RECEIVED
Aug 13 2024
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of General Sessions

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2023-001388

Jason Bryan McSwain,

Appellant,

vs.

The State of South Carolina,

Respondent.

REPLY BRIEF

Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
3710 Landmark Drive, Suite 113
Columbia, South Carolina 29204
(803) 445-1333

Counsel for Appellant

Other Counsel:
Mark Farthing
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3372

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

U.S. Constitution:

S.C. Constitution:

S.C. Statutes:

ARGUMENT

The 25-year requirement for judicial review before being allowed to petition for removal from the sex offender registry pursuant to S.C. Code § 23-3-462 is arbitrary and not rationally related to any legitimate interest and violates Jason McSwain's due process rights under the Fourteenth Amendment to the United States Constitution and Article I, section 3 of the South Carolina Constitution.

Although the South Carolina Supreme Court has significantly improved the state of law in this area when it issued its opinion in *Powell v. Keel*, 433 S.C. 457, 860 S.E.2d 344 (2021), the timing provision of the statute—that requires 25 years elapse before someone like Jason McSwain can apply for sex offender removal—is still too long to be constitutionally tolerable. For this reason, and because it is uncontroverted that Jason McSwain does not pose a threat to the community, this Court should hold the statute is unconstitutional as applied to him and that the 25-year requirement imposed by the statute does not sufficiently obviate the due process concerns this Court recognized in the *Powell* decision.

At the evidentiary hearing in this case, McSwain entered a number of exhibits showing his placement on the registry is not needed to protect the safety of the community. Having no subsequent arrests or contacts with law enforcement, an assessment by Dr. Donna S. Maddox, M.D. concluded his "risk to reoffend is below average" and that his expected recidivism rate "is 1.4% based on his being in the community for more than ten years without an offense." * Maddox Report. In his order denying McSwain's request for removal from the statute, the circuit court found "there may be merit" to McSwain's arguments, but that he was constrained by the state of the law to deny relief. *Cole Order.

In *Powell*, the South Carolina Supreme Court found that defendant received due process when he received judicial review after 10 years. Counsel is well- aware this Court does not traverse lightly into this area. See *Powell* at S.C.349, S.E.2d 468 (quoting *State v. Bani*, 97 Hawai'I 285,

36 P.3d 1255, 1268 (2001) ("[T]he 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."). However, the legislature's decision to require 25 years before anyone can be assessed under the statute still violates a defendant's rights to due process and is so overly inclusive that it dilutes the purpose of the statute in the first place. Moreover, McSwain's placement on the sex offender registry fails to promote the State's legitimate interest in this case. McSwain's conduct has been exemplary since his mistakes earlier in life. And now he has a young son who is being adversely impacted by his father's continued presence on a sex offender registry that serves no other purpose than to stigmatize an adult male who has been an upstanding member of his community for nearly 20 years. Respectfully, this Court should find the statute's 25-year restriction on seeking relief is too long to be constitutionally tolerable, and that it is unconstitutional as applied to McSwain.

CONCLUSION

This Court should find the 25-year requirement for someone to seek removal from the SOR to be unconstitutional and that the statute is unconstitutional as applied to Jason McSwain.

Respectfully submitted,

/s/ Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
3710 Landmark Drive, Suite 113
Columbia, South Carolina 29204
(803) 445-1333
elizabeth@franklinbestlaw.com

August 13, 2024