STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Richland County

Honorable Frank R. Addy, Circuit Court Judge

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SC Court of Appeals

THE STATE,

APPELLANT,

V.

RAHEEM AQUIL,

RESPONDENT

APPELLATE CASE NO 2016-002029

FINAL BRIEF OF RESPONDENT

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

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ISSUES PRESENTED

I.

The issue of whether the circuit court committed an abuse of discretion in terminating Appellant's community supervision is not preserved for Appellate review.

II.

The circuit court did not commit an abuse of discretion or an error of law in terminating Appellant's community supervision.

STATEMENT OF THE CASE

Respondent was convicted of assault and battery of a high and aggravated nature (ABHAN) on October 2, 2014. R. 7 - 12. The Honorable Deandrea G. Benjamin sentenced Respondent to ten years of incarceration suspended with the service of seven months incarceration and five years of probation. R. 7 - 12.

This sentence was to be served concurrently with Respondent's conviction for distribution of cocaine base; second offense, intimidation of court officials or jurors; assault and battery, first degree; and possession with intent to distribute marijuana. R. 7 – 12. Respondent was sentenced to thirty days of incarceration for possession of marijuana, first offense. *Id.*

On August 28, 2015, Respondent appeared in front of the Honorable Robert E. Hood on allegations that he violated the terms of his probation. R. 13 - 17. Judge Hood sentenced Respondent to one year for probation violations and terminated both probation and community supervision. *Id.*; R. 3, l. 12 – 5, l. 10. Through inadvertence, Judge Hood failed to clarify on several of the termination orders that he intended to terminate both probation and community supervision. *Id.*

On September 22, 2016, Respondent appeared before the Honorable Frank Addy, Jr. for a community supervision violation hearing. R. 1 – 6. Probation Agent Nathan Rizer represented the State. Ben Stitley represented Respondent. At the hearing both parties agreed that Judge Hood had intended to – in addition to revoking Respondent and sentencing him to one year incarceration – terminate Respondent's probation and community supervision. Accordingly, Judge Addy – without objection from the State – terminated Respondent's probation and community supervision. *Id.*

ARGUMENT

The issue of whether the circuit court committed an abuse of discretion in terminating Appellant's community supervision is not preserved for Appellate review.

Relevant Facts

At the September 22, 2016 hearing Agent Rizer and defense counsel explained to Judge Addy that Respondent's appearance before the court was the result of a "legal snafu." R. 5, ll. 1-21. Both parties agreed that there had been a misunderstanding regarding Judge Hood's intended ruling at the earlier, August 15, 2015 revocation hearing:

Agent Rizer:	If it please the Court, this is kind of a unique situation on this one. I can on that or do you want me to give the report?
Court:	No. Go ahead.
Defense Counsel:	Judge, we're asking just for you to order this case be terminated. I think the agent's in agreement with me. We went in front of Judge Hood a year and half ago, and apparently the three of us – Agent Rizer and myself and Judge Hood – kind of messed up something that cause [Respondent] to get put on community supervision when the intent was to give him one year and terminate his whole case. He finished his time, came out, didn't think he was on probation. We learned that he put on supervised released about four months after the fact. I've talk to everyone at SCDC. Probation's tried very hard on this; and we think we're at the conclusion if you order just to terminate and close his case, it can be done. It was everyone's intent, when he did the one year before, to terminate back then. I think Agent Rizer will agree with me on that.

Agent Rizer:	**That's correct, Your Honor.** I just – I just don't know that we can terminate a [community supervision] case.
Defense Counsel:	And the young lady I spoke to over at the Department said that if the judge writes "end the case," the case gets ended. So we're asking if you would consider doing that.
Agent Rizer:	And that was the initial intent. . .

R. 3, l. 5 – 4, l. 9.

Judge Addy then asked the parties if it was Judge Hood's intention to end Respondent's sentence. R. l. 16 – 5, l. 10. Defense counsel and Agent Rizer agreed that had been Judge Hood's intent and the intent of the parties. Without objecting to Judge Addy signing an order carrying out Judge Hood's intent, Agent Rizer again perfunctorily speculated that it might not be possible to terminate community supervision. *Id.*

Agent Rizer did not provide the Court with any legal authority or further elaborate on why he thought termination might not be possible. Despite numerous references by defense counsel to having consulted with SCDC and probation officals, Agent Rizer never requested the Court give him additional time to check with his supervisors or with either agency's general counsel's office. *Id.*

Without any objection from Agent Rizor, Judge Addy requested that defense counsel draft an order carrying into effect Judge Hood's intention that Respondent should have his probationary sentence and community supervision terminated. *Id.* Judge Addy issued a written order on terminating Respondent's sentence. The State did not file any post-trial motions.

