

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
Honorable L. Casey Manning, Circuit Court Judge

Opinion No. 2023-UP-161 (S.C. Ct. App. Filed April 26, 2023
Withdrawn, Substituted and Refiled June 28, 2023)

Lower Court Case No. 2016-GS-40-04324

THE STATE,

RESPONDENT,

V.

TERRELL DENARD KNIGHTNER,

PETITIONER

APPELLATE CASE NO. 2020-001018

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on August 18, 2023.

QUESTION PRESENTED

Did the Court of Appeals err in refusing to address the merits of whether the judge abused his discretion in ordering placement on the sex offender registry, after a probation violation but without a showing of good cause, because the conditional order finding that Petitioner was not required to register unless there was a violation of probation was not appealed?

STATEMENT OF THE CASE

On July 20, 2016, the Richland County Grand Jury indicted Petitioner, Terrell Denard Knightner, for criminal sexual conduct in the third degree. (R. pp. 1-2). On December 13, 2016, Petitioner appeared before the Honorable L. Casey Manning, waived grand jury presentment, and pled guilty to assault and battery in the first degree. (R. pp. 3-22). Robert Bank represented Petitioner at the plea. Sandra Mosier appeared on behalf of the State. Judge Manning sentenced Petitioner to three (3) years suspended with three (3) years of probation. (R. p. 25). Judge Manning ordered that Petitioner must abide by all sex offender conditions, that he be supervised by a sex offender agent, that he not be required to be monitored by GPS, that he is not to be placed on the sex offender registry unless there is a violation of these terms, and that the probation may terminate upon completion of sex offender counseling. (R. p. 26).

Over twenty months later, on August 29, 2018, a probation violation arrest warrant was issued. (R. pp. 27-28). On May 31, 2019, a probation revocation hearing was held before the Honorable DeAndrea G. Benjamin. Morgan Y. Drapeau represented Petitioner at the revocation hearing. (R. pp. 31-47). Judge Benjamin revoked probation, sentenced Mr. Knightner to sixty (60) days of incarceration, allowing for weekend time, and ordered him to register as a sex offender. (R. p. 45, lines 10-22; p. 54). On June 7, 2019, counsel for Petitioner filed a motion to reconsider, specifically challenging the order requiring sex offender registry. (R. pp. 55-59). On June 27, 2019, a hearing was held before Judge Manning on the motion to reconsider. (R. pp. 60-63). Judge Manning granted the motion to remove Petitioner from the sex offender registry without prejudice. (R. p. 64).

On July 3, 2019, the State filed a motion to reconsider. (R. pp. 65-66). On January 14, 2020, a hearing was held before Judge Manning on the State's motion to reconsider. (R. pp. 67-

83). Judge Manning took the matter under advisement. On February 7, 2020, Judge Manning reinstated Judge Benjamin's order placing Petitioner on the sex offender registry due to a violation of his bond conditions. (R. pp. 84-85). A timely notice of intent to appeal was filed on July 21, 2020.

On April 26, 2023, a three-judge panel of the South Carolina Court of Appeals affirmed the finding of the circuit court. State v. Knightner, 2023-UP-161 (S.C. Ct. App. filed April 26, 2023). The Court of Appeals found that, “. . . because Knightner did not appeal the plea court's sentencing order stating he would not be placed on the sex offender registry unless he violated the conditions of his probation, the order is the law of the case.” On May 11, 2023, a timely petition for rehearing was filed. On June 28, 2023, the Court of Appeals denied the petition for rehearing but withdrew the previous opinion and refiled a substituted opinion. State v. Knightner, 2023-UP-161 (S.C. Ct. App. filed April 26, 2023, Withdrawn, Substituted and Refiled June 28, 2023). The substituted opinion did not make any substantive changes. The only change appears to be the placement of quotation marks in the language inside the parenthetical following Smith v. State, 413 S.C. 194, 196, 775 S.E.2d 696, 607 (2015), in the second paragraph of the opinion. This second petition for rehearing was denied on August 18, 2023. This petition for writ of certiorari follows.

STANDARD OF REVIEW

“A [sentencing court] 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). “A [sentencing court] must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant.” Id. The sentence imposed will not be overturned on appeal absent an abuse of discretion. Id. An abuse of discretion occurs when the sentence imposed was based on either an error of law or a factual conclusion not supported by evidence in the record. Id.

REASON WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari to clarify that a violation of probation does not necessarily meet the requirement of good cause required for placement on the sex offender registry and that an appeal from an order requiring sex offender registry is timely at the time the order issues, regardless of an earlier conditional order that did not require registry unless there was a violation of probation.

