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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2023-000945

The State .....Respondent,

v.

Joseph Bernard Jackson, ...Appellant.

INITIAL BRIEF OF APPELLANT

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ISSUE ON APPEAL

Based on there being no evidentiary record, including evidence Appellant changed his residence, was it error for the trial court to deny Appellant's petition under S.C. Code Ann. § 23-3-540(H) to be removed from electronic monitoring based on the court finding Appellant, in fact, changed his residence and therefore failed to comply with the terms and conditions of electronic monitoring and thus needed continued monitoring?

STATEMENT OF THE CASE

On March 5, 2007, the clerk of court filed a general sessions order imposing electronic monitoring ("EM") on Appellant pursuant to S.C. Code Ann. § 23-3-540 . R. *(Initial Order Imposing EM).[1]

On February 28, 2023, Appellant filed a petition in general sessions court requesting to be released from the EM pursuant to S.C. Code Ann. § 23-3-540(H) (the "Petition"). R. *(Petition). The state filed no return to the Petition.

A hearing on the Petition was held in general sessions court on March 17, 2023, before the Honorable Edward W. Miller. "There were no witnesses. There were no exhibits." R. 2, ll. 1 – 3. Judge Miller, nonetheless, ruled that Appellant's conviction for violating the sex offender registry established, as a matter of law, Appellant had changed his residence without properly notifying the EM monitoring agency and thus failed to comply with the terms and conditions of electronic monitoring under § 23-3-540(H); he then denied the Petition. Tr. 9, l. 22 – Tr. 10, l. 15. The hearing concluded without taking evidence. Judge Miller twice told Appellant to appeal the legal ruling to see if he was "right or wrong." Tr. 10, ll. 3 – 15.

On March 20, 2023, the state's attorney sent Appellant's counsel a proposed order via email. R. *(State's Proposed Order). The state's proposed order included findings of fact and

[1] This order would be unconstitutional if issued today because the general sessions court failed to make two findings. First, that Appellant posed a high risk of reoffending. See State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) (holding an offender's risk for reoffending is at the heart of the EM and sex offender registry programs and, therefore, it violates due process to deny or fail to consider an offender's risk when imposing EM). Second, it did not conduct an individualized assessment under the Fourth Amendment of the reasonableness of imposing EM on Appellant. See State v. Ross, 423 S.C. 504, 514-515, 815 S.E.2d 754 (2018); see also State v. Mitchell, 427 S.C. 220, 830 S.E.2d 22 (Ct. App. 2019) (holding that "the benefit of Ross" must be given to an offender despite the fact that the original order imposing EM was issued prior to Ross being decided). These issues were also not addressed by the trial court in this matter.

rulings on issues raised by the solicitor but not ruled on at the hearing; it also included several new findings of fact purportedly supporting the conclusion Appellant had admitted, through his conviction for failure to register, also to violating the terms and conditions of EM. R. *(State's Proposed Order). The proposed order also referenced documents that had neither been offered or admitted into evidence. R. *(State's Proposed Order).

On March 28, 2023, Appellant's counsel provided the state's attorney with a proposed order and a draft motion for reconsideration of Judge Miller's oral ruling asking whether the state would agree to edit or withdraw its proposed order. R. *(Email to Solicitor). The state's attorney responded via email the same day that he was submitting the proposed order as written. R. *(Email to Solicitor). Later, on March 28, 2023, the state sent its unchanged proposed order to Judge Miller via email and noted Appellant's objection. R. *(Email from Solicitor to Judge).

Subsequently, but also on March 28, 2023, Appellant filed a motion to reconsider with the clerk of court and provided the same to Judge Miller and other counsel of record, along with a cover letter to the judge and an enclosed proposed order. R. *(1st motion to reconsider); R. *(Cover Letter to 1st Motion to Reconsider); R. *(Defendant's Proposed Order. In his cover letter and the accompanying motion, Appellant asked Judge Miller to reconsider his ruling and to reopen the record to hold an evidentiary hearing and address issues raised by the state's proposed order, including the lack of a supporting record. R. *(1st Motion to Reconsider).

The state did not file a return to Appellant's motion.

On April 3, 2023, Judge Miller filed an order denying Appellant's March 28, 2023, motion to reconsider as being prematurely filed under Rule 59(e) of the S.C. Rules of Civil Procedure and instructing Appellant he could refile once a written order was filed. R. *(Court's Order Denying Defendant's 1st Motion for Reconsideration). Judge Miller's order also denied Appellant's motion

for a full hearing because, according to the judge, a full hearing was "held on March 17th, and defendant failed to present any evidence that release from electronic monitoring was appropriate." R. *(Court's Order Denying Defendant's 1st Motion for Reconsideration). Appellant's counsel did not receive a copy of that order until April 27, 2023, when the clerk of court provided it in an email.

