to S.C. Code Ann. § 24-13-40 and State v. Boggs, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010). R. 18-20. On June 5, 2018, the Department, represented by

Matthew Buchanan, filed a reply to Appellant's motion to reconsider. R. 21-24. By order filed August 7, 2018, Judge Newman denied the motion. R. 25.

This appeal follows.

STANDARD OF REVIEW

"The determination of whether to revoke probation in whole or part rests within the sound discretion of the trial court." State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006) (citing State v. Miller, 122 S.C. 468, 474-475, 115 S.E. 742, 745 (1923); State v. Proctor, 345 S.C. 299, 301, 546 S.E.2d 673, 674 (Ct. App. 2001)); See State v. Garrard, 390 S.C. 146, 151, 700 S.E.2d 269, 272 (Ct. App. 2010) (applying the standard of review in Allen to an appeal from an order revoking community supervision). "The trial court must determine whether the State has presented sufficient evidence to establish that a probationer has violated the conditions of his probation." Id. (citing State v. King, 221 S.C. 68, 73, 69 S.E.2d 123, 125 (1952); State v. White, 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950); State v. Hamilton, 333 S.C. 642, 648–49, 511 S.E.2d 94, 97 (Ct. App. 1999)).

"An appellate court will not reverse the trial court's decision unless that court abused its discretion." Allen, 370 S.C. at 94, 634 S.E.2d at 656 (citing White, 218 S.C. at 135, 61 S.E.2d at 756; Hamilton, 333 S.C. at 647, 511 S.E.2d at 96). "An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." Id.

STATEMENT OF THE FACTS

At the beginning of the revocation hearing, Agent King informed Judge Newman that Appellant was sentenced to ten years for second degree lynching and eight years concurrent for kidnapping.[1] On August 1, 2017, after serving eighty-five percent of his sentence, Appellant was released on CSP. R. 3, ll. 9-16; R. 26. His CSP, as determined by the Department, was to be sixteen months long. R. 3, ll. 16-17. Agent King alleged Appellant violated the terms of his CSP by failing to provide a current address, moving without permission, willfully associating with a person whom Appellant knew had a criminal record, and being arrested on several new charges, including armed robbery, kidnapping, and criminal conspiracy. R. 3, l. 18 – 4, 25; See R. 26. Consequently, she requested Appellant's CSP be revoked, noting he had 299 days remaining. R. 5, ll. 9-11.

Appellant admitted to part of the allegations raised by Agent King. App. 5, l. 12 – 6, l. 5. However, he requested Judge Newman continue his CSP due to his poor health. Appellant was stabbed sixteen times in 2016 and was in a coma for four months. Although he survived, he continued to suffer from serious complications as a result. At the time of the hearing, Appellant had a catheter that had to be changed frequently and "full blown" sepsis. His counsel explained that because Appellant repeatedly succumbed to infections, he ultimately would require surgery. Appellant was also scheduled to receive radiation treatment. Due to his poor health, Appellant's counsel asserted "sending him to SCDC . . . would possibly be a death sentence." R. 6, l. 8 – 8, l. 13. Consequently, Appellant requested Judge Newman continue his CSP and allow him to "serve out those remaining 299 days." R. 8, ll. 11-13.

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[1] Appellant also pled guilty to strong armed robbery and was sentenced to a concurrent ten years.

Judge Newman ultimately revoked Appellant's CSP. R. 11, ll. 3-4. When asked by Agent King whether he was giving Appellant credit for time served, Judge Newman asserted, "He [Appellant] gets credit for whatever he is entitled to credit for." R. 11, ll. 10-13. However, Agent King maintained if Appellant's CSP was revoked in full and he received credit for the time he served since his arrest for the violation then he would "come back out on community supervision again for the time that he has been incarcerated." R. 11, ll. 14-20. She further explained, "To max out the sentence, Your Honor, he would not be . . . allowed to have credit for the time that he has been in [jail awaiting his revocation hearing]. Otherwise, he will come back out on a new certificate." R. 12, ll. 1-5.

An individual only identified as Mr. Cannon further claimed, "Your Honor, if you provide him with credit for time served, the Department of Corrections will calculate back to when . . . he was incarcerated on the CSP warrant, which would be roughly six months, so that would apply that six months to the 299 days. He would therefore be released ultimately six months prior to his max out date, then he will have six months more of CSP to do. If you were to just revoke the 299 days and not provide for the time served, he would do 299 days and then his CSP would be done." R. 12, ll. 8-19.

Judge Newman ultimately revoked the 299 days Appellant had remaining on CSP and ordered he not receive credit for time served. R. 13, l. 23; R. 16-17.