ARGUMENT

The Court of Appeals erred in refusing to address the merits of whether the judge abused his discretion in ordering placement on the sex offender registry, after a probation violation but without a showing of good cause, because the conditional order finding that Petitioner was not required to register unless there was a violation of probation was not appealed.

On December 13, 2016, Petitioner pled guilty to assault and battery first degree before the Honorable L. Casey Manning. The prosecutor told the judge, “He is pleading guilty today to assault and battery in the first degree, and the State is recommending sex offender counseling. And if he successfully completes that counseling, he would not have to register as a sex offender.” (R. p. 5, line 25 – p. 6, lines 1-4). S.C. Code Ann. § 23-3-430(D) provides, “Upon conviction, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the prosecution.” Assault and battery first degree is not a listed offense. Good cause for Petitioner to be included on the sex offender registry, as required by the statute, was not shown by the prosecution during the guilty plea.

The prosecutor explained that Petitioner and the complaining witness were in a brief relationship and had consensual sex. (R. p. 17, lines 1-4). The sexual relationship ended but the two remained friends. One night she went to Petitioner’s house where they watched television and talked. (R. p. 17, lines 8-10). According to the prosecutor, when she decided to leave Petitioner asked her not to leave, “ [a]nd there was a sexual assault of some sort that occurred.” (R. p. 17, lines 13-21). Petitioner was originally charged with criminal sexual conduct third degree. (R. pp. 1-2). The case did not involve a minor. The prosecutor also told the judge that the complaining witness now lived in Maine and was not interested in returning to South Carolina to prosecute the case. (R. p. 18, lines 10-14).

At the time of the guilty plea Petitioner was thirty-two years old and had no prior criminal record. (R. p. 18, line 18 - p. 19, lines 1-13). Defense counsel made the judge aware of Petitioner's ongoing medical conditions. Petitioner lived in an apartment of his own but located on the same property as his parents so that they could assist with his needs. (R. p. 19, lines 14-24). Defense counsel told the judge, "Your Honor, at the time of this incident, he didn't have a tremendous amount of experience with mature relationships, and this was obviously something that never happened before and has never happened since." (R. p. 19, line 25 – p. 20, lines 1-3).

Judge Manning sentenced Petitioner to three years suspended with three years of probation. (R. p. 25). The judge also ordered that Petitioner abide by all sex offender conditions; that he be supervised by a sex offender agent; that he not be required to be monitored by GPS; **that he not be placed on the sex offender registry unless there is a violation of these terms**; and that probation may terminate upon completion of sex offender counseling. (R. p. 26). The judge did not make a finding that good cause had been shown by the prosecution to warrant including Petitioner on the sex offender registry. Defense counsel advised the judge that the sex offender counseling classes requested by the State typically lasted from eighteen to twenty-four months. (R. p. 20, lines 12-13). Petitioner did not appeal the probationary sentencing order that did not require sex offender registry.

On August 30, 2018, about twenty months after the plea¹, a probation violation arrest warrant was obtained. (R. pp. 27-28). On March 22, 2019, Judge Manning ordered a joint DDSN/DMH competency evaluation. (R. pp. 48-53). The report found that while competent, Petitioner met the criteria for intellectually disabled. (R. p. 52).

¹ Judge Manning ordered that probation may terminate upon the completion of sex offender counseling.

On May 31, 2019, a probation revocation hearing was held before the Honorable DeAndrea G. Benjamin. (R. pp. 31-47). The agent told Judge Benjamin that Petitioner violated his probation by accessing Snapchat on social media, viewing pornography, deleting information from his phone and having contact with his minor niece and nephew. (R. p. 33, line 15 – p. 34, lines 1-6). Petitioner only had four classes left of the sex offender counseling before he was terminated from class for the violations unrelated to counseling. (R. p. 35, line 18 – p. 36, lines 1-16). Petitioner was current on all fines and fees. (R. p. 35, lines 2-5). The probation agent made a recommendation to the judge as follows:

My recommendation was to revoke 60 days and continue on supervision and to PTUP after successful completion of the sex offender counseling. He will have to reenroll, so he will have to start over the process. And, of course, it is your discretion if he is on the sex offender registry or not.

(R. p. 35, lines 7 - 15).

Defense counsel noted how Petitioner's intellectual disability delayed his completion of the course. (R. p. 35, line 18 – p. 36, lines 1-4). The violation stemming from communication with minors was also explained:

Judge, the communication with his niece and nephew, while we understand that is a violation, his charge was not anything to do with criminal sexual conduct with minors, and the communication with the niece and nephew was with his mother, who is in the courtroom. She was present during that, and he was always supervised during those times.

