

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Sep 11 2024

APPEAL FROM CHEROKEE COUNTY
Court of General Sessions

S.C. SUPREME COURT

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2023-001388

Jason Bryan McSwain,

Appellant,

vs.

The State of South Carolina,

Respondent.

FINAL BRIEF OF APPELLANT

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.....	2
Statement of the Case.....	4
Relevant Facts	4
Argument.....	7
Conclusion.....	13

TABLE OF AUTHORITIES

Cases:

<i>Brock v. Town of Mt. Pleasant</i> , 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016)	8
<i>CFRE, LLC v. Greenville Cty. Assessor</i> , 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)	8
<i>Curtis v. State</i> , 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001)	8
<i>Doe v. State</i> , 421 S.C. 490, 501, 808 S.E.2d 807, 813 (2017)	8
<i>Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.</i> , 409 S.C. 331, 339, 762 S.E.2d 561, 565 (2014)	8
<i>In re Justin B.</i> , 405 S.C. 391, 408, 747 S.E.2d 774, 783 (2013)	11
<i>In re Treatment & Care of Luckabaugh</i> , 351 S.C. 122, 140, 568 S.E.2d 338, 346 (2002)	8
<i>Powell v. Keel</i> , 433 S.C. 457, 472, 860 S.E.2d 344, 351–52 (2021)	9-12
<i>State v. Dykes</i> , 403 S.C. 499, 507, 744 S.E.2d 505, 510 (2013)	11
<i>State v. Hornsby</i> , 326 S.C. 121, 125–26, 484 S.E.2d 869, 872 (1997)	8
<i>State v. Letalien</i> , 985 A.2d 4, 30 (Me. 2009)	12
<i>State v. Walls</i> , 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002)	11
<i>Sunset Cay, LLC v. City of Folly Beach</i> , 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004)	11

U.S. Constitution:

U.S. Const. amend. VIII	9
U.S. Const. amend. XIV, § 1	7, 8, 11

S.C. Constitution:

S.C. Const. art. I, § 3	7, 8, 11
S.C. Const. art. I, § 15	9

S.C. Statutes:

S.C. Code Ann. § 23-3-43010

S.C. Code Ann. § 23-3-4626-8, 10

S.C. Code Ann. § 23-3-46310

STATEMENT OF THE CASE

Mr. McSwain was convicted of two counts of criminal sexual conduct, second degree in 2004. He served his sentence and complied with all requirements of probation and the sex offender registry. Nineteen years after his conviction, he requested that the South Carolina Law Enforcement Division (SLED) remove him from the sex offender registry. The request was denied because Mr. McSwain had not waited twenty-five years after conviction, per the statute. Mr. McSwain filed a motion in the court of General Sessions to review SLED's decision to deny his request, arguing it is violative of the Federal and State Constitutions. The Honorable J. Derham Cole denied the motion.

This appeal timely follows.

Relevant Facts

Mr. McSwain began a relationship with A.C. when she was sixteen years old and the bookkeeper for the basketball team he coached. ROA 47 ¶ 4. Her parents discovered the affair and contacted the school, which called law enforcement. ROA 47 ¶ 5. During the investigation, law enforcement learned he previously had relationships with two other students, M.D. when she was fifteen years old and A.J. when she was sixteen years old. ROA 48 ¶ 4, ROA 46 ¶ 4. M.D. initiated the relationship by coming to his house unannounced and repeatedly inviting herself over there. ROA 48 ¶¶ 4 & 5. Her relationship with Mr. McSwain was roughly two years prior to the investigation. ROA 48 ¶ 5. A.J. was in a consensual relationship with Mr. McSwain for a few months prior to the investigation. ROA 46 ¶ 4. She reconnected with him when she was around twenty years old and they had a brief relationship. ROA 46 ¶ 7.