At the same time, the clerk also forwarded an order from Judge Miller filed April 17, 2023, denying Appellant's Motion for Release from EM, which was worded identically to the state's proposed order. R. *(Order Denying Petition). This was the final order denying the Petition and it did not address any of the issues raised in Appellant's motion to reconsider.[2]

On May 5, 2023, Appellant filed a motion to reconsider the April 23, 2023, order denying the Petition. R. *(Defendant's 2nd Motion to Reconsider). On May 15, 2023, the state filed a return to the 2nd Motion for Reconsideration with the "information the State submitted" at the hearing attached as Exhibit A. R. *(State's Reply to 2nd Motion for Reconsideration).

On May 26, 2023, Judge Miller issued an order denying the 2nd Motion to Reconsider. R. *(Order Denying 2nd Motion to Reconsider).

Appellant filed a timely notice of appeal. This brief follows.

[2] The order denying the Petition triggers a 5-year statutory bar against Appellant petitioning for removal. See S.C. Code Ann. § 23-3-540(H)..

STATEMENT OF FACTS

The trial court's order denies the Petition based on finding Appellant changed his residence and therefore (1) had not fully complied with the terms and conditions of EM and (2) failing to reside at that address proved he still needed to be monitored. R. *(Order Denying Petition). The written order was preceded by an oral ruling that disposed of the Petition without an evidentiary hearing.

Oral Ruling Denying Petition

The court's denial of the Petition began as an oral ruling solely that Appellant's conviction for failing to register as a sex offender was, as a matter of law, also a failure to comply with the terms and conditions of the EM program. Tr. 10, ll. 3 - 14. Upon issuing this oral ruling, the trial court denied the Petition and ended the hearing without taking evidence. Tr. 10, ll. 3 - 14.

Appellant argued at the hearing there was a factual dispute regarding whether the underlying facts of the conviction sufficiently established Appellant also violated a term or condition of EM. Tr. 8, ll. 7 – 24. The trial court nonetheless ruled as a matter of law, treated it as dispositive of the Petition, and thus took no evidence. Tr. 10, ll. 3 – 15.

Written Order Denying the Petition

In its written order, the trial court changed its oral ruling from a legal conclusion based on a single fact (the conviction) to two findings based on multiple facts. R. *(Order Denying Petition). As to the first finding, the trial court concluded:

> Defendant pled guilty to a criminal charge of failing to register as a sex offender. The warrant to which he pled guilty asserted that he had moved away from the address where he had previously registered (9 Dobbs St.) and had failed to notify the Greenville County Sheriff's Office. His guilty plea was an admission that he was not living at the address provided as part of the GPS Tracking Program Conditions. By failing to reside at the given address on the GPS Tracking Program Conditions, he violated the "terms and

conditions of the electronic monitoring."

R. *(Order Denying Petition). The order does not cite to or reference from what source in the record the facts relied on in making the conclusions in the above-quoted paragraph were drawn. It also does not specifically outline how or whether the trial court made those findings by a clear and convincing evidence standard.

As to the second finding, the trial court concluded:

> Defendant has not provided any evidence that there is no longer a need to electronically monitor him. As the moving party, Defendant has the burden to prove that there is no longer a need to monitor him. He did not introduce any testimony, affidavits, reports, or any other evidence indicating that there is no longer the need to monitor him. On the contrary, the fact that he was not residing at the address provided either to SCPPPS as part of the GPS Tracking Program Conditions or the address provided for the Sex Offender Registry makes it clear that continuing to monitor him is needed.

R. *(Order Denying Petition). The order does not identify the properly admitted source in the record to support concluding Appellant changed his residence or failed to notify the monitoring agency; nor does it explain in what way the change in residence requires continued monitoring.

The trial court adopted the state's proposed order (unchanged) as its written order denying the Petition. Compare R. *(State's Proposed Order) and R. *(Order Denying Petition). This was done over the objection of Appellant as outlined in two filed motions to reconsider.

Appellant's 1st Motion to Reconsider

Appellant filed a motion to reconsider after the state submitted its proposed order but prior to the court issuing its written order denying the Petition. R. *(Defendant's 1st Motion to Reconsider). This first motion addressed the trial court's finding as a matter of law Appellant had failed to comply with the terms and conditions of EM.

