THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Charles B. Simmons, Jr. Special Circuit Court Judge

S.C. Sup. Ct. Opinion No. 27124
Heard September 18, 2012 – Filed May 22, 2013

THE STATE,

RESPONDENT

v.

JENNIFER RAYANNE DYKES,

APPELLANT

Appellant Case No. 2010-160047

RETURN OF PETITION FOR REHARING

The Respondent, the State of South Carolina by and through its attorney does hereby make this return to the Appellant's June 6, 2013 Petition for Rehearing. The State respectfully requests that Appellant's Petition for Rehearing be denied and dismissed.

Pursuant to the Appellant Court Rules a party is only entitled a rehearing if there are points that have been overlooked or misapprehended by the Court. The Respondent contends that the Court has applied the law and has not overlooked nor misapprehended any law or issue that was necessary to make a valid decision in this case.

I. The Court has not misapprehended the specific fundamental right to be "let alone," and addressed both privacy interests and bodily integrity.

The Appellant argues that GPS monitoring infringes on the specific fundamental right to be "let alone," and the right to control the integrity of one's own body. The Appellant leans heavily on the slight "touching" of the ankle in order to attach the GPS monitor as being a violation of one's bodily integrity.

Within her original brief, the Appellant describes several cases regarding the integrity of the right of a person to control his or her own body, of which none apply to the scenario at issue in this case. Each of the cases cited by Appellant in her original brief involves a much more offensive touching than the mere touching of an ankle for a few seconds to attach a GPS monitor. Within her petition for rehearing the Appellant cites the case of Union Pacific R. Co. v. Botsford, 141 U.S. 250 (1891), which addresses a surgical procedure prior to trial. The case at bar hardly equates to such an intrusion into one's body.

Although freedom from physical restraint has always been at the core of liberty protected by due process clause from arbitrary governmental action, this liberty interest is not absolute. The specific content and incidents of this right must be shaped by the context in which it is asserted. The Constitution does not forbid all searches or seizures, but only unreasonable searches and seizures. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The slight touching of an ankle for the purposes of attaching the GPS device does not equate to a seizure, nor does it deny Appellant the freedom to control her own body in violation of any of her Constitutional rights.

It is the opinion of the Respondent that this matter was not misapprehended, or overlooked by the Court. It specifically states in Footnote 8 of the opinion:

> "Certainly, in the abstract people generally have a right to be let alone. Respectfully, however, fundamental rights are not to be defined or examined in a vacuum, but rather must be viewed in the context of the situation presented. . . In the context of this case as much as the dissent wishes otherwise, Dykes cannot avoid her unalterable status as a convicted child sex offender, and pursuant to Glucksberg, she holds no fundamental right to be let alone."

State v. Dykes, 2013 WL 2242768 n. 8 (S.C).

This is what has been essentially argued by the Respondent throughout this case. The essential right to be left alone must be made on a case by case basis, and not taken in a vacuum. The touching of the Appellant in order to place the monitor on her ankle is so minimal it does not equate to a violation of her fundamental rights. This matter was properly considered and rejected by the Court, and should not be reconsidered.

II. The Court has addressed and satisfied all separate constitutional claims of the Appellant, therefore not requiring a rehearing.

The Court in its decision has addressed all arguments in the Appellant's Final Brief. The Court has not overlooked any points necessary to make a valid decision. Consequently, the Appellant is not entitled to a rehearing.

A. The Court has addressed and satisfied any violations of due process by ordering all defendants under this statute be eligible for a hearing before a court upon 10 years in the program to determine likelihood to reoffend.

The Appellant asks the Court to readdress the issue of due process. Prior to this decision the law failed to allow individuals who were convicted of Criminal Sexual Conduct with a minor in the first degree and Lewd Act upon a minor any review to determine their likelihood for reoffending, unlike other individuals who were permitted to petition the Court upon the service of ten years under the monitoring program. Within the opinion the court already found that "the complete absence of any opportunity for judicial review to assess a risk of re-offending, which is

beyond the norm of Jessica's law, is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending." Dykes, at 4. This specifically addresses the right of the Appellant to have some type of judicial review. The Court ultimately decided it was "unconstitutional to impose lifetime satellite monitoring with no opportunity for judicial review as is the case with CSC-First or lewd act pursuant to section 23-3-540(H)." Id. The matter of the denial of due process has been addressed and decided. There exists no need for another hearing for an identical decision.

B. The Court has clearly decided that General Assembly did not create the GPS monitoring program to be punitive; therefore, *ex post facto* does not apply.

It is obvious by the language of the opinion that the Court concluded the General Assembly did not intend for the application of GPS monitoring to be punitive. So the placing the Appellant within this program cannot be considered a violation of *ex post facto*. Pursuant to the South Code of Laws, the intent of the legislature in the creation of the sex offender registry and the electronic monitoring are:

> To promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens by providing law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of reoffending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

Id., at 3

The *ex post facto* clauses of the South Carolina and United States Constitutions are inapplicable to the facts in this case both because GPS placement is not punishment and the law has not been retroactively applied to the Appellant.

In order for the law to be prohibited by *ex post facto,* two elements must be present: (1) the law must be retrospective so as to apply to an event occurring before its enactment; and, (2) the law must disadvantage the offender affected by it. Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446 (1987). However, before this two-part analysis can begin, the statute in question must be found to be criminal in nature rather than civil. Where the General Assembly intends for a statute to be civil in nature, only "the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the [General Assembly's] intention." State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526, (2002) (citing Seling v. Young, 531 U.S. 250, 121 S.Ct. 727(2001)). Without such a finding *ex post facto* is inapplicable. Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140 (2003). In the determination that Jessie's law is not in fact punitive, it negates the existence of an *ex post facto* violation. This argument is no longer valid because of the decision of this Court; therefore, it should not be allowed to be reheard.

