STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Richland County
Clifton Newman, Circuit Court Judge

Appellate Case No. 2022-000299

THE STATE, ...RESPONDENT

v.

STACARDO GRISSETT, ... PETITIONER

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR THE RESPONDENT

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Questions Presented

By Petitioner

1. Did the Court of Appeals err by failing to review the revocation judge's refusal to give Petitioner credit for the time he served in custody between when he was served with a community supervision violation warrant and his revocation hearing, where the judge revoked Petitioner's community supervision, since, despite being moot, the issue is capable of repetition, yet will almost always evade review given the relatively short duration (one year) of the sentence a defendant found in violation of his community supervision can receive pursuant to law?

2. Did the revocation judge err by refusing to give Petitioner 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 Petitioner'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 Petitioner's sentence for the revocation to exceed the one year maximum permitted by S.C. Code Ann. §24-21-560(c)?

By Respondent

1. Despite Petitioner's instant issue being moot, the Court of Appeals erred in dismissing this matter because it is capable of repetition and is, in fact, a common issue with community supervision and probation violation hearings.

2. The General Sessions court did not err when it revoked 299 days and declined to order credit for time served because South Carolina law only provides for pretrial credit to be applied after trial and sentencing and a revocation of Community Supervision is not a new trial.

STATEMENT OF THE CASE

On August 23, 2010, Petitioner appeared before the Honorable L. Casey Manning and pled guilty to strong arm robbery, kidnapping, and second degree lynching, but his sentence was deferred. On September 16, Judge Manning sentenced Petitioner to ten years for strong arm robbery and lynching, and eight years for kidnapping, all to run concurrently. (R.p.31-p.39).

Petitioner maxed out his strong arm robbery sentence while in the Department of Corrections and, after serving eighty-five percent of his sentences for lynching and kidnapping, was released from incarceration. He immediately began a term of supervision under the Community Supervision Program (CSP) upon his release on August 1, 2017, to be supervised by Respondent. (R.p.29-p.30).

Roughly two months later, on October 3, 2017, probation agents issued a warrant for Petitioner's arrest alleging, among other technical violations, that he conspired with another individual to commit armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. The warrant was served on Petitioner on November 1, 2017. (Rp.26-p.27).

The violation hearing occurred before the Honorable Clifton Newman on May 18, 2018. At the hearing, Judge Newman revoked the remainder of Petitioner's CSP, which was 299 days. (R.p. 5, ll. 10-11). The attorney for Petitioner requested that he receive credit for time served. (R.p. 11, ll. 7-11). However, officials for Respondent pointed out that if the judge ordered credit for the pre-revocation time, it would reduce the amount of the revocation and result in Petitioner being released to another term of CSP. (R.p. 17, ll. 8-19). Judge Newman then revoked Petitioner for his remaining 299 days of CSP.

On May 24, Petitioner's attorney filed a motion to reconsider requesting he be given credit for time served. Respondent filed a reply to the motion on June 5, 2018, and Judge Newman denied the motion on August 7, 2018, finding, "the sentence imposed is not improper nor excessive under the circumstances." R. 25.

Petitioner filed a notice of appeal on August 17, 2018, which was perfected by the filing of an initial brief on April 24, 2019. Respondent filed its own initial brief on May 24, 2019, with final briefs filed in June 2019. The matter was scheduled for oral argument but removed from the roster, with an opinion issuing on October 13, 2021 that dismissed the matter, primarily because it was now moot. *State v. Grissett*, 2021-UP-351, October 13, 2021. Petitioner filed a petition for rehearing, to which Respondent did not file a return. The petition was denied February 14, 2022, and Petitioner filed his petition for writ of certiorari to the Court of Appeals on March 15, 2022. Respondent's return follows.

ARGUMENT

I. Despite Petitioner's instant issue being moot, the Court of Appeals erred in dismissing this matter because it is capable of repetition and is, in fact, a common issue with community supervision and probation violation hearings.

Neither party to this action challenges the Court of Appeals' finding that this action is moot because Petitioner is no longer incarcerated and has completed all requirements of his sentence. However, as noted by Petitioner, "an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Hayes v. State*, 413 S.C. 553, 558, 777 S.E.2d 6, 9 (Ct. App. 2015) (quoting *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)) (internal quotation marks omitted)).

Petitioner looks to *State v. Simpson*, 429 S.C. 83, 837 S.E.2d 669 (Ct. App. 2020), reh'g denied (Feb. 14, 2020) for a similar case in which the Court of Appeals decided the sentencing question in an otherwise moot matter was capable of repetition. This, in part, was "due to the duration of the home detention or probationary portions of such sentences" that causes them to "generally evade[] review." *Id.* Petitioner also cites to *Nelson v. Ozmint*, 390 S.C. 432, 434, 702 S.E.2d 369, 370 (2010) for a matter in which the Court of Appeals and this court declared an issue was capable of repetition and worthy of review, even though it was moot. In a similar vein, this Court has granted review of an otherwise moot matter because "the challenged action in its duration was too short to be fully litigated prior to its cessation or expiration" *Byrd v. Irmo High School*, 321 S.C. 426, 468 S.E.2d 861 (1996).