In his cover letter to the trial court accompanying the motion to reconsider, Appellant highlighted:

- He objected to the state's proposed order because it included additional rulings beyond the single oral ruling made at the hearing that a violation of the sex offender registry constituted a violation of the EM terms and conditions and that he had not had an opportunity to address those issues. R. *(Cover Letter to 1st Motion to Reconsider).
- He was requesting a hearing on the additional issues to create a full record. R. *(Cover Letter to 1st Motion to Reconsider).

In the motion, Appellant identified the issue ruled on at the March 17th hearing as being that a conviction for violating the sex offender registry was, as a matter of law, a violation of the terms and conditions of EM. R. *((Defendant's 1st Motion to Reconsider). Appellant identified additional legal and factual issues that had not been addressed at the hearing but are implicated by a removal petition. He specifically argued the court had not "finalized" issues the law required it rule on.

> - Whether the State has presented clear and convincing evidence that it is reasonable under the Fourth Amendment to continue to electronically monitor [Appellant]; and
> - Whether the State has presented clear and convincing evidence [Appellant] poses a sufficient risk to re-offend that justifies requiring him to continue to be electronically monitored.

R. *(Defendant's 1st Motion to Reconsider).

In reconsideration of the single issue ruled on at the March 17th hearing, Appellant laid out a legal argument for why it would be error for the court to use a violation of the sex offender registry as a bar to removal from EM and also why it would be error to equate a violation of one statute with violating the other without any factual support in the record.

- Section 23-3-540(H) does not explicitly state a violation of the sex offender registry is a bar to being removed from EM or that it constitutes a violation of the EM terms and

conditions as a matter of law. R. *(Defendant's 1st Motion to Reconsider).

- That had the legislature intended either to be the case, it would have done so using the specific language it used in other subsections of § 23-3-540 when it wanted to refer to violations of the sex offender registry. See S.C. Code Ann. §§ 23-3-540 (C), (D), (E), (F), (H), and (Q), where the specific term "this article" is used to refer to violations of the sex offender registry triggering EM. R. *(Defendant's 1st Motion to Reconsider).
- The proper standard of review was a Fourth Amendment totality of the circumstances assessment of the reasonableness of monitoring Appellant. See Ross, supra. R. *(Defendant's 1st Motion to Reconsider).
- The trial court's ruling violated the "safeguards and standards of the Fourth Amendment and relevant case law" by requiring Appellant to continue to be monitored without satisfying the Fourth Amendment standards set in Ross. R. *(Defendant's 1st Motion to Reconsider).
- The trial court was not operating from an existing record establishing it was reasonable under the Fourth Amendment to require Appellant submit to EM. R. *(Defendant's 1st Motion to Reconsider).
- One of the concerns the Ross court had was that "technical" violations would trigger EM where the violation did not substantively address the reasonableness of EM for an individual person and may be an "innocent" violation. R. *(Defendant's 1st Motion to Reconsider).

The state did not file a return to Appellant's motion for reconsideration.

Trial Court's Order Denying 1st Motion for Reconsideration

Judge Miller denied Appellant's first motion to reconsider on the basis it was premature

under Rule 59(e) of the S.C. Rules of Civil Procedure without citing to authority holding Rule 59(e) was applicable to motions for reconsideration under the Rules of Criminal Procedure.[3,4] Judge Miller also denied Appellant's request for a full hearing because he concluded a hearing had already been held "and defendant failed to present any evidence that release from electronic monitoring was appropriate." R. *(Order Denying Defendant's 1st Motion for Reconsideration). The order does not cite authority to support denying a motion to reconsider when a party offers additional evidence.[5] R. *(Order Denying Defendant's 1st Motion for Reconsideration).

Appellant's 2nd Motion to Reconsider

Appellant filed a second motion to reconsider after the trial court filed its written order denying the Petition. In this motion, Appellant re-asserted his arguments from the first reconsideration motion. R. *(Defendant's 2nd Motion for Reconsideration). He also made additional arguments in light of the written order.

- There were additional issues (legal and factual) that still needed to be addressed. R. *(Defendant's 2nd Motion for Reconsideration).
- The issues were not fully addressed because the trial court erred in ruling as a matter of law on a dispositive issue without taking evidence. R. *(Defendant's 2nd Motion for Reconsideration).

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[3] But see Rule 29, SCRCrimP, which allows a reconsideration motion to be filed in courts with criminal jurisdiction; see Rule 81, SCRCP, which states the SCRCP applies only to courts with civil jurisdiction; see also State v Garrard, 390 S.C. 146, 153, 700 S.E.2d 269, 273 (Ct. App. 2010) (holding Rule 29 of SCRCrimP—not Rule 59(e) of SCRCP—applied to a motion for reconsideration of a violation of probation).

[4] But he did direct that Appellant could refile once a written order was filed. R. *(Order Denying Defendant's 1st Motion for Reconsideration).