Mr. McSwain ultimately pled guilty to two counts of criminal sexual conduct, second degree, and one count of contributing to the delinquency of a minor on January 12, 2004. ROA 1, 14. He was sentenced to ten years' imprisonment, which was suspended upon serving two years and five years' probation. As a result of his convictions, Mr. McSwain was also required to register as a sex offender and has met all registration requirements throughout his time on the registry. He was allowed to serve the two years at a home detention center, which he completed in January 2006. He completed probation in 2011, which included counseling treatment. He has had no further legal infractions, and certainly no subsequent arrests or convictions of a sexual offense.

Instead, Mr. McSwain has remained committed to moving past his criminal convictions and creating a life for himself. When A.C. was in college, she wanted to reconnect with Mr. McSwain and sought to have his restraints modified so that he would no longer be prohibited from contact with her. ROA 51. With the help and support of her mother (whose report of their relationship led to his convictions), A.C. petitioned the court to modify the terms of his sentence, which the court granted. ROA 51. Mr. McSwain and A.C. eventually married and although they divorced after seven years, they have an amicable relationship and share joint custody of their son. ROA 47.

Mr. McSwain still resides in the same community and has endeavored to develop his career and remain a devoted father. He served as the Director for Environmental Health and Safety at a corporation that manufactures polymers. Despite a demanding career, he made time to coach his son's basketball team. Mr. McSwain has consistently been an involved father, always present and striving to do what is best for his son. ROA 47. However, having to maintain his status on the sex offender registry takes a toll on these achievements. Working for a global corporation that requires

worldwide travel was difficult. His passport was revoked, and he was informed he would need to be identified as a sex offender on his passport. Additionally, as his son (and his son's peers) have gotten older, his son has become a target for bullying based on Mr. McSwain's registration. ROA 49. Some of his son's friends are not allowed to visit Mr. McSwain's house because their parents know he is on the registry. And even the little things that make up a childhood have been impacted. ROA 49. His son enjoys going to the local YMCA, but he does not get to go with his father because Mr. McSwain is not allowed to go. ROA 49. Mr. McSwain has repaid his debt to society, has complied with the registry requirements, and maintained non-criminal behavior. Each of Mr. McSwain's victims has provided affidavits supporting this petition for him to be removed from the registry. ROA 46-48. Furthermore, he has undergone an evaluation with a forensic psychiatrist to determine his risk rate for recidivism. Dr. Donna S. Maddox used the Static 99-R actuarial risk assessment to review Mr. McSwain and he scored a zero. ROA 56. Based on this score, Dr. Maddox opined that he was at a below-average risk of reoffending and assigned him an expected rate of 1.4 percent based on his being in the community for over a decade without an offense. ROA 56.

Pursuant to Section 23-3-462, Mr. McSwain requested his removal from the registry from the South Carolina Law Enforcement Division (SLED). This request was denied on the basis that his request was premature, not because he posed any remaining threat to the public or that the interests of justice would be served by his continued registration. ROA 17. This denial is inconsistent with his rights under both federal and state constitutions. Mr. McSwain presented the facts above and made the same arguments to the circuit court in his motion to be removed from the sex offender registry. The motion was denied and the court made no ruling as to whether Mr. McSwain presents a risk that requires continued registry.

ARGUMENT

The time restraint prior to judicial review in Section 23-3-462 is arbitrary and not rationally related to any legitimate interest; therefore, it violates Appellant's due process rights under the Fourteenth Amendment to the United States Constitution as well as Article I, section 3 of the South Carolina Constitution.

Mr. McSwain applied to SLED to be removed from the registry, but was denied by letter dated October 17, 2022, solely on the basis that he had not been on the registry for twenty-five years as required by section 23-3-462. ROA 17. This arbitrary temporal requirement as a predicate to any form of review violates Mr. McSwain's due process rights secured under the Fourteenth Amendment to the United States Constitution and Article I, section 3 of the South Carolina Constitution.