The issue of whether pre-hearing detention for a revocation of community supervision is the same as pre-trial detention has been divisive for many years. For the Court of Appeals to hold that the merits of this matter should not be heard is not in line with this Court's precedent. This matter is clearly capable of repetition, as can be seen more clearly in the below argument. It is

rare that an action of this nature can get through the appropriate channels and reach resolution before the offender's supervision is completed and they are released. For these reasons, Respondent joins Petitioner's request for a writ of certiorari in order to address the merits and resolve this issue for the benefit of the lower courts.

II. The General Sessions court did not err when it revoked 299 days and declined to order credit for time served because South Carolina law only provides for pretrial credit to be applied after trial and sentencing and a revocation of Community Supervision is not a new trial.

A. Pre-revocation credit is not mandatory on an active sentence.

Petitioner claims that the judge erred when he refused to order credit for time served prior to the revocation hearing, arguing South Carolina law requires that the time must be ordered and the judge does not have discretion to refuse.

Petitioner relies on S.C. Code Ann. § 24-13-40 and the opinion of *State v. Boggs*, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010) in his argument, which refers to a different stage of the criminal proceeding and is therefore inapplicable. While the statute does clearly make *pretrial* detention credit mandatory, the time Petitioner served was not served prior to a trial. The relevant portion of the statute says, "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...*" (Emphasis added).

Petitioner's CSP violation hearing was not a trial. It is well-settled in South Carolina that probation violation hearings are not trials. *See State v. Hill*, 368 S.C. 649, 658, 630 S.E.2d 274, 279 (2006) and *State v. Franks*, 276 S.C. 636, 638, 281 S.E.2d 227, 228 (1981). "[W]hile the underlying probation violations may be criminal offenses, the probation revocation proceeding is not a criminal trial of those charges." *Hill*, at 658-659, 279.

Similarly, parole hearings are also not considered trials. The U.S. Supreme Court has held that, "the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 2600 (1972) (citing *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254 (1967). The Court continues, saying that "Parole arises after the end of the criminal prosecution, including imposition of the sentence." *Id.*

It stands, therefore, to reason that violation hearings of CSP, being another form of supervision following a conviction that may result in a revocation if its terms and conditions are violated, are not to be considered trials either. Consequently, § 24-13-40's requirement that pre*trial* detention be applied to the sentence would not apply to time served prior to a revocation hearing for CSP.

Section 24-13-40 also requires pretrial detention be applied to the *sentence*. In a probation matter, "the commencement of the service of the sentence follows the revocation of probation." *Id.* This, however, does not apply after a revocation of CSP, because CSP is a part of the defendant's active sentence.

Community Supervision begins upon the conclusion of at least 85 percent of a "no parole offense" as defined in S.C. Code Ann. § 24-13-100. A sentence for a "no parole offense" must include a term of community supervision, defined in S.C. Code Ann. § 24-21-560. The Department of Probation, Parole and Pardon Services (the Department) operates CSP and develops the guidelines and requirements of supervision. *Id.*

Although CSP is frequently compared to probation,[1] it is calculated differently. Probation is imposed by the General Sessions court after suspending all or a portion of the sentence.[2] The probation period is limited to five years.[3] The term of probation is therefore unrelated to the sentence, meaning that the term of probation can exceed the maximum incarceration allowed by law. Offenders do not receive credit toward their incarceration while serving probation because the sentence is suspended.

This is not the case with CSP. Offenders on CSP are still prisoners completing their active sentences. Furthermore, CSP includes both the suspended and unsuspended portions of the sentence. "We now definitively state that the 'original sentence,' as referenced in section 24-21-560(D), includes both the suspended and unsuspended portions of a circuit court's sentence; it is, in fact, the total sentence handed down by the court." *State v. Picklesimer*, 388 S.C. 264, 268, 695 S.E.2d 845, 848 (2010). Therefore, the time a prisoner serves on CSP is counted and applied directly towards his or her sentence. "[U]nder no circumstances shall a defendant be incarcerated, or forced to participate in mandatory CSP or residual probation, stemming from the same conviction, outside of the time given by the trial judge in the original sentence, which encompasses both the suspended and unsuspended portions of the sentence." *Id.* at 270, 848-849.

This is not a novel concept. Parolees facing revocations before the Board of Paroles and Pardons who serve time in county jails awaiting their hearings do not receive "pretrial" credit pursuant to § 24-13-40. Parolees are still serving their active sentence when released to parole, and "shall continue on parole until the expiration of the maximum term or terms specified in

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[1] "The CSP is a more stringent, closely monitored form of supervision than normal probation." *State v. Dawkins*, 352 S.C. 162, 167, 573 S.E.2d 783, 785 (2002).
[2] S.C. Code Ann. § 24-21-410.
[3] S.C. Code Ann. § 24-21-440.