[5] But see State v. Garrard, supra., (reasoning it is not a reasonable basis to deny holding a hearing on a motion to reconsider when there is additional evidence offered in the motion to reconsider or the return).

- The written order is inconsistent with the oral order because it relies on facts (not in evidence) whereas the oral ruling was issued as a matter of law based on the single (presumed) fact of the conviction without the underlying facts being in the record. R. *(Defendant's 2nd Motion for Reconsideration).
- The written order is based on documents that were not in evidence, specifically the "GPS Tracking Program Conditions" document and the arrest warrant charging Appellant with failure to register, which were both specifically referenced in the order. R. *(Defendant's 2nd Motion for Reconsideration).
- The order lacked evidence to support the findings and it therefore violated Appellant's right to due process because it denied him a full evidentiary hearing to address relevant (admissible) evidence, law, and argument. R. *(Defendant's 2nd Motion for Reconsideration).
- Evidence existed that Appellant would present in response to "properly admitted" evidence from the state; in support of his own arguments for removal; and in response to the state and the trial court's conclusions, including that Appellant had not changed his residence, that he was treated by Prisma Health for complications from strictures of the sigmoid colon, and had spent several days in the hospital around the time of the alleged change in residence. R. *(Defendant's 2nd Motion for Reconsideration).
- There were findings in the order about Appellant's change in residence that did not satisfy the standard set by S.C. Code Ann. § 23-3-460(D) for proving a change in residence because the GPS tracking document did not, in fact, establish Appellant had spent 10 or more consecutive days at a new residence as the state alleged and the trial court had concluded he had. R. *(Defendant's 2nd Motion for Reconsideration).

- The state failed to meet its burden of proof on several issues, including its burden to prove reasonableness under the Fourth Amendment both for the original monitoring order and for continued monitoring; as well as failing to prove by clear and convincing evidence that Appellant posed a high risk of reoffending and that it was necessary to continue to monitor him. R. *(Defendant's 2nd Motion for Reconsideration).
- The case did not have to remain in its current posture of being unsupported by a properly admitted record because an evidentiary hearing would resolve that error. R. *(Defendant's 2nd Motion for Reconsideration).

The State's Return to 2nd Motion for Reconsideration

The state filed a return to the 2nd Motion for Reconsideration. In it, the state argued Appellant had had a full hearing. R. *(State's Return to Defendant's 2nd Motion for Reconsideration). It did not address how this argument was consistent with the trial court ruling as a matter of law and ending the hearing without taking evidence.

The state admitted that none of the documents it relied on for its argument (including the ones relied on in the trial court's written order) had been properly moved into evidence. R. *(State's Return to Defendant's 2nd Motion for Reconsideration). The state argued Appellant had the opportunity to object to the documents. R. *(State's Return to Defendant's 2nd Motion for Reconsideration). It did not address how that squared with the state admitting it failed to offer or move the items into evidence. The state again did not address how this argument squared with the trial court ruling as a matter of law and ending the hearing without taking evidence.

The state argued Appellant was the sole party with a burden of proof. R. *(State's Return to Defendant's 2nd Motion for Reconsideration). It did not address how it could be that the state itself would not have the burden of establishing by any standard (including clear and convincing

evidence) the claims it was asserting—namely that Appellant had changed residences, failed to comply with the terms and conditions of the EM program, and that it was necessary to continue to monitor him—but Appellant would.

In defense of the findings having support in the record, the state argued that it had not argued at the hearing that the failure to register conviction was, as a matter of law or by "prima facie evidence," also a finding Appellant failed to comply with the terms and conditions of EM; but that it had relied on the "facts contained in the [arrest] warrant" being sufficient support for the findings. R. *(State's Return to Defendant's 2nd Motion for Reconsideration). The state did not provide an argument for how this position was consistent with its earlier argument in the same return that the evidence had not been properly admitted into the record; nor how it was consistent with trial court ruling as a matter of law rather than after taking a set of facts into evidence; nor how it was consistent with the ruling being dispositive as a matter of law and the trial court (twice) directing Appellant to appeal to see if it was "right or wrong." Tr. 10, ll. 3 – 15.

Trial Court's Order Denying 2nd Motion to Reconsider

The trial court's order denying Appellant's 2nd motion for reconsideration states it reviewed the motion and return under Rule 29(a), SCRCrimP, and determined a hearing was unnecessary.[6] R. *(Order Denying 2nd Motion for Reconsideration). The order does not address the basis for this determination; nor does it cite to authority for what, if any, standard it relied on.[7]

The order also denied Appellant's request to reopen the record on the basis Appellant had

[6] The order does not provide a reason or authority for why the civil procedure rules no longer applied to Appellant's motion to reconsider.