He lives in the house behind them, which has been approved by probation, from my understanding. And so one day when she was ill and needed him to cook dinner, and that is when he was in the house, and the kids came running down.

(R. p. 36, lines 5 – 16).

Judge Benjamin found Petitioner violated conditions of probation. Judge Benjamin revoked 60 days, to be served on weekends, and ordered sex offender registry. (R. p. 54).

Judge Benjamin noted:

I'm reading the [sentencing] order, but I don't know anything about the underlying case for me to decide whether or not he needs to be on the registry or not on the registry, other than Ms. Drapeau said it had nothing to do with children. So, frankly, y'all can take it back to Judge Manning. I mean, the way the order is written is that if he violates, he goes on the registry. But that is not my order.

(R. p. 38, lines 14 – 25).

On June 7, 2019, counsel for Petitioner filed a motion to reconsider placement on the sex offender registry. (R. pp. 55-59). On June 27, 2019, a hearing on the motion to reconsider was held before Judge Manning. (R. pp. 60- 63). Counsel for Petitioner told the judge, "So, we're here to ask that Mr. Knightner be removed from the sex offender registry. Pursuant to the statute, they have to place good cause on the record to put someone on the sex offender registry." (R. p. 61, lines 10- 14). On June 27, 2019, the same day as the hearing, Judge Manning signed an order granting, without prejudice, the motion to remove Petitioner from the sex offender registry. (R. p. 64).

On July 3, 2019, the State filed a motion to reconsider. (R. pp. 65-66). The State asserted that the Solicitor's Office was not notified of the June 27, 2019, hearing on the motion to reconsider placement of Petitioner on the sex offender registry and asked to be heard on the issue. On January 14, 2020, a hearing was held before Judge Manning on the issue of sex offender registry. (R. pp. 67-83). Counsel for Petitioner argued that the violations of probation did not provide good cause for Petitioner to be placed on the sex offender registry. (R. p. 78, lines 11-16). The judge asked both sides for proposed orders as to the sex offender registry. (R. p. 80, line 23 – p. 81, line 1; lines 18-25).

On February 7, 2020, Judge Manning signed an order granting the State's motion to reconsider. (R. pp. 84-85). In the order Judge Manning wrote, "The order signed on June 27, 2019 by this Court shall hereby be rescinded and Judge Benjamin's order of May 31, 2019 placing the Defendant Terrell Knightner onto the sex offender registry due to a violation of his bond [probation] conditions shall be reinstated." (R. p. 85). The violations of probation did not provide good cause to require sex offender registry. The judge erred.

In affirming the judge's decision to place Petitioner on the sex offender registry the Court of Appeals wrote:

Initially, because Knightner did not appeal the plea court's sentencing order stating he would not be placed on the sex offender registry unless he violated the condition of his probation, the order is the law of the case. See Smith v. State, 413 S.C. 194, 196, 775 S.E.2d 696, 697 (2015) ("[A]n unappealed ruling, right or wrong, is the law of the case." (alteration in original) (quoting Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012))). Additionally, the probation court could not alter provisions in the sentencing order because only the plea court had the authority to determine whether Knightner must register as a sex offender as a condition of his sentencing. See In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010) ("A [sentencing court] has broad discretion in sentencing within statutory limits."); id. ("A [sentencing court] must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant."); id. ("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."); S.C. Code Ann. § 23-3-430(D) (Supp. 2022) ("Upon ... guilty plea ... of a person of an offense not listed in this article, the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the prosecution."); State v. Davis, 375 S.C. 12, 17, 649 S.E.2d 178, 180 (Ct. App. 2007) ("The statute's plain language dictates that the court's authority for placing individuals in the Registry exists only as a condition of sentencing."); id. at 16, 649 S.E.2d at 180 ("[O]nce the Sentencing Judge's order became final, neither he, nor the Probation Judge would be permitted to alter the sentence he had handed down."). As a result, the sentencing order required the probation court to order Knightner to register as a sex offender when he violated his parole, and the plea

court properly granted the State's motion to reconsider, reinstating the probation court's order.

State v. Knightner, No. 2020-001018, 2023 WL 3093108, at *1 (S.C. Ct. App. Apr. 26, 2023).

The Court of Appeals erred. The sentencing order was conditional and did not become final until Petitioner was ordered to register as a sex offender on February 7, 2020. An appeal of the conditional order which did not require Petitioner to register as a sex offender, unless he violated probation, would have been dismissed as not yet ripe for review. Petitioner timely challenged the sex offender registry requirement when it was ordered on February 7, 2020, after a finding that Petitioner violated the conditions of his probation. The State failed to show good cause to require Petitioner to register as a sex offender. The violation of probation is not sufficient to show good cause. The order placing Petitioner on the sex offender registry on February 7, 2020, without a finding of good cause, was timely appealed and the Court of Appeals should have addressed the merits and order that Petitioner be removed from the sex offender registry.

Ripeness

In Joseph v. S.C. Dep't of Lab., Licensing & Regul., 417 S.C. 436, 466, 790 S.E.2d 763, 779 (2016), the South Carolina Supreme Court wrote:

“Before any action can be maintained, a justiciable controversy must be present.” Sloan v. Geenville Cnty., 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). “A justiciable controversy is a real and substantial controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical or abstract character.” Id. “The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing.” Id. at 547, 590 S.E.2d at 546.

Judge Manning's sentencing order with regard to the sex offender registry was contingent upon the finding of a probation violation. No justiciable controversy existed until there was a probation violation. The controversy with regard to the sex offender registry did not become ripe until there was a probation violation and Petitioner was ordered to register as a sex offender. The sentencing order did not become final until February 7, 2020, when Judge Manning ordered Petitioner to register as a sex offender. See also In Int. of Francis Richard G., 296 S.C. 185, 371 S.E.2d 520 (1988) (holding Department of Youth Services' retention of custody over a juvenile, who was found guilty of murder and sentenced to Department for indeterminate period not to exceed 30 years, was not mandatory but discretionary and juvenile could be released at time of his twenty-first birthday and thus, his claim on appeal that family court lacked jurisdiction to sentence a juvenile to an indeterminate sentence pursuant to a statute did not present a justiciable controversy and the issues raised were not ripe for judicial determination); State v. Tucker, 376 S.C. 412, 656 S.E.2d 403 (Ct. App. 2008) (finding that challenge to plea agreement waiving post-conviction relief claims was not ripe for review because Tucker had not yet filed for post-conviction relief).

In finding that the unappealed sentencing order from December of 2016, was the law of the case, the Court of Appeals overlooked the fact that the sex offender requirement was contingent upon a violation of probation. As a result, the sentencing order did not become final until February 7, 2020, when Petitioner was ordered to register as a sex offender as a result of the probation violation. Petitioner timely challenged the sex offender registry requirement. The Court of Appeals erred in refusing to address the merits and find that the State failed to show good cause.

The merits – No Good Cause Shown

S.C. Code Ann. § 23-3-430(D) provides, “Upon conviction, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the prosecution.” Assault and battery first degree, the charge to which Petitioner pled guilty, is not a listed offense. As a result, the State was required to show good cause. The State failed to show good cause.

In re M.B.H., 387 S.C. 323, 692 S.E.2d 541 (2010), the South Carolina Supreme Court held “that a finding of good cause in this context means only that the judge must consider the facts and circumstances of the case to make the determination of whether or not the evidence indicates a risk to reoffend sexually.” Id. at 327, 692 S.E.2d at 542. The Court held that the lower court did not abuse its discretion in requiring M.B.H. to register, where the solicitor showed good cause:

At the dispositional hearing, the solicitor introduced the [Coastal Evaluation] Center’s evaluation report to support the request for Appellant to be placed on the private sex offender registry. The judge relied on the professional findings and recommendations in that report in concluding good cause existed for placing Appellant on the registry. The record is clear that the judge considered all of the facts and circumstances of this case, both aggravating and mitigating, in determining that there is a risk of sexual reoffense. Such a determination is supported by the evidence in the record.

Id. at 327, 692 S.E.2d at 542-43.

In contrast, in the present case there were no professional findings or recommendations to support placing Petitioner on the sex offender registry. The evidence fails to indicate a risk to reoffend sexually. The State failed to show good cause to place Petitioner on the sex offender registry during the sentencing hearing. The State did not ask that Petitioner be placed on the sex offender registry. Instead, the State recommended that if Petitioner successfully completed sex

offender counseling, he would not have to register as a sex offender.” (R. p. 5, line 25 – p. 6, lines 1-4). Petitioner would have successfully completed sex offender counseling if not for the probation violations that had nothing to do with the successful completion of sex offender counselling. Petitioner only had four classes left of the sex offender counseling before he was terminated from class for the violations unrelated to counseling. (R. p. 35, line 18 – p. 36, lines 1-16). Judge Manning did not make a finding that good cause had been shown by the prosecution to warrant including Petitioner on the sex offender registry.

