RECEIVED
Aug 16 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JACOB STEVEN STURGELL, SR.,

APPELLANT

APPELLATE CASE NO. 2021-001517

ANDERS BRIEF OF APPELLANT

JOANNA K. DELANY
Appellate Defender

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

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Other authorities

STATEMENT OF ISSUE ON APPEAL

Whether the court erred in denying Appellant's request to be permitted contact with his child upon his release from custody, where Appellant was not alleged to have abused his child?

STATEMENT OF THE CASE

On November 12, 2018, an Aiken County Grand Jury indicted Appellant for third-degree criminal sexual conduct with a minor. Appellant was also charged with third-degree sexual exploitation of a minor. R. 47 – 50. On September 14, 2021, Appellant appeared before the Honorable Courtney Clyburn-Pope for a plea hearing. R. 1. William McKellar represented Appellant. Ashley Hammack and Stephen Ryan prosecuted the case. R. 2.

Appellant entered negotiated guilty pleas to third-degree criminal sexual conduct with a minor and third-degree sexual exploitation of a minor, for negotiated concurrent sentences of 10 years' incarceration suspended on the service of 5 years' incarceration and 5 years' probation. R. 4, l. 21 – 6, l. 10. The circuit court accepted Appellant's pleas and sentenced him according to the negotiations. R. 11, ll. 16-20; R. 19, l. 8 – 20, l. 3. On December 7, 2021, the parties reconvened before the court for a motion to reconsider. R. 22 – 23. On December 9, 2021, the court issued an order denying the motion to reconsider. R. 46.

This appeal follows.

STANDARD OF REVIEW

"'In criminal cases, the appellate court sits to review errors of law only.'" *State v. Vick*, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009) (quoting *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "'bound by the trial court's factual findings unless they are clearly erroneous.'" *Id.* (quoting *Wilson,* 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *State v. Slocumb*, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

ARGUMENT

The court erred in denying Appellant's request to be permitted contact with his child upon his release from custody, where Appellant was not alleged to have abused his child.

Relevant facts

The State alleged that Appellant attempted to sexually assault his ex-girlfriend's eleven-year-old son. The State further alleged Appellant possessed child pornography. R. 6, l. 15 – 8, l. 24. Appellant entered negotiated guilty pleas to third-degree criminal sexual conduct with a minor and third-degree sexual exploitation of a minor, for negotiated concurrent sentences of 10 years' incarceration suspended on the service of 5 years' incarceration and 5 years' probation. R. 4, l. 21 – 6, l. 10. Also negotiated was the State's agreement to dismiss by nolle prosequi unspecified charges stemming from events related to Appellant's May 11, 2021, arrest and not pursue further charges from images found since the May arrest. R. 5, ll. 19-25. The circuit court accepted Appellant's pleas and sentenced him according to the negotiations. R. 11, ll. 16-20; R. 19, l. 8 – 20, l. 3.

Appellant had custody of his four-year-old biological son. R. 11, ll. 23-24. Appellant's son was not a victim in these cases; Appellant was not alleged to have sexually abused his son. R. 12, l. 24 – 13, l. 3; R. 29, ll. 23-24. Defense counsel requested that the court permit Appellant to have contact with his son while on probation. Defense counsel made the request because one of the standard conditions of probation for sex offenders, condition number four, only permitted probationers to have contact with minor family members after advance approval is given by the supervising probation agent. The State did not oppose the request. R. 12, l. 4 – 13, l. 20.

The court ruled that Appellant was to have no contact with the victims, but that his probation agent should be the one to determine whether Appellant was permitted to have contact

with his child. The court found the request was premature since it was a decision that should be made once Appellant was released on probation several years down the road. R. 13, l. 21 – 14, l. 18.

On December 7, 2021, the parties reconvened before the court "virtually" for a motion to reconsider. R. 22 – 23; R. 25, ll. 6-8. Defense counsel asked the court to reconsider its ruling on Appellant's ability to see his biological son. Further inquiry had revealed that Appellant would be required to attend therapy and receive a therapist's approval before a probation agent would permit him contact with a minor family member. R. 28, l. 21 – 30, l. 11. Defense counsel again asked that Appellant be exempt from standard probation condition number four so that he could have immediate contact with his son when released. R. 30, ll. 14-17.

The defense offered letters attesting to Appellant's good relationship with his son.[1] R. 29, l. 25 – 30, l. 8. The letters were from various friends and family members of Appellant who could attest that Appellant was a good father. R. 37 – 45. The court inquired about whether the defense could provide a letter from the mother of Appellant's son indicating her position on the matter, and held the record open pending receipt of such a letter. R. 31, l. 21 – 33, l. 19. Defense counsel subsequently submitted a letter from the mother of Appellant's son, in which the mother explained that Appellant had a good relationship with his son, and the mother wished Appellant was permitted to have contact with the child. R. 39. However, the court issued an order denying the motion to reconsider. R. 46.

[1] The letters were not labeled as court's exhibits, but the Judge stated on the record that she had received letters from defense counsel. R. 31, l. 21 – 33, l. 12. Undersigned counsel obtained from defense counsel a copy of all letters defense counsel submitted to the Judge and the letters are located at pp. 37 – 45 of the Record on Appeal.

Discussion

Appellant had a constitutionally protected relationship with his child. The court's ruling unreasonably impinged on that right since Appellant was not alleged to have sexually abused his son.

