

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Pickens County  
Honorable Edward W. Miller, Circuit Court Judge  
Appellate Case No. 2018-000161

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**RECEIVED**  
JUL 30 2019  
SC Court of Appeals

THE STATE,

Respondent,

vs.

ORIN JERRELL KEMP,

Appellant.

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**INITIAL BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUE ON APPEAL

Appellant's argument the plea judge abused his discretion by "refusing" to order a specific amount of credit for time served as part of the sentence imposed is not properly preserved for appellate review because Appellant neither raised any objections to his sentence during the guilty plea hearing nor asked the plea judge, who ordered Appellant receive all the credit for time served to which he was statutorily entitled, to make a specific determination regarding the issue of credit for time served and, therefore, cannot appropriately raise any objections to his sentence, including in regard to the manner in which credit for time served was awarded, for the first time on appeal.

## STATEMENT OF THE CASE

Over the course of several years, Appellant Orin Jerrell Kemp was arrested on multiple occasions in connection to a series of vehicle break-ins and thefts. In March of 2017, the Pickens County Grand Jury indicted Appellant for one count of breaking and entering a motor vehicle and one count of petit larceny, which was subject to enhancement as a third or subsequent property crime pursuant to Section 16-1-57 of the South Carolina Code of Laws. On January 24, 2018, Appellant appeared—along with several other defendants involved in unrelated cases—in the Pickens County Court of General Sessions for a guilty plea hearing before the Honorable Edward W. Miller, circuit court judge. During the course of the hearing, Appellant waived presentment on additional charges of possession of burglary tools and financial transaction card theft and then entered guilty pleas to all four charges. At the conclusion of the plea hearing, Judge Miller accepted Appellant’s guilty pleas and sentenced him to an aggregate ten-year term of imprisonment, which was suspended upon the completion of a five-year term of imprisonment along with three years of probation. Appellant then timely filed a notice of appeal.<sup>1</sup>

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<sup>1</sup> Along with the notice of appeal, defense counsel filed a lengthy explanation pursuant to Rule 203(d)(1)(B) of the South Carolina Appellate Court Rules. (Rule 203 Explanation from Defense Counsel). In that lengthy explanation, defense counsel raised a number of factual allegations and arguments that were never presented to the plea judge. (Rule 203 Explanation from Defense Counsel). Furthermore, defense counsel identified “[p]roceeding forward with a guilty plea in contravention of the underlying agreement of the State and undersigned counsel as to the credit for time served” as the issue appropriate for appellate review. (Rule 203 Explanation from Defense Counsel).

## STATEMENT OF FACTS

Throughout a multi-year span of time, Appellant was arrested on several different occasions in and around the campus of Clemson University in connection to a series of vehicle break-ins and thefts. (Tr. pp. 19-20; Arrest Warrant # 2016A3920300063; Arrest Warrant # 2016A3920300064; Arrest Warrant # 2017A3920300019; Arrest Warrant # 2017A3920300040). As a result of his actions, the Pickens County Grand Jury indicted him for petit larceny and breaking into a motor vehicle. (Tr. p. 3; Indictment # 2016-GS-39-02937; Indictment # 2016-GS-39-02939).

Following the issuance of those indictments, Appellant appeared in the Pickens County Court of General Sessions for a guilty plea hearing. (Tr. p. 3). During the course of the hearing, Appellant acknowledged he was facing the petit larceny and breaking into a motor vehicle charges, and he waived presentment on additional charges of possession of burglary tools and financial transaction card theft. (Tr. pp. 10-11; Indictment # 2018-GS-39-0248; Indictment # 2018-GS-39-0249). Furthermore, he affirmed to the plea judge he understood the penalties he was facing on each of those charges, which amounted to a maximum term of imprisonment of twenty-five years. (Tr. pp. 10-11). After doing so, Appellant unreservedly pled guilty to all four charges unreservedly, indicated his decision to do so was made freely and voluntarily, and admitted he was guilty of all the offenses. (Tr. pp. 11-13).

Once Appellant entered his guilty pleas, the solicitor recounted the facts of Appellant's crimes along with the details of Appellant's extensive prior criminal record.<sup>2</sup> (Tr. pp. 19-20). Additionally, one of Appellant's victims addressed the court and explained Appellant's criminal

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<sup>2</sup> By the time he entered his guilty pleas, Appellant had been convicted of over twenty-five prior crimes, including multiple counts of breaking into a motor vehicle and petit larceny, over the course of a criminal career spanning more than two decades. (Tr. pp. 20-21).

actions had negatively impacted her life. (Tr. pp. 20-21). Following those remarks, the plea judge accepted Appellant's guilty pleas but indicated he was not going to go along with a recommendation from the parties.<sup>3</sup> (Tr. p. 21).

