STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from the Thirteenth Circuit
The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2023-000945

THE STATE, RESPONDENT

v.

BERNARD JOSEPH JACKSON, APPELLANT

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the circuit court judge erred when he declined the Appellant's request to be removed from electronic monitoring based upon his violation of its terms, which include his admission of failing to register on the sex offender registry and changing his residence inappropriately?

STATEMENT OF THE CASE

After completing his sentence for Criminal sexual conduct with minor, or Attempt – victim 11 to 14 years of age inclusive – Second degree, the Appellant was released on community supervision. In accordance with §23-3-430(C)(2)(a), he was required to begin registering on the sex offender registry upon his release. As a result of consecutive violations of his community supervision, the Honorable Charles B. Simmons, Jr. ordered that he be placed on electronic monitoring pursuant to §23-3-540(D) and in accordance with the Sex Offender Accountability and Protection of Minors Act of 2006 (hereinafter noted as "SORNA"). (R.p.15)

On February 28, 2023, the Appellant filed a petition in general sessions court requesting to be released from the electronic monitoring pursuant to §23-3-540(H). In accordance with the requirements of this statute, a hearing was held on March 17, 2023 before the Honorable Edward W. Miller. Additionally, the solicitor of the circuit and the Department were both given an opportunity to testify *or* submit affidavits in response to the petition, which is also required by the statute. On April 15, 2023, the Court issued an Order denying Appellant's Petition after finding that Appellant had not complied with the terms and conditions of the electronic monitoring and that there was a need to electronically monitor him. (R.p.31-p.33). See also §23-3-540(H).

Prior to the issuance of Judge Miller's written Order, Appellant filed a motion for reconsideration and submitted his own proposed order while objecting to the proposed order that had been drafted by the solicitor's office. Judge Miller denied the Appellant's motion to reconsider as it was prematurely filed under Rule 59(e) of the South Carolina Rules of Criminal Procedure, which states that such motions "shall be served not later than 10 days after receipt of written notice of the entry of the order."

As noted in the Appellant's brief, he filed a second motion to reconsider on May 5, 2023, which was ultimately denied by Judge Miller on May 26, 2023.

On June 9, 2023, the Appellant filed his appellate brief and served it upon the South Carolina Attorney General's Office. After obtaining an extension, the Department comes now on behalf of the State in response and to respectfully request that Judge Miller's denial of the petition for removal of the GPS device be upheld.

ARGUMENT

1. **The court did not err in denying Appellant's petition under S.C. Code §23-3-540(H) to be removed from electronic monitoring when petitioner offered no evidence, and based its ruling on the fact that he did not comply with the sex offender registry, thus determining that there was a need to continue to electronically monitor him.**

Appellant argues that the trial court erred when it based its ruling on Appellant's convictions for failure to register as a sex offender. Respondent would submit that the trial court was within its discretion when it found that Appellant's failure to abide by the conditions of the sex offender registry showed a continued need for electronic monitoring, which was well within the discretion afforded the court in S.C. Code §23-3-540(H).

The General Assembly outlined the process of the petition for removal of the GPS device in §23-3-540(H). After the notice requirements, the court of general sessions may grant the petition "if the court finds that there is clear and convincing evidence that the person has complied with the terms and conditions of the electronic monitoring *and* that there is no longer a need to electronically monitor the person." (emphasis added).

Appellant clearly desires to flip the burden of proof to the State even though he was the petitioner. The court must make findings that not only has the applicant complied with the program, but also that there is no longer a need for the monitoring. Such proof must come from the applicant, not the State.

Appellant asserts that there was no evidentiary record that he changed his residence despite having the opportunity to present evidence of the contrary at the hearing. Instead, Appellant attempts to muddy the residence issue by claiming that the issue was over whether he was residing with his girlfriend and alleging that there was no allegation or evidence that he was trying to commit any new crimes regarding sex offenses. (R. p. 8, ll. 8-10, 22-24).

In actuality, the Solicitor did present evidence to the Court that Appellant had been charged with failing to register and living within a thousand feet of a school, which was in violation of the sex offender statutes and by extension the terms and conditions of electronic monitoring. These are both offenses to which he pled guilty. (R. p. 9, ll. 12-25). Appellant should be estopped from attempting to relitigate the facts of that conviction in the subsequent proceeding to be removed from tracking. See Doe v. Doe, 346 S.C. 145, 148, 551 S.E.2d 257, 259 (2001) "We now adopt the rule that once a person has been criminally convicted he is bound by that adjudication in a subsequent civil proceeding based on the same facts underlying the criminal conviction".

As noted in the transcript and in the Solicitor's Return to Appellant's Motion for Reconsideration, Appellant did not present any evidence via testimony or any other materials to suggest that he had complied with the terms and conditions of the electronic monitoring and that there was no need to continue to monitor him. Thus, Appellant failed to meet his burden to prove to the court that he should be released from monitoring. While this is a case of first impression regarding §23-3-540(H), typically the burden is on the moving party or the party seeking relief. See Hook v. South Carolina Department of Health and Environmental Control, 439 S.C. 52,75, 885 S.E.2d 442, 454) (2023) ("In an action for contempt, the burden of proof is on the moving party."); Wills v. State, 437 S.C. 385,393, 878 S.E.2d 330, 3345 (2022) ("In post-conviction

proceedings, the burden of proof is on the applicant to prove the allegations in his applications. The applicant has the burden of establishing his entitlement to relief…". See Rule 71.1(e), SCRCP.

