STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Pickens County
The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-002622

THE STATE, ... RESPONDENT

v.

LUTHER BRIAN MARCUS ... ... APPELLANT

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. **Whether the trial court abused its discretion when it revoked the Appellant's probation in full?**

STATEMENT OF THE CASE

The Respondent concurs with the Appellant's Statement of the Case.

ARGUMENT

I. THE JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE REVOKED THE APPELLANT'S PROBATION AND SENTENCED HIM TO THE MAXIMUM TIME REMAINING IN HIS SENTENCE.

On April 27, 2010 in Oconee County the Appellant was convicted of second degree burglary and was sentenced to fifteen years imprisonment, suspended to seven years to serve, with five years of probation on release from prison. (R.p.6; ll. 23-24). The South Carolina Department of Corrections (SCDC) released him from imprisonment for this charge on September 30, 2016. (R.p.8; ll. 3-4). Soon thereafter he was charged with willfully exposing himself in a public place, which the State alleged to have occurred on December 13, 2016. (R.p.2, ll. 20-25; R.p.3, ll. 1-3). He was convicted of this charge on December 12, 2017. (Rp.4; ll. 22-24). After the verdict, the Court took up the matter of the Appellant's probation violation. (R.p.6-p.9). Counsel for the Appellant, David D. Cantrell (Cantrell) claimed that SCDC had erred in the amount of time Appellant was required to serve in prison on the underlying conviction. Specifically he claimed that SCDC had imprisoned the Appellant for eleven months longer than the suspended sentence required. (R.p.6, ll. 24-25; R.p.7, ll. 1-2). He pointed out that the Appellant had been serving several Oconee and Pickens County convictions concurrently. (R.p.6, ll. 17-24). He stated that because the Appellant had served more time than the suspended sentence required, this would "max out his sentence on the 15-year sentence, therefore he should not be continued on probation . . . ." (R.p.7, ll. 5-7). He also stated that "we believe he would be entitled to all credit for all of those times and that that would – should be credited to any active sentences, and that that maxed him out on all the sentences." (R.p.7, ll. 12-15). After Cantrell's statements, Judge Edward W. Miller (the Judge) responded "Well, that's all not in my jurisdiction, as you are aware." (R.p.7, ll. 24-25). A little later in the hearing the Appellant himself stated "I just feel like I maxed a total of

15 years out from those suspended sentences . . . . I feel like I gave my time to the State". The Judge responded with "[y]ou understand that's not up to me." (R.p.8, ll. 18-23). Thereafter the Judge sentenced him to three years for the willful exposure conviction, and revoked the entirety of the time remaining in the underlying sentence. (R.p.9, ll. 6-7).

Discussion.

A. The Judge Correctly Believed He Had No Jurisdiction Over Prison Term Calculations Performed By SCDC.

In his brief, the Appellant claims that when the judge revoked the Appellant's probation, he was not doing so because he believed he had jurisdiction and discretion to do so, but because he didn't believe he had discretion to modify the terms of Appellant's probation. Alternatively stated, the Appellant argues that the judge believed he only had discretion to fully revoke the Appellant's probation.[1] This claim is based on the Judge's statements in responses to the Appellant and to his counsel. However, this is not a reasonable interpretation of those statements. Instead, they indicated that the Judge did not believe he had jurisdiction over time served calculations properly made by SCDC. Cantrell claimed that the Appellant had maxed out the total amount of prison time he should have served, and that SCDC then improperly held him for a further eleven months. (R.p.6, ll. 24-25; R.p.7, ll. 1-2). He appears to have wanted the judge to treat the alleged extra amount of time served by the Appellant as time served against any further penalty of jail time for the probation violation. Other than his own statements, Cantrell provided no evidence that SCDC had in fact held the Appellant too long, or that he had maxed out his sentence.[2] After Cantrell made this argument, which was premised on an error by SCDC, the Judge stated in response "Well,

[1] See Appellant's Initial Brief, pp. 5 and 6.

[2] Note that the Appellant was released from prison 6 years, 5 months, and 3 days after his conviction; 04-27-10 through 09-30-16.

that's all not in my jurisdiction, as you are aware." (R.p.7, ll. 24-25). The only reasonable interpretation of this response is that the Judge meant that he had no jurisdiction to determine exactly how much time the Appellant should have served, or *should serve* when revoked, because the General Assembly had assigned this responsibility to SCDC. See infra Section B. If the Judge revoked his probation and sentenced him to prison time, it may be that the extra time Cantrell alleged the Appellant had served should shorten the amount of time he would actually serve, but that determination would be up to SCDC, not the trial court. This is why, when the Appellant stated that "I feel like I gave my time to the State", the Judge replied with "[y]ou understand that's not up to me". (R.p.8, ll. 18-23). He was not in either instance referring to his discretionary power over the terms and conditions of the Appellant's probation; he was referring to his jurisdiction to calculate the proper length of prison terms *after incarceration by SCDC*. He correctly stated that he had no jurisdiction to make such calculations.

B. The South Carolina Department of Corrections Has Jurisdiction Over Calculating the Amount of Time To Be Served by Prisoners.