At that point, defense counsel asserted he negotiated a "deal" with the solicitor for Appellant to receive a sentence of ninety days in the "stockade" while further receiving *no* credit for 706 days of time he had already served, and he urged the plea judge to "go along" with that "deal" or "offer."<sup>4</sup> (Tr. pp. 22-23). In response, the solicitor noted Appellant had served 281 days in Pickens County, 240 days in the South Carolina Department of Corrections on unrelated charges, and 185 days in Anderson County on unrelated charges, and she contended Appellant was not entitled to credit for the time he served on the Anderson County charges.<sup>5 6</sup> (Tr. pp. 23).

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<sup>3</sup> Consistent with the plea judge's statement about a sentencing recommendation being made, the information contained in the sentencing sheets from Appellant's case reflects Appellant pled guilty with a recommendation from the State as opposed to entering guilty pleas with a negotiated sentence. (Sentencing Sheets). Notably, the sentencing sheets were personally signed by the solicitor, defense counsel, the plea judge, *and* Appellant. (Sentencing Sheets).

<sup>4</sup> As to what was meant by defense counsel's use of the word "stockade," the Pickens County Prison apparently was colloquially known as the "stockade." See, e.g., Nikie Mayo & Mike Ellis, *Sheriff: Pickens County inmates escape, 1 shot dead by homeowner, 1 captured*, ANDERSON INDEPENDENT MAIL, Dec. 4, 2018, <https://www.independentmail.com/story/news/2018/12/04/sheriff-pickens-county-inmates-escape-one-shot-dead-homeowner/2200186002/> (explaining the Pickens County Prison was "commonly called the stockade").

<sup>5</sup> Pursuant to South Carolina law, 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." S.C. Code Ann. § 24-13-40. Based on that, Appellant was statutorily prohibited from receiving credit for the time he served in the Department of Corrections on unrelated charges. Id.

<sup>6</sup> At the time he entered his guilty plea in Pickens County, Appellant was in the process of resolving nineteen charges in total. (Tr. p. 23).

Defense counsel then asserted he believed the “resolution” he discussed with the solicitor was an appropriate means of giving Appellant credit for the time he had served. (Tr. pp. 23-24).

After considering those contentions, the plea judge again affirmed he was not going along with the recommendation of the parties. (Tr. p. 27). The plea judge then sentenced Appellant to an aggregate ten-year term of imprisonment, and he suspended that sentence to a five-year term of imprisonment coupled with a three-year term of probation. (Tr. p. 27). Furthermore, the plea judge expressly ordered Appellant receive all the credit for time served to which he was statutorily entitled while—consistent with the language from South Carolina’s accepted sentencing sheet form—leaving the calculation of that non-discretionary credit to the staff at the South Carolina Department of Corrections.<sup>7 8</sup> (Tr. p. 27; Sentencing Sheets). Thereafter, defense counsel did *not* raise any objections to the sentence imposed on any grounds or seek any further actions from the plea judge in regard to Appellant’s credit for time served. (Tr. p. 27).

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<sup>7</sup> On the accepted South Carolina sentencing sheet form, the relevant portion regarding credit for time served reads as follows: “The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.” (Sentencing Sheets).

<sup>8</sup> Generally, the issue of credit for time served is *not* discretionary. See Hayes v. State, 413 S.C. 553, 559, 777 S.E.2d 6, 10 (Ct. App. 2015) (“The requirement that a prisoner receive credit for time served is mandatory.”); see also State v. McCord, 349 S.C. 477, 487, 562 S.E.2d 689, 694 (Ct. App. 2002) (“[T]his matter is not discretionary with the trial court.”). However, in the limited circumstance of credit for time served on monitored house arrest, the matter falls within the sentencing judge’s discretion. See S.C. Code Ann. § 24-13-40 (“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.”).

## STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The issue of whether a criminal defendant is serving an illegal or unconstitutional sentence constitutes a question of law. Bordeaux v. State, 410 S.C. 495, 499, 765 S.E.2d 143, 145 (2014). Therefore, an appellate court considering the lawfulness of a sentence reviews the matter de novo solely for errors of law. Id.; see Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (“[Appellate courts] are free to decide a question of law with no particular deference to the circuit court.”).