[7] But see State v. Garrard, supra., (reasoning it is not a reasonable basis to deny holding a hearing on a motion to reconsider when there is additional evidence offered in the motion to reconsider or the return).

had an opportunity to present evidence at the March 17th hearing, reasoning Appellant could have presented "whatever evidence and testimony that he wished to present." R. *(Order Denying 2nd Motion for Reconsideration). The order does not address why Appellant only gets one opportunity; or why, in the face of additional evidence referenced in the motions to reconsider, another hearing was not necessary or required by law. The order does not set forth an analysis of or ruling on Appellant's argument that the trial court erroneously ruled as a matter of law on a dispositive issue at the hearing and the court itself ended the hearing without taking additional evidence.

The Hearing

At the only hearing on the Petition, the trial court orally ruled Appellant's conviction for failing to register as a sex offender was, as a matter of law, a failure to comply with the terms and conditions of electronic monitoring under § 23-3-540(H). Tr. 10, ll. 3 - 14. The court made this ruling as a matter of law during a pre-evidentiary colloquy that involved a legal argument by Appellant where no facts were admitted into evidence or noted in support by the trial court. Tr. 7, l. 14 – Tr. 8, l. 24. After issuing its ruling, the trial court twice directed Appellant to appeal the issue and then ended the hearing without taking evidence. Tr. 10, ll. 3 – 15.

The hearing started and remained in a pre-evidentiary phase where the parties were apprising the trial court of the issues they believed were relevant and what they intended to present as evidence. Tr. 4, l. 7 – Tr. 10, l. 15. The hearing never moved into an evidentiary phase.

After a preliminary discussion,[8] the trial court asked Appellant: "what do you want to tell me?" Tr. 4, l. 6. To which, Appellant made a short statement as to the relief he sought and that he believed he could meet the statutory requirements. Tr. 4, ll. 7 – 18. Appellant outlined his

[8] The discussion was about a prior criminal case where Appellant was found not guilty at trial and was represented by the trial court's former law partner. Tr. 3, l. 3 – Tr. 4, l. 5.

arguments and what he believed they would prove. Appellant identified he believed he could establish by clear and convincing evidence Appellant had satisfied the 10-year requirement and had also complied with the terms and conditions of electronic monitoring. Tr. 4, ll. 11 – 18.

Turning to the state, the trial court asked for its "position." Tr. 4, ll. 19 – 20. The state previewed the issues (as Appellant had just done) and set out "our position" for the court. Tr. 6, l. 7. It began with arguing Appellant had the burden of proof and then identified what it intended to present in support of its position. Tr. 4, l. 21 – Tr. 6, l. 21. At this point, the state specifically raised the issue of whether Appellant's conviction for failure to register as a sex offender meant he had violated the terms and conditions of electronic monitoring by changing his residence. Tr. 5, l. 12 – Tr. 6, l. 11. The state referenced one of several documents it claimed would support its positions. Tr. 6, ll. 3 – 4 ("tab number six"). It did not mark or move this or any other document into evidence.

Upon finishing his presentation, the state's attorney told the trial court "I have with me" a probation agent and an attorney for the probation department; and that he believed they were not taking a position on the motion. Tr. 6, ll. 11 – 16. The trial court asked: "Yes, ma'am, anything you want to -- what do y'all want to tell me?" Tr. 6, ll. 20 -21. The probation department, in fact, did not take a position on Appellant's removal from electronic monitoring. Tr. 6, l. 24 – 7, l. 1. The trial court also asked about the probation agent's involvement. Tr. 7, l. 10. To which the agent responded: "We're here, Your Honor, if you have any questions about the GPS point reports." Tr. 7, ll. 11 – 12.

The trial court then heard Appellant's response. Appellant advised (i) there were legal issues with the state's response and (ii) there was a factual dispute as to the issues, specifically as to Appellate changing his residence and complying with EM. Tr. 7, l. 14 – Tr. 8, l. 24. Appellant argued case law did not support the state's argument that Appellant's conviction for failure to

register was, as a matter of law, a violation of the terms and conditions of electronic monitoring. Tr. 8, ll. 1 – 7 (citing State v. Ross, 423 S.C. 504 (2018)), where the appellate court rejected the exact same legal argument from the state). Appellant also raised an additional issue from Ross he believed relevant to his case: that prior to being placed on electronic monitoring, a court had not made an individualized determination that Appellant needed to be monitored (and it was not likely the state could have proven that had the court taken it up in the initial order) which, Appellant argued, meant the trial court would now need to address per Ross. Tr. 7, ll. 20 – 25; see also R. *(1st motion to reconsider); R. *(2nd motion to reconsider).