C. There exists no violation of equal protection; therefore, this issue should not be reconsidered by the Court.

The Appellant argues that her treatment is not identical to other sex offenders. She does not have a fundamental right not to be placed on GPS monitoring, nor does she fall under a suspect class. The rational basis test is used to determine if equal protection is being violated.[1] Under the rational basis test, the requirements of equal protection are satisfied when (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and, (3) the classification rests on some reasonable basis. Fraternal Order of Police v. South Carolina Dep't of Rev., 352 S.C. 420, 574 S.E.2d 717 (2002). Jessie's law was enacted for the purpose of the

[1] If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. Denene, Inc. v. City of Charleston, 359 S.C. 85, 596 S.E.2d 917 (2004).

monitoring sex offenders whose victims were children. The GPS monitor is used to monitor the whereabouts of these offenders to assist law enforcement either for prosecution or exoneration. All individuals convicted of CSC 1st w/minor and Lewd Act are treated alike. This law was not created for the monitoring of all sex offenders, only those whose victims were children. Children require more protection, so the intent of the legislature is to create laws specifically created for the protection of those children. As stated in Jessie's law, the purpose of the statute is to provide law enforcement with the tools needed in investigating criminal offenses, particularly against children, and the use of GPS monitoring is certainly reasonable for the enhanced monitoring of child sex offenders. Jessie's law and the placement of GPS monitoring on Appellant is appropriate pursuant to the rational basis test; therefore, there is no violation of equal protection.

D. There exists no violation of the Appellant's right to be free from an unreasonable search and seizure. So this matter should not be subject to any reconsideration by the Court.

The Appellant requests a hearing from this Court to determine a claim of a possible unreasonable search and seizure. The Respondent argues that this court should not hold another hearing to address a claim that has no merit.

The Fourth Amendment governs all intrusions by public agents upon personal security. Terry, at 16. Here the GPS monitoring device does not prevent the Appellant from doing anything she pleases. She is not restricted or restrained from going where she pleases when she pleases; therefore, there exists no seizure or unlawful restraint. The Appellant bases her argument in part on the case of City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed. 333 (2000), in which the United States Supreme Court ruled that the state cannot use a program that "seizes" people when the primary purpose is crime control. In Edmond, traffic stops were being used to investigate drug trafficking. In the Appellant's case, she is not being

seized as contemplated by Edmond. In Terry, a "seizure" is defined as an individual being restrained from his freedom to walk away and a "search" is defined as the careful exploration of the outer surfaces of a person's clothing in an attempt to find a weapon. Terry, at 16. Mandatory GPS monitoring does not fit either definition. Neither her person nor her residence is ever searched, and there is no restraint of movement.[2]

In Edmond, checkpoints have been declared in violation of the Fourth Amendment due to their being indistinguishable from the general interest in crime control. Edmond, at 32. However, if the stop is in the interest of a specific crime, and the use of the highway checkpoint is a legitimate means to stop this specific crime, the United States Supreme Court has found them to not be in violation of the 4th Amendment. U.S. v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)(suspicionless seizures at a fixed checkpoint designed to intercept illegal aliens.); Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481 (1990)(a sobriety checkpoint aimed at removing drunk drivers.) The use of a GPS monitor is specific to the monitoring of convicted sex offenders who specifically committed sexual related crimes against minors. This is far from a fishing expedition because it is a specific, targeted population based on a legitimate state interest that does not infringe on the privacy rights of the Appellant. The State submits that it is not an infringement on privacy rights nor can it be considered an unreasonable search or seizure.

Even if it can be determined that there is a minor intrusion of privacy, that intrusion is overridden by the public interest of the government in the protection of children. In weighing such an intrusion against the public interest, the Court examined the government interests advanced to justify such routine intrusions, "upon the constitutionally protected interests of a

[2] The Respondent's policy that caused a restraint of travel mentioned in the original Dykes opinion no longer exists.

private citizen, and concluded that under the circumstances the government interests outweighed those of a private citizen." Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 87 S.Ct. 1727 (1967).

The Respondent submits that the Appellant never had any privacy rights unreasonably infringed by being placed in the GPS program. There exist no search of her person, or premises, nor is the device capable of conducting such a search. There was also no seizure because the Appellant was never detained; she is allowed to move freely anywhere she pleases. Since the Appellant will not be subjected to a search or seizure, nor has had her privacy infringed, there exists no need for another hearing before this Court regarding this matter.

CONCLUSION

For the reasons set forth above, the Respondent's submits the Appellant's Petition for Rehearing should be denied and dismissed.

Respectfully submitted,

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ATTORNEY FOR THE RESPONDENT

Columbia, South Carolina
June 13, 2013

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JUN 17 2013

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that this 13th day of June, 2013, I served the following documents:

1. Return to Petition for Rehearing; and
2. Certificate of Service;

by first class mail, postage prepaid as follows:

Wanda Carter, Chief Appellate Defender
South Carolina Commission on Indigent Defense
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PO Box 11589
Columbia, SC 29211-1589

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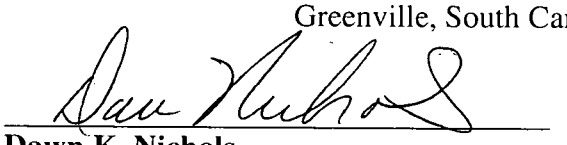

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