The liberty protected by the Due Process Clause includes the right of parents to establish a home and bring up their children. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); U.S. Const. amend. XIV. Natural parents have a constitutionally-protected, fundamental liberty interest in the care, custody, and management of their children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Due process provides heightened protection against government interference with a parent's fundamental right to make decisions concerning the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 64 (2000). The relationship between parent and child is constitutionally protected. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

"A trial judge has broad discretion in sentencing within statutory limits." *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010) (citing *Brooks v. State*, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997)). "A judge must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant." *Id.* (citing *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008)). "The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion." *Hicks*, 377 S.C. at 325, 659 S.E.2d at 500 (citing *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981)). The sentencing court has the authority to modify the conditions of probation. *See* S.C. Code Ann. § 24-21-430.

However, there are limits on probationary conditions.

> Various conditions of probation generally have been upheld unless (1) the condition is so unreasonable or overly broad that compliance

> is virtually impossible and the burden imposed on the probationer is greatly disproportionate to any rehabilitative function the condition might serve; (2) the condition has no relationship to the crime of which the offender was convicted; (3) the condition requires or forbids conduct which is not reasonably related to future criminality; (4) the condition relates to conduct which is not in itself criminal unless the prohibited conduct is reasonably related to the crime of which the offender was convicted or to future criminality; (5) **the condition violates due process because it is overly broad** or void for vagueness; or (6) the condition unnecessarily or excessively tramples upon First Amendment rights of free association.

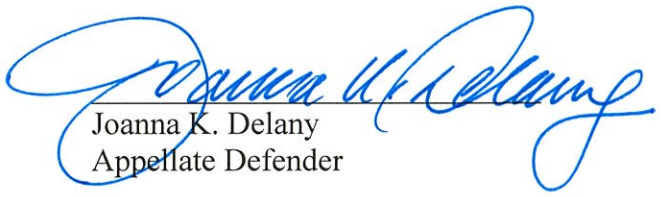
State v. Allen, 370 S.C. 88, 97–98, 634 S.E.2d 653, 657 (2006) (emphasis added). "A condition of probation or suspension is not necessarily invalid simply because it restricts a probationer's ability to exercise constitutionally protected rights, but where an otherwise valid condition of probation impinges on constitutional rights, those conditions must be carefully tailored and reasonably related to the goals of reformation and rehabilitation, and prohibiting further illegal conduct." 4 A.L.R.7th Art. 3 (2015) (citing C.J.S., Criminal Law § 2151).

In *Dawson v. State*, 894 P.2d 672, 680 (Alaska Ct. App. 1995), the Alaskan appellate court addressed a probationary condition that the defendant was forbidden to have any contact with his wife unless the contact was approved by his probation officer. Dawson was convicted of delivering cocaine and maintaining a residence used for the distribution of cocaine. *Id.*, 894 P.2d at 673. Dawson's wife had been equally involved in dealing crack with Dawson. *Id.*, 894 P.2d at 680. The Alaska appellate court found that a condition of probation restricting marital association plainly implicates the constitutional rights of privacy, liberty and freedom of association and must be subject to special scrutiny. *Id.* The court concluded that "to avoid unnecessary intrusion on marital privacy, it would seem appropriate to tailor a close fit between the scope of the order restricting marital association and the specific needs of the case at hand." *Id.*, 894 P.2d at 681. Therefore, "the challenged condition is unduly restrictive of liberty and cannot withstand scrutiny." *Id.*

Here, similar to the facts in *Dawson*, the court's refusal to order that Appellant be permitted contact with his biological child upon release intruded on Appellant's constitutionally-protected relationship with his son. Appellant's son was not a victim in these cases, so the standard probation condition at issue was overly broad, as it was not carefully tailored and reasonably related to reformation, rehabilitation, or prohibiting further illegal conduct. *Quilloin v. Walcott*, 434 U.S. at 255 (1978); *State v. Allen*, 370 S.C. at 97–98, 634 S.E.2d at 657; U.S. Const. amend. XIV.

CONCLUSION

Based on the foregoing argument, this Court should reverse and remand for a new sentencing hearing.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of August, 2022.

RECEIVED
Aug 16 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JACOB STEVEN STURGELL, SR.,

APPELLANT

APPELLATE

CASE NO. 2021-001517

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jacob Steven Sturgell states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. She has reviewed the record of appellant's guilty plea and motion to reconsider before Judge Courtney Clyburn-Pope, which were held on Sept 14, 2021 and December 7, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Jacob Steven Sturgell.

Respectfully Submitted,

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of August, 2022.

RECEIVED
Aug 16 2022
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

Joanna K. Delany
Appellate Defender

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

ATTORNEY FOR APPELLANT

This 16th day of August, 2022.

RECEIVED
Aug 16 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

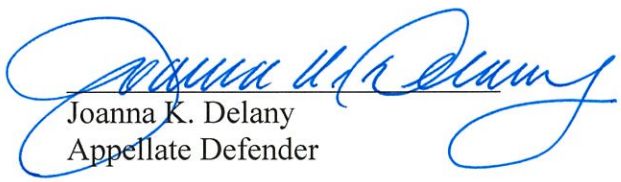
JACOB STEVEN STURGELL, SR.,

APPELLANT

APPELLATE CASE NO. 2021-001517

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Record on Appeal in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Jacob Steven Sturgell, #386086, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 16th day of August, 2022.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT