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BRANDY W. HICREE

STATE OF SOUTH CAROLINA)
 COUNTY OF CHEROKEE)
 Jason Bryan McSwain,)
 Appellant,)
 -vs-)
 The State of South Carolina,)
 Respondent.)
 _____)

SC Court of Appeals
 THE COURT OF GENERAL SESSIONS
 Indictment No: 2003-GS-11-00063
 1063501

This matter is before the Court on motion of Jason Bryan McSwain pursuant to S. C. Code Ann. Section 23-3-463, on appeal of a decision of the South Carolina Law Enforcement Division ("SLED") refusing his request for the termination of his requirement to register on the sex offender registry and seeking an order of this Court removing him from the sex offender registry.

At the hearing held in this matter the appellant appeared with counsel Elizabeth Franklin-Best, Esq. The State was represented by Assistant Circuit Solicitors Anthony C. Leibert and Matthew T. Craft.

It appears that the notice requirements of S. C. Code Ann. Section 23-3-463(G) related to this appeal and motion hearing have been satisfied. Counsel ably presented their respective positions with regard to the validity of the appeal and motion.

Salient Facts

Appellant was convicted of Criminal Sexual Conduct With a Minor 2nd Degree (S. C. Code Ann. Section 16-3-655(B)) upon his entry of a plea of guilty (Indictment Number 2003-11-00063) to that crime on January 12, 2003. At the time of his conviction he was twenty-seven years of age. At the time of the offense the appellant was at least twenty-five years of age and the minor was less than sixteen years of age. As a collateral consequence of his conviction he was required to register as a sex offender pursuant to S. C. Code Ann. Section 23-3-430(C)(2)(e). His conviction is classified as a Tier II offense under S. C. Code Ann. Section 23-3-430(C)(2)(e).

Appellant filed an application with SLED pursuant to S. C. Code Ann. Section 23-3-462 seeking termination of the requirement to register as a sex offender. SLED refused his request for

termination due to his failure "to meet the requirements for removal outlined in S. C. Code 23-3-462". Specifically, the appellant failed to meet the timeframe requirement of S. C. Code Ann. Section 23-3-462(A)(1)(b) which is applicable to the applicant's conviction.

Applicable Law

S. C. Code Ann. Section 23-3-430(A) provides that any person who is a resident of the State of South Carolina and who in this State has been convicted of the crime of Criminal Sexual Conduct with a Minor 2nd degree in violation of S. C. Ann. Section 16-3-655(B), "shall be required to register" on the sex offender registry in accordance with the requirements of S. C. Code Ann. Section 23-3-450.

A person convicted of Criminal Sexual Conduct with a Minor 2nd degree is referred to as a "Tier II" offender. S. C. Code Ann. Section 23-3-430(c)(2)(e). S. C. Code Ann. Section 23-3-462(A)(1)(b) permits a Tier II offender who was convicted as an adult to apply to SLED for termination of the requirement to register "after having been registered for at least twenty-five years" if he shows that that he has satisfied the mandates of S. C. Code Ann. Section 462(A)(3)(4)(5) and (6).

An offender who is denied a request for termination of the registration requirement by SLED may appeal the denial to the General Sessions Court by following the procedure established under S. C. Code Ann. Section 23-3-463. S. C. Code Ann. Section 23-3-462(E). "An offender may file a motion with the general sessions court to request an order to be removed from the requirements of the sex offender registry act if: (1) He is a Tier I or Tier II offender ... whose application for removal under Section 23-3-462 has been denied by SLED." S. C. Code Ann. Section 23-3-463(A)(1). "All motions pursuant to this section must be made no earlier than the appropriate timeframes related to the underlying offense as specified in Section 23-3-462(A)(1) or subsection (A)(2). An offender is not eligible for a hearing pursuant to this section if he submitted an application prior to the timeframe specified in Section 23-3-462(A)(1) that was either not accepted or erroneously accepted by SLED." S. C. Code Ann. Section 23-3-463(B).

Discussion

Based upon the presentation and submissions made, it appears that the appellant had an inappropriate and illegal sexual relationship with a minor, although the relationship was

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consensual and with the encouragement of the minor. Upon his convictions for a crime relating thereto, a condition of his sentence was that he have no contact with the minor victim. On February 24, 2005 the Court removed the "no contact" requirement on motion of and at the request of the minor victim who was then eighteen years of age. The two were subsequently married and have a child together. Although divorced after seven years of marriage, the two still have an amicable relationship and both are involved in the parenting of their child.