Appellant filed a motion to reconsider arguing he was entitled to credit for the 198 days he spent in custody since he was served with the violation warrant until the date of his revocation hearing pursuant to S.C. Code Ann. § 24-13-40 and State v. Boggs, 388 S.C. 314, 696 S.E.2d 597 (2010). R. 18-20. Appellant asserted "it is mandatory that a defendant receive credit for the

time that he was held awaiting sentencing." R. 16. Because neither exception found in § 24-13-40 applied to Appellant, he argued he must receive credit for time served. R. 16-19.

Additionally, citing to S.C. Code Ann. § 24-21-560(C)(5), Appellant explained that if a prisoner is in violation of his CSP, the court "may revoke the prisoner's community supervision and impose a sentence of *up to one year* for violation of the community supervision program." R. 18 (emphasis in original). Based on this statute, Appellant argued that because he had already served 198 days, he could only serve an additional 167 days in the custody of the Department of Corrections for this revocation. R. 19. By refusing to give him credit for time served, Appellant asserted his sentence for the revocation was effectively 496 days, 130 days over the maximum revocation allowed by statute. R. 19.

In reply, the Department argued the second exception found in § 24-13-40, which states credit for time served prior to trial and sentencing shall not be given when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense, applied to Appellant since "he was not only incarcerated on the CSP warrant, but also warrants for" two counts of kidnapping, two counts of armed robbery, assault and battery first degree, criminal conspiracy, and three counts of possession of a firearm by a violent felon. R. 21-22; See S.C Code Ann. § 24-13-40.

Citing to S.C. Code Ann. § 24-21-560(C), the Department also argued "the CSP statute explicitly states that the inmate is not entitled to earn credits that would reduce the sentence." R. 21. Consequently, according to the Department, Appellant was not entitled to credit for the 198 days he served on the CSP warrant awaiting his revocation hearing. R. 22-23.

Further, the Department argued:

> CSP is not like Probation. The supervision is limited to the suspended portion of the sentence or the remaining fifteen percent of a defendant's sentence

> after serving 85 percent at the Department of Corrections. See State v. Picklesimer, 388 S.C. 264, 695 S.E.2d 845 (2010). Consequently, when an inmate begins a term of CSP, the Department calculates the number of days of the program. *Each day the inmate is not absconded reduces that number, whether the inmate is incarcerated or in the community.* For example, if the inmate has 100 days remaining on CSP, that inmate will be finished with his supervision after 100 days. If, however, the inmate is given a 100-day revocation and is given 40 days of pre-sentence time, that inmate would serve 60 days and would therefore have to serve 40 more days in the community.

R. 22(emphasis added).

Lastly, the Department argued "to apply pre-sentence credit" would undo the intent of the sentencing judge. The judge intended for Appellant to serve the remaining portion of his CSP, 298 days, in prison. R. 22-23. According to the Department, if the presentence credit was applied to Appellant's sentence, he would not be finished with his CSP upon release. R. 23. He would, in effect, be released 198 days earlier than the judge intended, "with that same amount of days of CSP that must be completed." R. 23.

After noting the court cannot terminate CSP, the Department concluded the sentencing judge could not sentence Appellant to incarceration for the remainder of his CSP while Appellant also received credit for his presentence detention, arguing "[t]o do so and terminate CSP at the same time would amount to double credit." R. 23.

By order filed August 7, 2018, Judge Newman ultimately denied the motion finding "the sentence imposed is not improper nor excessive under the circumstances." R. 25.

ARGUMENT

The revocation judge erred by refusing to give Appellant credit for the nearly two hundred days he served in custody between when he was served with the community supervision violation warrant and his revocation hearing where the judge revoked Appellant's community supervision, since credit for time served was mandatory pursuant to S.C. Code Ann. § 24-13-40 and the judge's refusal to provide credit for time served allowed Appellant's sentence for the revocation to exceed the one year maximum permitted by S.C. Code Ann. § 24-21-560(C).

I. Credit for Time Served is Mandatory Pursuant to S.C. Code Ann. § 24-13-40 Towards a Sentence for a Revocation of Community Supervision

Appellant was entitled to credit for the time he served between when he was served with the CSP violation warrant and the date of his revocation hearing pursuant to S.C. Code Ann. § 24-13-40 because neither exception found in the statute applied. The statute states:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. . . . In every case in computing the time served by a prisoner, **full credit against the sentence must be given for time served prior to trial and sentencing**, and may be given for any time spent under monitored house arrest. Provided, however, that **credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.**

S.C. Code Ann. § 24-13-40 (emphasis added).