## ARGUMENT

**Appellant's argument the plea judge abused his discretion by "refusing" to order a specific amount of credit for time served as part of the sentence imposed is not properly preserved for appellate review because Appellant neither raised any objections to his sentence during the guilty plea hearing nor asked the plea judge, who ordered Appellant receive all the credit for time served to which he was statutorily entitled, to make specific determination regarding the issue of credit for time served and, therefore, cannot appropriately raise any objections to his sentence, including in regard to the manner in which credit for time served was awarded, for the first time on appeal.**

Appellant contends the plea judge abused his discretion when he purportedly "refused" to order a specific amount of credit for time served while maintaining 706 days of credit should have been awarded.<sup>9</sup> In making that particular contention, Appellant readily acknowledges the plea judge did, in fact, award him with credit for time served as part when imposing the sentence, but Appellant nonetheless faults the plea judge for leaving the calculation of the precise amount of non-discretionary credit earned to the Department of Corrections, who was responsible for administering the sentence after it was imposed. Significantly though, defense counsel did not raise any objections to Appellant's sentence after it was imposed, did not ask the plea judge to specifically determine and designate the amount of days of credit for time served to which Appellant was entitled, and did not argue to the plea judge he was required to take such action. As a result, the plea judge was never asked to take the action Appellant now contends he abused his discretion by allegedly refusing to take. Under such circumstances, Appellant failed to preserve any issue with the manner in which credit for time served was ordered in his case, and his appellate argument cannot properly be considered or addressed for the first time on appeal. Appellant's convictions and aggregate sentence should be affirmed.

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<sup>9</sup> As the incident giving rise to the financial transaction card theft charge occurred just 368 days before the guilty plea hearing and the incident giving rise to the possession of burglary tools charge occurred just 282 days before the guilty plea hearing, Appellant presumably is not contending on appeal he should have been awarded 706 days of credit on those particular charges. (Tr. p. 1; Arrest Warrant # 2017A3920300019; Arrest Warrant # 2017A3920300040).

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is “to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review.” Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity “to rule properly after it considered all relevant facts, law, and arguments.” I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). If an issue is not presented to and ruled upon by the circuit court judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Critically, on appeal, an appellant is limited solely to the grounds raised at trial. State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997); see State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) (“[A] party cannot argue one theory at trial and a different theory on appeal.”).

Moreover, in the context of sentencing issues, a criminal defendant is required to contemporaneously object to an alleged sentencing error during trial in order to preserve an issue

with a sentence for appellate review. State v. Salisbury, 330 S.C. 250, 276, 498 S.E.2d 655, 669 (Ct. App. 1998); see State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) (“[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.”). Importantly, an appellant’s failure to timely object to or seek modification of a sentence in the trial court precludes him from pursuing the issue on appeal. State v. Winestock, 271 S.C. 473, 475, 248 S.E.2d 307, 308 (1978); see State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (“No objection to sentencing was raised at trial and this issue is not properly before the court.”); State v. Shumate, 276 S.C. 46, 47, 275 S.E.2d 288, 288 (1981) (“A defendant’s failure to timely object to or seek modification of his sentence in the trial court precludes him from presenting his objection for the first time on appeal. Appellant’s contention was not advanced at the probation revocation hearing where the results were most favorable to him. By failing to object to or seek modification of the revocation sentence in the trial court he is now foreclosed from doing so on appeal.” (citations omitted)).

In the case sub judice, Appellant contends on appeal—for the first time—the plea judge abused his discretion when he “refused” to specifically designate the amount of credit for time served Appellant was to receive after he entered his guilty pleas. Importantly though, during the guilty plea hearing, defense counsel did not ask the plea judge to specifically determine the number of days of credit for time served Appellant should receive and did not argue to the plea judge he was required to do so when sentencing Appellant. Likewise, since defense counsel did not ask the plea judge to make a specific determination regarding Appellant’s entitlement to credit for time served, defense counsel obviously did not accuse the plea judge of refusing to make such a determination. Instead, defense counsel simply contended Appellant had served 706 days of incarceration prior to pleading guilty while urging the plea judge to accept a “deal”