Section 23-3-462 states

(A) After successful completion of the requirements of this section, an offender may apply to the South Carolina Law Enforcement Division for the termination of the requirements of registration pursuant to this article. If it is determined that the offender has met the requirements of this section, SLED shall remove the offender's name and identifying information from the sex offender registry and shall notify the offender within one hundred twenty days that the offender has been relieved of the registration requirements of this article.

(1) An offender may file a request for termination of the requirement of registration with SLED, in a form and process established by the agency:

(a) after having been registered for at least fifteen years if the offender was required to register based on an adjudication of delinquency or the offender was required to register as a Tier I offender;

(b) after having been registered for at least twenty-five years, if the offender was convicted as an adult, and was required to register as a Tier II offender;

South Carolina Code Section 23-3-462.

The Fourteenth Amendment provides that “[n]o State shall ... deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1; *see also* S.C. Const. art. I, § 3 (providing no person shall “be deprived of life, liberty, or property without due process

of law”). Courts must “ensure[] that legislation which deprives a person of a life, liberty, or property right have, at a minimum, a rational basis, and not be arbitrary” *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 346 (2002). When a fundamental right is not implicated, we require the law to be “reasonably designed to accomplish its purposes.” *State v. Hornsby*, 326 S.C. 121, 125–26, 484 S.E.2d 869, 872 (1997). Courts have “a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid.” *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). However, the general presumption that a statute is constitutionally valid may be overcome “by a clear showing the act violates some provision of the constitution.” *Doe v. State*, 421 S.C. 490, 501, 808 S.E.2d 807, 813 (2017). “Determining the proper interpretation of a statute is a question of law, which this Court reviews de novo.” *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 339, 762 S.E.2d 561, 565 (2014). Thus, this Court may interpret the statute “without any deference to the court below.” *Brock v. Town of Mt. Pleasant*, 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016) (quoting *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)).

On June 9, 2021, the Supreme Court of South Carolina decided *Powell v. Keel*, which held that the requirement for lifetime registration under the Sex Offender Registry Act, was unconstitutional absent any opportunity for judicial review to assess the risk of re-offending. *Powell v. Keel*, 433 S.C. 457, 472, 860 S.E.2d 344, 351–52 (2021). In that case, Powell had been indicted for criminal solicitation of a minor on December 1, 2008, based on sexual internet conversations

he had engaged in with a person he believed to be a twelve-year-old girl¹, and pled guilty on April 2, 2009. *Id.* at 460, 860 S.E.2d at 345. He was sentenced to two years' probation suspended to one year probation and was informed he would be required to register as a sex offender for life. *Id.* at 460, 860 S.E.2d at 346. Powell successfully completed his probationary sentence in 2011 along with sixty hours of sex offender group therapy. *Id.* at 461, 860 S.E.2d at 346. He was assessed as having a low rate of recidivism. *Id.*

Powell subsequently filed a petition in circuit court on November 21, 2016, “for a declaratory judgment, claiming . . . the lifetime duration of his sex offender registration constitutes excessive punishment in violation of the Eighth Amendment of the United States Constitution and article I, section 15 of the South Carolina Constitution, deprives him of due process and equal protection, and warrants equitable relief in the form of his removal from the registry.” *Id.* The Supreme Court agreed that “the lifetime registration requirement implicates protected liberty interests” and held that the absence of judicial review violated due process. *Id.* at 464–65, 860 S.E.2d at 347–48. The Supreme Court suspended the effective date of the opinion for twelve months “to allow the General Assembly to correct the deficiency in the statute regarding judicial review.” *Id.* at 472, 860 S.E.2d at 352. Although it deferred to the General Assembly on crafting the mechanisms of the process due, the Supreme Court “require[d] the hearings at which sex offenders may demonstrate they no longer pose a risk sufficient to justify continued registration be conducted with reasonable promptness and meet standards of fundamental fairness.” *Id.* at 468, 860 S.E.2d at 349. As to Powell particularly, the Supreme Court found he was afforded a hearing

¹ Powell was in fact communicating with “an undercover police officer posing as a twelve-year-old girl as part of an internet sting operation.” *Id.* at 460, 860 S.E.2d at 345.

where “the circuit court assessed his risk of re-offending and determined he no longer poses a risk sufficient to justify his continued registration as a sex offender [and ordered his] removal from the sex offender registry.” 433 S.C. at 468, 860 S.E.2d at 349–50. It therefore held that “[a]fter more than ten years of registration, we find [Powell] was provided an opportunity for judicial review sufficient to satisfy due process.” *Id.* at 468, 860 S.E.2d at 350.