"The requirement that a prisoner receive credit for time served is mandatory." Hayes v. State, 413 S.C. 553, 559, 777 S.E.2d 6, 10 (Ct. App. 2015) (citing State v. Boggs, 388 S.C. 314, 316, 696 S.E.2d 597, 598 (Ct. App. 2010)). "Thus, a prisoner will receive credit for time served

unless either (1) they were an escapee or (2) the prisoner was already serving a sentence on a different offense." Id. at 560, 777 S.E.2d at 10 (citing S.C. Code Ann. § 24-13-40).

In Boggs, the sentencing judge indicated he did not want to give the defendant credit for time served and did not check the box on the sentencing sheet indicating credit for time served. Boggs, 388 S.C. at 316, 696 S.E.2d at 598. The judge acknowledged Boggs was entitled to credit but stated on the record that "when I don't check it off" the Department of Corrections would not give Boggs the credit, concluding, "I am just telling you how it works in the real world." Id. This Court reversed the sentencing judge, holding the statutory credit for time served was mandatory and a "judge's disappointment in the maximum sentence he can impose is not one of the exceptions to the mandatory language" in the statute. Id.

In Hayes, the defendant pled guilty to possession of crack cocaine and criminal conspiracy and was sentenced to five years' imprisonment, suspended to time served and three years' probation. The trial judge ordered Hayes receive credit for 240 days time served. Hayes, 413 S.C. at 555, 777 S.E.2d at 8. Hayes was subsequently charged with various probation violations. Id. The probation revocation judge ultimately revoked his probation, reinstated three years of his suspended sentence, and terminated probation. Id. The judge noted Hayes had previously served 240 days and should receive credit for this time. Id. However, the Department of Corrections refused to apply the 240 days to Hayes' reduced sentence. Hayes argued on appeal that the plain language of § 24-13-40 required his pretrial detention credit be awarded to his partially revoked sentence. Id. at 558, 777 S.E.2d at 9. He also emphasized that if the Department of Corrections applied the statute in the same way to a full revocation, the result would be a longer sentence than authorized by law. Id.

This Court agreed and held Hayes was entitled to credit for the 240 days time served based on the plain language of the statute. Id. at 560, 777 S.E.2d at 10. The Court emphasized the statute does not make a distinction for split sentences and pretrial detention time should apply against a probation revocation whenever a probationer received a split sentence. Id.

Like the defendants in Boggs and Hayes, Appellant was entitled to credit for the presentence time he served on the CSP warrant while awaiting his revocation hearing as neither of the exceptions found in § 24-13-40 applied. Appellant was not an escapee and he was not already serving a sentence on a different offense. See Hayes, 413 S.C. at 560, 777 S.E.2d at 10 (citing S.C. Code Ann. § 24-13-40). Consequently, credit for time served was mandatory. See Boggs, 388 S.C. at 316, 696 S.E.2d at 598.

In its reply to Appellant's motion to reconsider, the Department argued Appellant was not entitled to credit for time served pursuant to § 24-13-40 because he was not only incarcerated on the CSP warrant, but also on warrants for his new pending charges. R. 21. According to the Department, "the jail time credit that he [Appellant] is seeking credit for is time while he is awaiting trial and sentence [for] another offense." R. 21. Given these circumstances, the Department asserted Appellant was not entitled to credit for time served pursuant to the second exception found in the statute. R. 21-22. However, this argument is based on a misreading of the statute and/or a misunderstanding of Appellant's circumstances.

Again, the exception states in relevant part: "credit for time served prior to trial and sentencing shall not be given . . . when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense *in which case he shall not receive credit for time served prior to trial in a reduction of his sentence* ***for the second offense***. Appellant was incarcerated and serving a sentence for strong armed robbery, kidnapping, and second degree

lynching for which he pled guilty to on September 16, 2010. He was also incarcerated on pending charges for which he was awaiting trial and sentence. Appellant's new charges constitute the "second offense" referenced in the statute. Consequently, Appellant is not entitled to credit for the time he served on the CSP warrant and his ultimate CSP revocation if he is convicted of and sentenced for his new pending charges.

As Judge Newman recognized during the revocation hearing: "Well, a person on community supervision is an inmate outside of the institution. You are still serving time. And you are placed outside the institution into the community under community supervision." R. 10, ll. 3-7. It is undisputed that Appellant was still serving his sentence for his 2010 convictions for strong armed robbery, kidnapping, and second degree lynching when he was arrested and incarcerated on new charges. Consequently, Appellant was entitled to credit towards his 2010 sentence for the presentence time he served on the CSP warrant. However, he would not be entitled to credit for the time he served on his CSP revocation towards any sentence he may receive on his new charges.