The Appellant claims that the Judge abused his discretion because he failed to exercise his power to modify the terms and conditions of probation. However, what the Appellant was asking the Judge to do was to abuse his discretion by making prison time served calculations that were not within his power to make. This is because after a person has been sentenced and bound over to SCDC's custody, it is SCDC that calculates the total amount of time for which the person should actually be imprisoned. "There is hereby created as an administrative agency of the State government the Department of Corrections. The functions of the Department shall be to implement and carry out the policy of the State with respect to its prison system . . . and the performance of such other duties and matters as may be delegated to it pursuant to law." S.C. Code § 24-1-30. "The director shall be vested with the exclusive management and control of the prison system, and

all properties belonging thereto . . . and shall be responsible for the management of the affairs of the prison system and for the proper care, treatment, feeding, clothing, and management of the prisoners confined therein. The director shall manage and control the prison system." S.C. Code § 24-1-130. The management of the prison system includes determining the length of time served:

> 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. However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, 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 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.

S.C. Code Ann. § 24-13-40

It may be that the Appellant is entitled to get credit for time served before his probation was revoked, but this will be determined by SCDC. It may also be that the amount of time he serves will be reduced for other reasons. See e.g. S.C. Code §§ 24-13-210 (credit given inmates for good behavior); 24-13-220 (time off for good behavior in cases of commuted or suspended sentences); 24-13-150 (early release, discharge, and community supervision; limitations; forfeiture of credits). However, with regards to the Appellant, these calculations are to be made by SCDC, not the court.

C. Counsel For the Appellant Did Not Request a Partial Revocation, Therefore the Judge Could Not Have Abused His Discretion When He Did Not Order a Partial Revocation.

The General Assembly granted the State's circuit judges the discretion to revoke an offender's probation in part or in full:

> [T]he court . . . shall cause the defendant to be brought before it and may revoke the probation or suspension of sentence and shall proceed to deal with the case as if there had been no probation or suspension of sentence except that the circuit judge before whom such defendant may be so brought shall have the right, in his discretion, to require the defendant to serve all or a portion only of the sentence imposed. Should only a portion of the sentence imposed be put into effect, the remainder of such sentence shall remain in full force and effect and the defendant may again, from time to time, be brought before the circuit court so long as all of his sentence has not been served and the period of probation has not expired.
>
> S.C. Code Ann. § 24-21-460

"The decision to revoke probation is in the discretion of the circuit court judge." State v. Williamson, 356 S.C. 507, 510, 589 S.E.2d 787, 788 (Ct. App. 2003). "This [C]ourt's authority to review such a decision is confined to correcting errors of law unless the lack of legal or evidentiary basis indicates the circuit judge's decision was arbitrary and capricious." Id. (quoting State v. Hamilton, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct.App.1999)).

The Appellant argues that the Judge abused his discretion because he did not consider a partial rather than full revocation, or consider otherwise modifying the terms of his probation. However, the Appellant's counsel, Cantrell, was not asking the court for a partial revocation. It appears that he wanted the judge to treat the Appellant's alleged excess time served in prison on the underlying sentence as time served against any penalty for the probation violation, and apparently also wanted him to terminate the Appellant's probation. He claimed that SCDC had jailed the Appellant for too long, and made a couple of indirect statement about what should happen: "So we believe that that would, in fact, max out his sentence on the 15-year sentence, therefore, he should not be continued on probation . . . ." (R.p.7, ll. 4-7). He stated further that "we believe he would be entitled to all credit for all of those times and that that would – should be credited to any active sentences, and that that maxed him out on all the sentences." (R.p.7, ll.12-15). In any case there is no refusal by the Judge to consider a partial revocation because Appellant's counsel never asked for one, and

under the circumstances revoking his probation in full instead of simply terminating his probation was entirely within the judge's discretion.

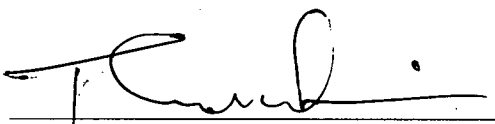
D. Counsel For the Appellant Submitted No Evidence That SCDC Erred in the Amount of Time the Appellant Served.

The Appellant presented no evidence that SCDC had imprisoned the Appellant for too long, therefore even if the Judge had jurisdiction to calculate the correct amount of time the Appellant should have served, he was presented with no evidence to make such a calculation. Cantrell made a bare assertion that SCDC had imprisoned the Appellant for too long but did not seek to introduce evidence that this was true. Unsupported factual assertions by counsel are not good evidence: "It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence." Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006); See e.g. McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) (appellate courts repeatedly held "that statements of fact appearing only in arguments of counsel will not be considered"); S.C. Dept. of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct.App.2003) ("[a]rguments made by counsel are not evidence"). Therefore counsel for the Appellant provided no basis for the court to calculate the correct amount of time the Appellant should have served, or should serve in the future.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the Court find that the Judge did not abuse his discretion when he revoked the Appellant's probation.

Respectfully submitted,



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