As to the facts alleged by the state, Appellant identified there was a factual dispute concerning whether Appellant had, in fact, changed his residence or violated a term or condition of EM. He provided "background on the violation" that was in direct dispute with the state's assertions of the facts and argument it intended to present. Tr. 8, ll. 7 – 8. Appellant said he would take the position he had not changed his residence from his father's home, where he'd lived for over 30 years, to his girlfriend's home. Tr. 8, ll. 8 – 14. Appellant then argued his health issues were relevant to determining whether he had, in fact, changed his residence or was merely receiving more assistance from his girlfriend than he had in the past. Tr. 8, ll. 15 – 24.

The trial court posed the question to Appellant: "So how do you explain the violations of electronic monitoring?" Tr. 9, ll. 22 – 23. Appellant responded with a legal argument that the statutes are separate and a violation of one (based, among other reasons, on the argument rejected in Ross) did not mean Appellant had violated the other as a matter of law. Tr. 9, l. 22 – Tr. 10, l. 2. Without transitioning or pausing the legal argument, the trial court issued its oral ruling.

> THE COURT: Okay. Well, I tell you what, I'm going to deny your motion. You can appeal that and see if I'm right or wrong.
>
> MR. SCALZO: Are you denying, Judge, on the basis that that's

the same statute?

THE COURT: I'm denying it because he violated the home incarceration or whatever electronic monitoring provisions, he violated that.

MR. SCALZO: Okay, Judge, just for the record, those [violations of the sex offender registry] are not part of the [electronic monitoring] statute but okay [I understand your ruling].

THE COURT: Okay. Well, you let an appellate court tell you that. Thank you.

MR. SCALZO: We will, Judge, thank you.

Tr. 10, ll. 3 – 15.

The hearing ended. The motions to reconsider were filed. They were denied. There were no additional hearings.

ARGUMENT

I. Based on there being no evidentiary record, including evidence Appellant changed his residence, it was error for the trial court to deny Appellant's petition under S.C. Code Ann. § 23-3-540(H) to be removed from electronic monitoring based on the court finding Appellant, in fact, changed his residence and therefore failed to comply with the terms and conditions of electronic monitoring and thus needed continued monitoring.

The record does not support finding Appellant changed his residence. And it was error for the trial court to rely on that finding, as well as others in its written order, to conclude Appellant failed to comply with the terms and conditions of EM by changing his residence as well as in finding that changing his residence proved Appellant needed continued monitoring. These findings are erroneous because there is no evidence in the record Appellant changed his residence. Moreover, there is no evidence in the record to support the other findings made by the trial court in its order because there is no evidence in the record.

The record contains no evidence because of compounding errors made by the trial court. It began with erroneously ruling as a matter of law on a dispositive issue at the hearing and then ending the hearing without taking evidence. After that, the trial court erroneously denied Appellant's two motions to reconsider and reopen the record. Consequently, the record contains no properly admitted evidence upon which to support any of the trial court's findings. The trial court therefore abused its discretion in denying the Petition based on findings that are unsupported by the record. State v. Mitchell, 421 S.C. 365, 370, 807 S.E.2d 193, 195 (2017) (it is an abuse of discretion "when [the ruling is] based upon factual conclusions, the ruling is without evidentiary support").

A. The trial court erred by ruling as a matter of law and not taking evidence.

Appellant showed, at the hearing and in his motions to reconsider, that the underlying facts concerning whether he changed his residence were in dispute and that the court was relying on facts not in evidence to support its findings. Moreover, Appellant argued at the hearing and in his motions that it was erroneous for the court to conclude as a matter of law that a violation of one statute was also a violation of the other without taking evidence on the underlying facts. Despite this showing, the trial court did not take evidence at the hearing and denied Appellant's motions to reopen the record and to hold an evidentiary hearing. That was error.

When a court rules as a matter of law on an issue, that ruling must be based on evidence that is ***susceptible to only one inference***. See Bell v Progressive Direct Ins. Co., 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014) (summary judgment may be granted "when the evidence is susceptible of only one reasonable interpretation") (internal citations omitted); see also Hurd v. Williamsburg County, 353 S.C. 596, 579 S.E.2d 136 (Ct. App. 2003) (applying the rule to review of a directed verdict motion on the question of deciding proximate cause in a negligence action as a matter of law rather than submitting it to the jury as factfinder); see also Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335 (1962) (applying the rule where the issue to be determined was whether recovery in a wrongful death action could be barred based on "the contributory recklessness and willfulness of a guest in an automobile [accident]").

In this case, because the evidence was susceptible to more than one inference and because the facts were in dispute, it was error for the trial court to rule as a matter of law that Appellant changed his residence based solely on his conviction for failure to register as a sex offender.

Appellant's conviction does not satisfy the ***susceptible-to-one-inference*** rule. We can start with the statutes. To prove a violation of failure to register the state must show an offender failed

> to register, provide notification of change of address, or notification of permanent or temporary change in employment, or attendance, enrollment, employment, volunteer status, intern status, or vocation status at any public or private school, as required by this article [].

S.C. Code Ann. § 23-3-470 (A). By definition, there are many factual scenarios that could support a conviction for what is generally termed "failure to register." Absent other evidence, no conclusion could be drawn as to whether any of those scenarios would also be a violation of a term or condition of electronic monitoring or what factual scenario applied to Appellant.

Furthermore, there is no definition in S.C. Code Ann. §23-3-540 of what a violation of the terms or conditions of electronic monitoring could be. At a minimum, to determine whether a violation of one constitutes a violation of the other requires a factual determination based on evidence be in the record of what the terms and conditions are and what the alleged conduct is underlying the failure to register conviction. None of that evidence is in the record. Perhaps more importantly, no single conclusion about whether Appellant violated a term or condition of electronic monitoring can be drawn from the failure to register conviction by itself. There simply are no facts for the trial court to rely on.

Appellant's conviction for failure to register does not, by itself, lead only to the conclusion Appellant violated the terms and conditions of electronic monitoring; or only that he changed his residence; or only that he did so in violation of the EM program. It certainly does not do so by clear and convincing evidence when there is no evidence in the record. Two things to the contrary stand out. First, the trial court was aware there was a factual dispute on this issue. Tr. 8, ll. 7 – 24. The trial court, therefore, was also aware there was additional available evidence that could lead to more than one conclusion.

The second point to the contrary is there are multiple factual scenarios that could support a conviction for failure to register that do not also prove to be violations of a term or condition of

electronic monitoring. For example, failing to register (for any reason) is not a violation of the terms or conditions of electronic monitoring according to the document entitled "GPS Tracking Program Conditions." To begin with, the EM conditions are not in evidence. R. *(State's Reply to 2nd Motion to Reconsider) (the state conceded it did not put the document into evidence). Although this document was not marked for identification, offered as an exhibit, or admitted into evidence, it was provided to the trial court in reference to the positions each party was taking on the motion.[9] At best, this document raises a factual issue regarding whether Appellant changed his residence in a manner that violates the program conditions. However, the conviction for failure to register by itself does not conclusively address the residence issue; nor would it, since Appellant argued there was a factual dispute surrounding the allegations he'd changed his residence. Tr. 8, ll. 7 – 24. Not to mention the GPS coordinate evidence (again, neither marked, offered, nor admitted) would not have established Appellant was at a different residence for 10 or more consecutive days or there with an equivalent regularity as required by S.C. Code Ann. § 23-3-460. R. *(Defendant's 2nd Motion to Reconsider) (demonstrating the GPS tracking document does not show Appellant spending 10 or more consecutive days at a different residence but that he spent a total of 137 non-continuous hours—5 days, if consecutive—at his girlfriend's house). Therefore, the very "evidence" the trial court relies on does not even establish the purported factual conclusion the court is using it for.

Plus, that document was provided to inform the trial court of the state's position.[10] It was not "proof" Appellant violated a term or condition related to his residence. Once again, it highlights the issue cannot be conclusively decided without additional evidence in the record.

[9] The trial court specifically asked the state what its "position" was on the issues after Appellant set out the nature of his motion and request for relief. R. 4, ll. 19 – 20.

[10] The state admitted it had not properly moved the document (or any document) into evidence. R.

At best, Appellant's conviction was uncontested. But only the conviction itself was uncontested. The underlying facts of the conviction clearly were disputed. R. 8, ll. 7 – 24.; R. *(1st motion to reconsider); R. * (2nd motion to reconsider). Not to mention:

- the fact of conviction, although uncontested, proves nothing more than that Appellant was convicted of a particular crime;
- the conviction by itself did not prove the underlying facts surrounding the offense or the guilty plea;[11] and
- many fact patterns can support a conviction.

Because the conviction for failure to register was susceptible to more than one inference as to whether Appellant changed his residence (and to whether that also meant he violated the terms and conditions of the electronic monitoring program or needed continued monitoring), the trial court erred in making its finding as a matter of law.