The present case is distinguished from State v. Fraley, 437 S.C. 135, 876 S.E.2d 703 (Ct. App. 2022), where there were dueling experts testifying for and against sex offender registry and the Court found that the trial judge did not abuse his discretion in finding the State showed good cause. Dueling experts did not testify in the present case and there was no showing of good cause. In Fraley the Court of Appeals distinguished In re Christopher H., 432 S.C. 600, 607, 854 S.E.2d 853, 856 (Ct. App. 2021), a case where the Court of Appeals reversed an order requiring registration as a sex offender “because the *only* evidence of risk indicated a low risk and the evidence overwhelmingly indicated registration was not appropriate, the sentencing court abused its discretion in ordering registration.” The showing of risk to reoffend in the present case is less than the low risk shown in Christopher H. There was no risk to reoffend shown in the present case.

The present case is distinguished from State v. Hicks, 377 S.C. 322, 659 S.E.2d 499 (Ct. App. 2008), where the Court of Appeals found good cause existed in the form of confrontational gestures towards the victim’s father, living arrangements within a half-mile of many girls of similar age to the victim, and sex with the fourteen-year-old victim. In the present case,

Petitioner interacted with his niece and nephew, accessed Snapchat, viewed pornography, and deleted data from his phone. His underlying charge did not involve a minor.

In State v. Davis, the Court of Appeals held that a probation revocation judge was not authorized to order placement on the sex offender registry as a condition of probation. 375 S.C. 12, 649 S.E.2d 178. Davis was indicted for criminal sexual conduct with a minor and pled no contest to assault and battery of a high and aggravated nature. Id. at 13-14, 649 S.E.2d at 178-9. He was sentenced to six years imprisonment suspended upon the service of two years' probation. Id. Additional conditions included sex offender counseling and "not be required to register as a sex offender." Id.

After the counselor contended that Davis was not meaningfully participating in the sessions, Davis was brought before the circuit court for a probation revocation hearing. Id. at 14, 649 S.E.2d at 179. His probation was revoked and placement in the sex offender registry was mandated. Id. at 15, 649 S.E.2d at 179. Davis successfully argued that under S.C. Code Ann. § 23-3-430(D), placement in the registry as a condition of sentencing is only allowed when the solicitor has shown good cause. Id.

In the present case the State failed to show good cause during the probation revocation hearing before Judge Benjamin. The violations of probation for accessing Snapchat on social media, viewing pornography, deleting information from his phone and having contact with his minor niece and nephew are not sufficient good cause and fail to indicate a risk to reoffend as required. Judge Benjamin specifically noted that she did not know anything about the underlying case to decide whether or not Petitioner "needs to be on the registry or not on the registry." (R. p. 38, lines 18 – 20). Judge Benjamin also noted that "the way the order is written is that if he violates, he goes on the registry." (R. p. 38, lines 23-25). The conditional sentencing

order in the present case differs from the sentencing order in Davis that did not require sex offender registry. The error in the present case of placing Petitioner on the sex offender registry without a showing of good cause by the prosecution, however, is the same as the error found in Davis.

The State failed to show good cause for Petitioner to be required to register as a sex offender during the State's motion to reconsider on January 14, 2020. During this hearing the judge gave the State the opportunity to submit a proposed order stating, "You can submit a proposed order as to why he should go on, and I'll consider it." (R. p. 80, line 25 – p. 81, line 1). The order that Judge Manning signed does not include a finding of good cause. (R. pp. 84-85).

In State v. Fraley, 437 S.C. 135, 138, 876 S.E.2d 703, 705 (Ct. App. 2022), the Court of Appeals wrote, "Our supreme court has determined good cause under the statute 'means only that the judge must consider the facts and circumstances of the case to make the determination of whether or not the evidence indicates a risk to reoffend sexually.' In re M.B.H., 387 S.C. at 327, 692 S.E.2d at 542." In the present case both judges failed to make a determination that Petitioner was at risk to reoffend sexually. At both the sentencing hearing and the probation revocation hearing, and the hearings that followed, the State failed to present evidence to indicate a risk to reoffend sexually. The violations of probation including accessing Snapchat on social media, viewing pornography, deleting information from his phone and having contact with his minor niece and nephew, are not sufficient to indicate a risk to reoffend sexually.


"Our standard of review is abuse of discretion. See In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010) (reviewing registration under this standard)." State v. Fraley, 437 S.C. 135, 137, 876 S.E.2d 703, 704 (Ct. App. 2022). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual

conclusions, is without evidentiary support.” State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).” The sentencing judge’s finding as to the sex offender registry is without evidentiary support. The sentencing judge abused his discretion in requiring sex offender registry without a showing of good cause by the State.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the procedural as well as substantive issue.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of September, 2023.