Discussion

South Carolina is a strict error preservation state. An issue which is not properly preserved cannot be raised for the first time on appeal. *State v. Vanderbilt*, 287 S.C. 597, 598, 340 S.E.2d 543 (1986). In order to preserve an error for appellate review, a defendant must make a contemporaneous objection on a specific ground. *State v. Holliday*, 333 S.C. 332, 338, 509 S.E.2d 280, 283 (Ct. App. 1998). "The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge." *Id.*

A trial judge commits no error in overruling a general objection. *State v. Bailey*, 253 S.C. 304, 310, 170 S.E.2d 376, 379 (1969). If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. *State v. Pauling*, 322 S.C. 95, 99, 470 S.E.2d 106, 109 (1996).

Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct.App.2004). The rationale for the rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error. *Id.*

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide a proper platform for meaningful appellate review. *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 372-73, 628 S.E. 2d 902, 919 (Ct. App. 2006).

Here, the issue of whether the circuit court abused its discretion in terminating Petitioner's community supervision is manifestly unpreserved. As an initial matter, Agent Rizer never objected to Judge Addy carrying out Judge Hood's intent. Judge Addy specifically asked

"if you're telling me that it was Judge Hood's intention to terminate the case, then I'll honor what Judge Hood intended to do." R. 4, ll. 16-18. Agent Rizer did not object.

The only evidence of any disagreement by Agent Rizer were two vague statements pondering whether or not a community supervision sentence can be terminated. R. 3, ll. 2-11. This is not an objection. Agent Rizer gave Judge Addy no grounds or reasons as to why Agent Rizer thought terminating Respondent's community supervision was improper.

Moreover, the State and the defense agreed that it was Judge Hood's intention – at the August 15, 2015 hearing – to terminate Respondent's probation and his community supervision. R. 3, l. 12 – 5, l. 10. As Agent Rizer succinctly put it, "[t]hat was the initial intent." R. 4, l. 9. There is no evidence in the record or in the State's initial brief that Agent Rizer or any other representative of the State objected to Judge Hood's initial intent to terminate community supervision.

The law of the case doctrine also precludes the State from now arguing that Judge Hood was incorrect. *Belton v. State*, 313 S.C. 549, 554, 443 S.E.2d 554, 557 (1994) (holding that one circuit court was without authority to review findings of another with regards to whether Budget and Control Board had jurisdiction to hear reinstated employee's appeal of the Board's calculation of her "back pay"). The State agreed at the hearing that Judge Hood's intent was to terminate Respondent's probation and community supervision after Respondent served one year for his violation. R. 3, l. 12 – 5, l. 10; *see also Priester v. Brabham,* 230 S.C. 201, 95 S.E.2d 167 (1956) (holding that, because there was no exception to the ruling of the court below, that ruling, right or wrong, was the law of the case).

Whether or not Judge Hood had the power to order such a sentence is irrelevant as the State did not object to Judge Hood's sentence when he handed it down at the August 15, 2015

hearing. Thus, the State cannot now raise – for the first time on appeal – the argument that Judge Hood abused his discretion or committed an error of law. Furthermore, even if the State had objected to the sentence, Judge Addy would not have had the authority to overrule Judge Hood. R. 4, ll. 16-20; *see also Cook v. Taylor,* 272 S.C. 536, 252 S.E.2d 923 (1979); *Sheppard v. Kimbrough,* 282 S.C. 348, 318 S.E.2d 573 (Ct.App.1984).

Therefore, in addition to being unpreserved for want of an objection, the State's failure to raise this argument when before Judge Hood in August, 2015, made his ruling the law of the case under which they are now bound. Respondent's sentence should be affirmed.

II.

The circuit court did not commit an abuse of discretion or an error of law in terminating Appellant's community supervision.