[their] sentence..." S.C. Code Ann. § 24-21-670. Whether the parolee is in the community complying with the terms of parole or in a county jail awaiting a violation hearing, he is serving his original, full sentence until its expiration date.

Another way to illustrate this difference is to consider the fact that with an active sentence, there is a fixed date which will eventually arrive at which the sentence will expire. For incarcerated inmates, that date is reflected in their "max out" date. For inmates released to CSP, that date is calculated at one hundred percent of their sentence – the "original sentence" that encompasses the suspended and unsuspended portion of the sentence. *Picklesimer*, 388 S.C.at 268, 695 S.E.2d at 848. Therefore, when Petitioner appeared at his revocation hearing, his CSP end date was 299 days from the day of the hearing. Had Judge Newman taken the matter under advisement and pronounced his revocation order ten days later, Petitioner would have had 289 days left. Essentially, each day spent on CSP is one day closer to the end of his sentence.

In light of the foregoing, Petitioner's argument that § 24-13-40 requires he receive "pretrial" credit – credit that he accrued while his sentence was active – is misguided. Petitioner served 198 days prior to his CSP revocation hearing, but he was still serving his sentence. Judge Newman correctly stated during the hearing, "[Petitioner's] an inmate from the Department of Corrections in the community supposedly being supervised." (R. p. 10, l. 24-25 – p. 11, l. 1). The CSP is, therefore, a continuation of an inmate's active sentence.

Petitioner is essentially asking the court to give him double credit towards his sentence. If the court ordered the 198 days to be applied to the remaining 299 days left of his sentence, the time he served on his sentence would ultimately be applied twice.

The only alternative to double credit, as explained to the court at the hearing,[4] would be to reduce the revocation by 198 days without affecting the original sentence. In that scenario Petitioner would not serve the remainder of his sentence at the Department of Corrections for the revocation. Instead, he would be released by the same amount of pre-revocation time. Then, pursuant to § 24-21-560(D), Petitioner would have to complete a new term of CSP for the remainder of his sentence.

This latter alternative would be unwieldy and contrary to the judge's intent Petitioner to serve the remainder of his sentence at the Department of Corrections.

B. The judge did not exceed the one-year revocation limit.

Petitioner argues the judge exceeded the one-year limit when he revoked his CSP. This is incorrect. The judge revoked the remainder of his CSP, which was 299 days – clearly a period of time less than one year.

Petitioner points out that when the pre-revocation time he spent in detention is added to his revocation, his total incarceration exceeds one year. While that is true, it is also true that the judge did not revoke more than one year. Petitioner was serving an active sentence and was receiving credit toward his sentence while awaiting his revocation hearing at the county jail. Since that time was already served and applied towards his sentence, the judge could not retroactively order Petitioner to serve that time again. Instead, the judge had only what lay before him: the 299 days which constituted the remainder of Petitioner's sentence.

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[4] The transcript refers to a "Mr. Cannon," but that was likely the Respondent's attorney Matthew Buchanan.

Offenders on CSP are considered inmates, according to § 24-21-560. Consequently, every day an inmate spends on CSP is a day served of the sentence, whether in the community or incarcerated awaiting a violation hearing. To follow Petitioner's argument that the judge must consider the inmate's previously-served time, then every day spent on CSP would therefore have to be credited toward a revocation, which strains credulity. In another scenario, if an inmate spends an entire year awaiting a CSP violation hearing, the judge would be powerless to address the violation if Petitioner's. This cannot be the legislature's intended interpretation or outcome.

While it would certainly be in the court's discretion to consider the time the inmate has served in the county jail while awaiting the revocation hearing, the court is not obligated to award that time to the inmate. As discussed earlier, § 24-13-40 is inapplicable to CSP. The time Petitioner is asking for is not pretrial credit, which the statute and *Boggs* guarantees. That time would have already been applied when Petitioner was first sent to the Department of Corrections after his conviction.

Instead, Petitioner has been serving his active sentence while awaiting his violation hearing. That time he spent in the county jail was already served and credited toward his total sentence, so the only amount the judge had left was the unserved portion of Petitioner's sentence. Had there been more than a year left of his sentence, the judge, per the limitations of § 24-21-560(C), would have been restricted to revoking only one year of his sentence. But because the judge's revocation was less than one year, he did not violate the limitation of § 24-21-560(C).

CONCLUSION

The Respondent agrees with Petitioner insofar as the issue presented is capable of repetition and evading review even though the matter is otherwise moot. Petitioner's argument and reliance upon § 24-13-40 is misplaced because CSP is an active part of an inmate's sentence and § 24-13-

40 only applies to *pretrial* credit. Furthermore, the judge only revoked 299 days, which is less than the one-year limitation on revocations in § 24-21-560(C). Therefore, if this Court grants a writ of certiorari, it should determine that the judge's actions were proper in declining to award pre-revocation credit to Petitioner.

Respectfully submitted,

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