Additionally, the South Carolina Rules of Evidence Rule 1101(d)(3) renders the Rules of Evidence inapplicable for various hearings conducted in General Sessions matters. Consider the informal nature of a hearing such as this, wherein the petitioner must show that he or she complied with the terms of the electronic monitoring over the course of a minimum of ten years. Quite simply, the length of this time frame may require hearsay in order to make a showing of compliance. The presiding judge, being the factfinder, is well-suited to weigh whatever evidence is presented and to make such inferences as required to rule upon the petition for removal.

Thus, it can be inferred that the hearing on the Appellant's petition falls within a category wherein the Rules of Evidence would not apply. See United States v. Walker, 2019 WL 4412909 ("The statutory use of a non-exhaustive list of illustrative examples does not exclude items not expressly specified. …the Rules of Evidence do not apply to proceedings to establish prior convictions because they are miscellaneous proceedings akin to sentencing hearings."

Although Appellant raises a lack of evidence in the record, the burden was with him all along. As the moving party, he bore the responsibility to show to the court his compliance with the terms of electronic monitoring and the lack of a need to further monitor him. The information provided by the State was sufficient to show that he failed to abide by the sex offender registry requirements, thus showing a need for him to continue to be monitored through the GPS program.

The GPS tracking program falls under Article 7 of Title 23, which entails all of the code sections for the Sex Offender Registry. Consequently, a violation of the requirements to register is a violation of Article 7.

Pursuant to SC Code §23-3-430(C)(2)(a), the Appellant was informed upon his release from incarceration that he was required to register as a sex offender for placement on the sex offender registry. When he was released, he also was placed on community supervision. Upon his first violation of his community supervision, he was ordered to be placed on electronic monitoring. On the second violation, he was ordered to be placed on electronic monitoring per SC Code §23-3-540(D). (R.p.15) Per the Department's tracking policy, he signed a GPS Tracking Program Conditions form that noted where he would reside. (R.p.53-p.54)

Based upon the Greenville County Sheriff's Office information, the Appellant had failed to register and he changed his address. Section 23-3-460(C) states that "if a person required to register *pursuant to this article* changes his address within the same county, that person must send written notice of the change of address to the sheriff within three business days." (emphasis added). The Appellant admittedly failed to do so, which is why he was charged with these violations and subsequently pled guilty. Pursuant to §23-3-460(I) and §23-3-470(A), the notification of change of address requirement applies to *both* permanent *and* temporary addresses.

Appellant's convictions for violating the provisions of Article 7 necessarily implicate the electronic monitoring program, as it too falls under Article 7. Even though the State did not have the burden of proof in the hearing, the evidence it did present of the convictions was sufficient to refute Appellant's assertion – also without evidence – that he had complied with the program and that there was no need to further monitor him with clear and convincing evidence.

Indeed, the fact that he failed to register is a significant violation because it can also prevent an offender from being able to be removed from the sex offender registry pursuant to §23-3-462(A)(4). Thus, the judge did not abuse his discretion based upon this fact and his other violation of changing addresses without notifying the Sheriff's Office.

As Judge Miller stated in his order, "[a]s the moving party, [Appellant] 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." Respondent urges this Court to uphold the circuit court's ruling because Appellant introduced no evidence on his behalf, failing to present the barest minimum except for an argument that the court should overlook his violations of other provisions of the sex offender registry.

The Appellant also raises State v. Ross, 423 S.C. 504, 815 S.E.2d 754 (2018), in his arguments that the circuit court should have removed him from the GPS program. However, Ross can be distinguished from the analysis that was before the court in this case.

Unlike Ross, who was ordered to be placed on monitoring after failing to register, the Appellant was ordered to be placed on electronic monitoring while he was on community supervision pursuant to §23-3-540(D) as a result of his violations. The distinction is worthy of noting because Ross was under no supervision at the time he was ordered to be placed on monitoring under §23-3-540(E). The Court in Ross drew its own distinction between the appellant in Ross and the appellant in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013). "Second – and more importantly – the factual and legal context of our decision in Dykes was completely different. … The fact the defendant was on probation when the court imposed electronic monitoring is important." Ross at 757, S.E.2d at 510.

Thus, the decision of the Court to deny the Appellant's petition for removal from electronic monitoring should be upheld since it was not an erroneous decision, but one that is significantly supported by §23-3-430, et seq., §23-3-462-463, §23-3-540(H) and the case law cited herein. All interested parties had the opportunity to testify or submit affidavits in response to the Appellants' petition at the March 17, 2023 hearing, which is what was required by §23-3-540(H).

CONCLUSION

Based on the foregoing arguments, the Department respectfully requests Appellant's arguments be dismissed and the final decision of the General Sessions Court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
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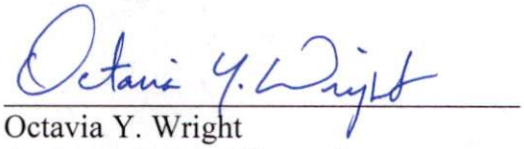
CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed July 25, 2023, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 1st day of December, 2023.



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