under which Appellant would receive *no* credit for time served whatsoever. Then, after the plea judge declined to accept the parties' sentencing recommendation, imposed the sentence he believed was appropriate under the circumstances, and ordered Appellant to be given credit for all the time served to which he was entitled without expressly specifying the exact amount he should receive, defense counsel did not raise any objections or make any further requests of the plea judge, including in regard to the manner in which the credit for time served was awarded. See Roche v. South Carolina Alcoholic Beverage Control Comm'n, 263 S.C. 451, 455, 211 S.E.2d 243, 244 (1975) ("[T]he purpose of appeal under our procedure is 'to determine if the lower court did something that it should not have done, or omitted doing something it should have done.' Accordingly, a trial judge will not be reversed for failing to act on a matter that was not submitted to him." (citation omitted)); cf. State v. Vang, 353 S.C. 78, 85, 577 S.E.2d 225, 228 (Ct. App. 2003) (finding any issue resulting from the trial judge's failure to take a particular action was not preserved for appellate review because Vang did not ask the trial judge during trial to take the action Vang contended on appeal should have been taken).

Since defense counsel neither raised any objections to Appellant's sentence nor challenged the plea judge's decision to award credit for time served without making an express determination as to the specific amount of credit to which Appellant was entitled, no arguments or objections were preserved for appellate review in regard to the issue of Appellant's credit for time served. See Johnston, 333 S.C. at 462, 510 S.E.2d at 425 ("[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review."). Therefore, Appellant is precluded from raising any objections or challenges to his sentence, including in regard to his credit for time served, for the first time on appeal. See State v. McCray, 222 S.C. 391, 394, 73 S.E.2d 1, 2 (1952) (finding McCray's appellate contention the sentence imposed

was “cruel and excessive” was unavailable to him on appeal because that particular contention was not raised to the circuit court judge); see also I’On, 338 S.C. at 422, 526 S.E.2d at 724 (“The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.”); see generally In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) (“Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review.”). As a result, Appellant’s appellate challenge to the plea judge’s manner of awarding credit for time served is not properly preserved for appellate review and cannot appropriately be raised or addressed for the first time on appeal.<sup>10</sup> See State v. Walker, 252 S.C. 325, 327-328, 166 S.E.2d 209, 210 (1969) (declining to address Walker’s appellate contention the sentence he received could not have properly been imposed “on the elementary ground that the question was not raised below”); cf. State v. Gulledge, 321 S.C. 399, 404-405, 468 S.E.2d 665, 669 (Ct. App. 1996) (“Gulledge . . . argues the State did not prove she had the resources to pay \$210,000.00 in restitution and the trial court failed to state its findings and the underlying facts and circumstances of them. Because this argument was neither raised to nor addressed by the trial court, we need not deal with it.” (citation omitted)). Appellant’s convictions and aggregate sentence should be affirmed.

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<sup>10</sup> Moreover, since the plea judge expressly awarded Appellant with the credit for time served to which he was statutorily entitled and there is nothing appearing in the record establishing Appellant has not received any of the credit he believes he should have received, Appellant very well may have received both everything he is seeking and everything he is entitled to under the law, and, thus, he has failed to meet his burden of establishing an error actually occurred in his case. See Thomasko v. Poole, 349 S.C. 7, 17, 561 S.E.2d 597, 602 (2002) (“It is well established that an appellant seeking reversal of a decision by the trial court must show both error and prejudice.”); see also State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (“Inasmuch as the appellant obtained the only relief he sought, this court has no issue to decide.”); State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (“[T]his Court has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression or corrupt motive.”).

**CONCLUSION**

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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July 30, 2019

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Pickens County  
Honorable Edward W. Miller, Circuit Court Judge  
Appellate Case No. 2018-000161

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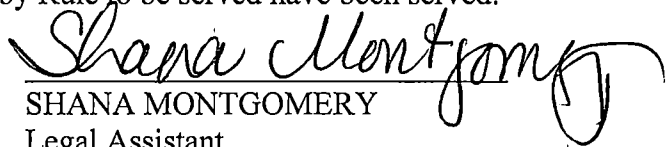
**PROOF OF SERVICE**

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I, Shana Montgomery, certify I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Victor R. Seeger, Esq.  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
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I further certify all parties required by Rule to be served have been served.  
This 30th day of July, 2019.

  
SHANA MONTGOMERY  
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ALAN WILSON  
ATTORNEY GENERAL

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July 30, 2019

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SC Court of Appeals

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Columbia, SC 29211

RE: State v. Orin Jerrell Kemp – Appellate Case No. 2018-000161

Dear Mr. Seeger:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case:

Sincerely,

Mark R. Farthing  
Assistant Attorney General  
Bar Number 76901

MRF/  
Enclosures

cc:  (original enclosed)  
Victim Advocacy Division