Relevant Facts

The State appears to argue in its brief – for the first time in this case – that Judge Hood, or possibly Judge Addy, erred by terminating Respondent's community supervision. Appellant's Br. p. 3 – 5. The State takes the position that the judicial branch does not have authority to terminate a community supervision sentence. *Id.* Rather the State avers that the authority to terminate an individual's participation in a community supervision program lies solely in the unfettered discretion of the Department of Probation, Parole, and Pardon Services. *Id.*

This argument – in addition to being unpreserved – is without merit. Sentencing is an inherently judicial function. S.C. Const. art. I, § 8; *see also State v. Archie*, 322 S.C 135, 470 S.E.2d 380 (1996) (holding that Probation Department may not enhance a probationers' sentence). Moreover, the statutory scheme put in place by the General Assembly through the Comprehensive Community Control System, clearly envisions judicial review of all Department decisions relating to the terms, conditions, and revocation of an individual's participation in the community supervision program. S.C. Code Ann. § 24-21-540; § 24-21-560(C), (D).

Discussion

In criminal cases, the appellate courts sit to review preserved errors of law only. *In re Walter M.*, 386 S.C. 387, 390, 688 S.E.2d 133, 134 (Ct. App. 2009). A trial judge has broad discretion in sentencing and a sentence will not be overturned absent an abuse of discretion based on an error of law or a material factual conclusion without evidentiary support. *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). Appellate courts will only interfere

with the discretion of a judge in the imposition of a sentence in rare and unusual circumstances. *State v. Ferguson*, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952).

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct.App.2002) (*citing State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct.App.1999) *cert. denied as improvidently granted, State v. Hudson*, 346 S.C. 139, 551 S.E.2d 253 (2001).

The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan* at 366, 574 S.E.2d 203, 547 S.E.2d at 206. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limit or expand the statute's operation. *Id.*

Courts should consider, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *Hudson*, 336 S.C. 237, 519 S.E.2d 577.

Finally, penal statutes must be strictly construed against the State and in favor of the defendant. *Hair v. State*, 305 S.C. 77, 406 S.E.2d 332 (1991). Any doubt as to the proper construction should be resolved in favor of the citizen against the state. *State v. Cutler*, 374 S.C. 376, 264 S.E.2d 420 (1980); *see also Yates v. United States*, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity).

Pursuant to the Comprehensive Community Control System, individuals sentenced to no parole offenses are required to enter a community supervision program. S.C. Code Ann. § 24-21-510, et. seq. The community supervision program is an intensive and intrusive form of probation created by the General Assembly and administered by the Department of Probation, Parole, and Pardon Services (the "Department"). *Id.* A term of community supervision is a separate sentence from a probationary sentence.

The Department has authority to design and oversee many aspects of the community supervision programs. S.C. Code Ann. 24-21-510. For example, unlike a probationary sentence, the Department has the authority to specify the "period of a time a prisoner is required to participate in a community supervision program and the individual terms and conditions of a prisoner's participation shall be at the discretion of the Department based upon guidelines developed by the director." S.C. Code Ann. § 24-21-560(B).

Contrary to the State's arguments, the Department's discretion is not absolute. Appellant's Br. p. 3 – 5. The judicial branch, through the circuit courts, has the power to review the Department's decision to revoke an individual's community supervision program. Specifically, when the Department believes an individual has violated a term of community supervision, "[t]he court shall determine whether:"

> (1) the terms of the community supervision program are fair and reasonable;
>
> (2) the prisoner has complied with the terms of the community supervision program;
>
> (3) the prisoner should continue in the community supervision program under the current terms;
>
> (4) the prisoner should continue in the community supervision program under other terms and conditions as the court considers appropriate;

(5) the prisoner has willfully violated a term of the community supervision program.

S.C. Code Ann. § 24-21-560(C).

In addition, 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." *Id.*

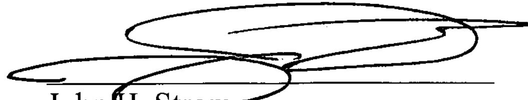
The trial court, not the Department, retains the final authority to review the terms, conditions, and alleged violations of individual's in the community supervision program. Accordingly, Judge Hood had the authority to sentence Respondent to a year of incarceration and then order his probation and community supervision program be terminated upon his release.

Any argument to the contrary by the State clearly violates the separation of powers and results in an absurd situation where the Department, an executive branch agency, would effectively have the power to veto circuit court determinations regarding whether an individual violated the terms of his community supervision program.

Accordingly, the court's sentence should be affirmed.

CONCLUSION

By reason of the foregoing argument, the trial court's decision and Respondent's sentence should be affirmed.



John H. Strom
Appellate Defender

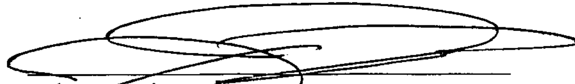
ATTORNEY FOR RESPONDENT

This 18th day of April, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

April 18, 2017



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