The appellant presented a current psychiatric evaluation wherein the forensic psychiatrist opined that the applicant's "risk to offend is below average" and "his expected recidivism rate is 1.4% based upon his being in the community for more than ten years without an offense".

Appellant asserts that he should be removed from the registry because; he has successfully completed the requirements of his sentence; he has no subsequent arrests; he has the support of the victim with whom he shares a child; his psychiatric evaluation establishes that he is a low risk to reoffend; registration as a sex offender impairs employment opportunities; the stigma attached to registration has taken a toll on his child and his relationships with his peers; and the continuing requirement of registration violates his due process rights under the state and federal constitutions. Appellant asserts that the registration requirement for sex offenders was not intended to be a punishment but was imposed for protection of the public from offenders likely to reoffend and to assist law enforcement in solving sexual crimes. Appellant claims that in his case there is no longer any societal benefit to his continued registration and that the requirement is only inflicting punishment upon him and his child.

When a party challenges the constitutional validity of a statute, he bears the burden of proving it unconstitutional. All legislative enactments are presumed constitutional and are to be construed to render them valid. "A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." "The difficult and sensitive task of reaching an accommodation between the State's substantial interest in requiring sex offender registration and notification, on the one hand, and an offender's legitimate interest in ensuring against erroneous deprivation of his or her liberty interest, on the other, is best left, in the first instance, to the legislature." Powell v. Keel, 433 S.C. 457, (2021). After the Court's ruling in Keel, the General Assembly appears to have responded to the suggestion that it establish a hearing process to permit sex offender registrants the opportunity to "demonstrate they no longer pose a risk sufficient to justify continued registration" and that such hearings "be conducted with

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reasonable promptness and meet standards of fundamental fairness”, and enacted S. C. Code Ann. Sections 23-3-462 and 23-3- 463.

While there may be merit to the appellant’s assertions in this case, it is undisputed that the appellant fails to meet the requirements for termination of the registration requirements of S. C. Code Ann. Section 23-3-430(A). He was convicted of a Tier II criminal offense as an adult which mandates registration for a period of at least twenty-five years. S. C. Code Ann. Section 23-3-462(A)(1)(b). Notwithstanding the clear mandate of the law, the appellant asserts he should be removed from the Sex Offender Registry because he “is not at risk of reoffending, and he does not pose a threat to the public” and “has complied with all the requirements of his sentence and has maintained an unblemished record”.

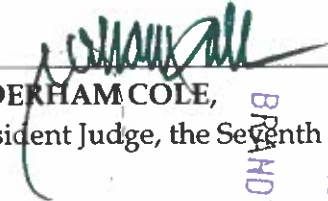
The establishment of a process to satisfy constitutional due process in the deprivation of a liberty interest resulting from a criminal conviction is best left to the General Assembly and they have spoken on the issue in the context of this case. Whether or not the General Assembly’s enactments addressing this issue are sufficient to satisfy constitutional requirements is best left to the Supreme Court for determination, as this court has not been clearly convinced beyond a reasonable doubt that the enactments of the General Assembly applicable to this case are repugnant to any constitutional protections or rights of the appellant.

Conclusion

After consideration of the record, the argument of counsel, submissions made, and the applicable law, this Court finds that the appellant’s MOTION for REMOVAL and APPEAL of SLED’s denial of this application for removal from the South Carolina Sex Offender Registry should be and IS therefore DENIED.

IT IS SO ORDERED!

August 21, 2023
Spartanburg, South Carolina



J. DERHAM COLE, Judge Presiding
Resident Judge, the Seventh Judicial Circuit

BRANDY W. MCBEE

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STATE OF SOUTH CAROLINA
THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT

J. DERHAM COLE
JUDGE

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August 21, 2023

The Honorable Brandy W. McBee
Cherokee County Clerk of Court
Post Office Drawer 2289
Gaffney, SC 29342-2289

Re: 2003-GS-11-00063

Jason Bryan McSwain, Appellant vs. The State of South Carolina, Respondent

Dear Clerk;

Enclosed please find for filing an order(s) with reference to the above-captioned case(s). Upon entry of the order(s), please serve notice upon the affected parties in accordance with *Rule 77(d) of the South Carolina Rules of Civil Procedure*. Thank you in advance for your usual and capable assistance in this matter.

With kindest personal regards, I remain,

Sincerely yours,

J. Derham Cole
Resident Judge
The Seventh Judicial Circuit

BRANDY W. MCBEE

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