B. The trial court erred in denying Appellant's two motions to reconsider.

The trial court erred in denying Appellant's two motions to reconsider and reopen the record for the same reasons it erred in ruling as a matter of law at the hearing. Appellant demonstrated in his motions to reconsider not only that there was a factual dispute over whether he changed residences, whether he violated a term or condition of EM, and whether he still needed to be monitored, Appellant also demonstrated there were other factual and legal issues that need to be resolved. R. *(1st Motion to Reconsider); R. *(2nd Motion to Reconsider).

*(State's Reply to 2nd Motion to Reconsider).

[11] For instance, if the plea was "no contest" or pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970) that might have an impact on what facts were admitted to at the plea since these are different than a standard plea.

The trial court erred for an additional reason in denying the motions. As reasoned in State v. Garrard, when additional evidence is offered in a motion to reconsider there is no longer a reasonable basis under Rule 29, SCRCrimP, for the trial court to not hold a hearing. 390 S.C. at 153; see also Elam v. S.C. DOT, 361 S.C. 9, 602 S.E.2d 772 (2004) ("It is inherently unfair to disallow" a party the opportunity via an additional hearing to call a misapprehension to the court's attention).

C. The trial court's erroneous rulings resulted in no evidentiary record.

The record is evident by its emptiness. "There were no witnesses. There were no exhibits." Tr. 2, ll. 1 – 3. Therefore, there is no record to support the trial court's findings because the state never put anything into evidence that established Appellant changed his residence let alone under what circumstances he did so and what impact, if any, it had on his compliance with the terms and conditions of EM or the need for his continued monitoring.

Although not identified in the transcript, the state's packet of what it intended to offer into evidence was provided to the trial court at the hearing for informational purposes not as evidence. Most significantly, the state admitted in its Return to Defendant's Motion to Reconsider that it did not introduce its packet of documents into evidence. R. *(State's Return to 2nd Motion to Reconsider).

This is significant because, while the state argued Appellant had the burden of proving he had not violated the terms or conditions of electronic monitoring, Tr. 4, l. 22 – Tr. 5, l. 1, once Appellant asserted he had indeed complied, the burden would be on the state to refute that claim with evidence. See e.g. Lord v. D & J Enterprises, Inc., 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014) (in a summary judgment context, applying the rule that once the moving party makes its initial case, the opposing party has the burden of doing more than resting on allegations to prove

its position); Stanley v. Kirkpatrick, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2004) ("It is well established that a motion to amend is addressed to the discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice").

However, except for the reference to "tab number six" (although not to a specific page or paragraph or line number), the state's documents remained unmarked. It never offered them as evidence and the trial court never admitted them into the record. Tr. 2. Ll. 1 -3; see also R. *(1st motion to reconsider); R. *(2nd motion to reconsider); R. *(State's Reply to 2nd Motion to Reconsider). Moreover, both the state and the trial judge erroneously maintained the burden never leaves Appellant regardless of the positions the state takes. That's clearly wrong. See the cases cited in the above paragraph.

C. The trial court's findings rely on facts not in evidence.

Despite there being no documents offered or admitted into evidence, the written order specifically references documents to support its finding. It references the arrest warrant, documents allegedly signed by Appellant, documents from the Department of Probation, Parole and Pardon Services, and documents from Appellant's registry as a sex offender. R. *(written order denying petition). None of these items were in evidence. Appellant was denied the opportunity to challenge the admissibility of these items as evidence and their consideration by the trial court.

The order also relies on things not testified to by any witness. Most crucially, it relies on facts about Appellant's alleged change of address and what terms and conditions of monitoring are that he is alleged to have failed to comply with. R. *(written order denying petition). Once again, at best, Appellant's conviction, by itself, may have been uncontested but Appellant clearly argued at the hearing (and then in his motions to reconsider) that the fact of conviction, although uncontested, did not prove by any standard Appellant failed to comply with monitoring. Tr. 8, ll.

7 – 24.; R. *(1st order denying motion to reconsider)' R. *(2nd order denying motion to reconsider). How could the trial court decide what term or condition Appellant had failed to comply with if there was no evidence in the record as to what the terms or conditions were or Appellant's knowledge or agreement of them?

Based on there being no evidentiary record, including evidence Appellant changed his residence, it was error for the trial court to deny the Petition to be removed from electronic monitoring based on finding Appellant, in fact, changed his residence and therefore failed to comply with the terms and conditions of electronic monitoring and thus needed continued monitoring.

CONCLUSION

Appellant respectfully requests this Court reverse the decision of the trial court and find he was entitled to a full evidentiary hearing on his petition to be removed from the electronic monitoring requirements of S.C. Code Ann. § 23-3-540(H).

Respectfully submitted,

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September 11, 2023