Additionally, in its reply, the Department argued to give Appellant credit for time served would "undo" the intent of the sentencing judge who desired Appellant serve the remaining 299 days of his CSP in prison. R. 22-23. However, as this Court made clear in Boggs, a "judge's disappointment in the maximum sentence he can impose is not one of the exceptions to the mandatory language" in § 24-13-40. See Boggs, 388 S.C. at 316, 696 S.E.2d at 598. Judge Newman's desire for Appellant to serve the remainder of his CSP incarcerated is not one of the exceptions to the mandatory language in § 24-13-40. Consequently, regardless of the judge's intent, Appellant was entitled to credit for the time he served presentence.

Moreover, based on the Department's own argument, Appellant was entitled to credit for time served. In its reply to Appellant's motion to reconsider, the Department asserted, "CSP is not like Probation. The supervision is limited to the suspended portion of the sentence or the remaining fifteen percent of a defendant's sentence after serving 85 percent at the Department of Corrections. Consequently, when an inmate begins a term of CSP, the Department calculates the number of days of the program. *Each day the inmate is not absconded reduces that number, whether the inmate is incarcerated or in the community.*" R. 22. Based on the Department's own statement, Appellant was entitled to credit for the time he served on the CSP warrant before his revocation hearing since he was not absconded at the time. The 198 days Appellant spent incarcerated presentence had to reduce the amount of time he had remaining on CSP.

Respectfully, this Court should hold Appellant was entitled to credit for time served pursuant to § 24-13-40 because neither exception outlined in the statute applied.

II. Appellant's Sentence Exceeded the One Year Revocation Allowed Pursuant to S.C. Code Ann. § 24-21-560(C)

Pursuant to S.C. Code Ann. § 24-21-560(C), the Department argued in its reply that Appellant was not entitled to credit for time served while in custody awaiting his revocation hearing because this statute states an inmate is not entitled to earn credits that would reduce the sentence for a violation of the community supervision program. R. 22. However, receiving credit for time served would not reduce Appellant's sentence for the violation of his CSP. In fact, the opposite is true. Not providing Appellant credit for time served extended his sentence longer than allowed by law. Section 24-21-560(C) states in relevant part:

> If the court determines that a prisoner has willfully violated a term or condition of the community supervision program, the court may impose any other terms or conditions considered appropriate and may continue the prisoner on community supervision, or *the court may revoke the prisoner's community supervision and*

> *impose a sentence of* ***up to one year*** for violation of the community supervision program. A prisoner who is incarcerated for revocation of the community supervision program is not eligible to earn any type of credits which would reduce the sentence for violation of the community supervision program.

S.C. Code Ann. § 24-21-560(C) (emphasis added).

Because Appellant had already served 198 days of the one year sentence the court could impose pursuant to the statute, he could only serve an additional 167 days in the custody of the Department of Corrections for this revocation. Appellant's sentence, which denied him credit for the time he served between his arrest on the CSP warrant and his revocation hearing, was effectively a 497 day sentence, which is 132 days over the maximum revocation allowed by law. Consequently, Appellant's sentence as ordered by Judge Newman was illegal as it was in clear violation of § 24-21-560(C).

Citing to State v. Scott, 351 S.C. 584, 571 S.E.2d 700 (2002), the Department properly acknowledged that the court cannot terminate CSP. R. 23. Because Appellant was entitled to credit for time served pursuant to § 24-13-40 and because Judge Newman could not terminate Appellant's CSP, Appellant should have been ordered to serve an additional 167 days incarcerated, which was the remainder of the one year revocation permitted by law, and then serve an additional 132 days in the community to satisfy his sentence. Judge Newman's desire to terminate Appellant's CSP cannot trump the law. This avoids Appellant receiving "double credit" as suggested by the Department. See R. 23.

Respectfully, this Court should hold Appellant's sentence violated § 24-21-560(C) because he was ordered to serve 167 days more than one year permitted for a revocation.

III. Despite being Moot, the Issue is Capable of Repetition but Evading Review

Because Appellant is no longer incarcerated and has completed his CSP, this issue is moot. However, "an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." Hayes, 413 S.C. at 558, 777 S.E.2d at 9 (quoting Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)) (internal quotation marks omitted). As this Court held in Hayes, where the defendant did not receive credit for time served due to the split nature of his sentence, the issue here is capable of repetition but evading review. See Id. It is apparent, based on the record before this Court, that the Department is urging circuit court judges to order prisoners, such as Appellant, not receive credit for time served to which they are entitled pursuant to § 24-13-40. Consequently, prisoners, such as Appellant, are being ordered to serve sentences that exceed the one year maximum per revocation allowed pursuant to § 24-21-560(C). Therefore, Appellant respectfully requests this Court address the merits.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court hold Appellant was entitled to credit for time served pursuant to S.C. Code Ann. § 24-13-40 and that his sentence as ordered violated S.C. Code Ann. § 24-21-560(C) because it exceeded the one year maximum sentence permitted per revocation.

Respectfully Submitted,

Lara M Caudy

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Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of June, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 28, 2019

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