In response, the General Assembly enacted sections 23-3-462 and 23-3-463 of the South Carolina Code, which provided an intricate framework for removal from the registry. The process of obtaining judicial review depends on the offense and the offenses were divided into three distinct tiers identified in section 23-3-430. For Tier One, a registrant must wait fifteen years after registration and then file an application for removal with SLED, upon denial of this application, the registrant could seek judicial review. § 23-3-463 (A)(1). For Tier Two, a registrant must wait twenty-five years after registration and then file an application for removal with SLED, upon denial of this application, the registrant could seek judicial review. § 23-3-463 (A)(2). For Tier Three, a registrant could only move for removal thirty years “from the date of discharge from incarceration without supervision, or the termination of active supervision of probation, parole, or any other active alternative to incarceration.” § 23-3-463 (A)(3).

Yet Mr. McSwain was denied relief based solely on timing, despite the clear evidence he is not at risk of reoffending. Mr. McSwain has consistently registered for the past nineteen years and the denial of review, especially considering his insignificant risk of reoffending, is inconsistent with his due process rights under the Fourteenth Amendment to the United States Constitution and Article I, section 3 of the South Carolina Constitution. There is no longer a corresponding benefit to society for his registration.

Mr. McSwain is categorized under Tier Two because of his conviction for second-degree criminal sexual conduct. This result exposes how the statutory scheme designed by the General Assembly fails to comply with the mandate of *Powell*. Having to wait twenty-five years until obtaining judicial review is not the “reasonable promptness” and “fundamental fairness” required by the Supreme Court to ensure due process. Mr. McSwain has a negligible risk of reoffending and therefore his continued registration does not “bear[] a reasonable relationship to any legitimate interest of government.” *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004). The Supreme Court has stated “a likelihood of re-offending lies at the core of South Carolina’s civil statutory scheme.” *State v. Dykes*, 403 S.C. 499, 507, 744 S.E.2d 505, 510 (2013); *see State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) (“[I]t is clear the General Assembly did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes.”).

This Court recognized the State has a legitimate interest in protecting the public from those with a high risk of re-offending by placing those individuals on the sex offender registry. *See In re Justin B.*, 405 S.C. 391, 408, 747 S.E.2d 774, 783 (2013) (characterizing the goals of SORA’s registration scheme as “a legitimate exercise of the State’s police power”). However, placing an arbitrary time limit for the person to wait before petitioning the court for judicial review is not rationally related to that legitimate purpose. In fact, it has the opposite effect as this Court noted in *Powell*, “the lifetime inclusion of individuals who have a low risk of re-offending renders the registry over-inclusive and dilutes its utility by creating an ever-growing list of registrants that is less effective at protecting the public and meeting the needs of law enforcement.” *Powell v. Keel*, 433 S.C. 457, 466, 860 S.E.2d 344, 349 (2021), reh’g denied (Aug. 4, 2021), referring to *State v.*

Letalien, 985 A.2d 4, 30 (Me. 2009). This Court should rule that the twenty-five-year time limit before judicial review is not rationally related to the State's legitimate interest in protecting the public and should order the circuit court to conduct a hearing to determine whether Mr. McSwain poses a risk sufficient to require his continued registration.

CONCLUSION

This Court should rule this statute is unconstitutional and order the Circuit Court hold a hearing to determine whether Mr. McSwain poses a risk sufficient to justify his continued registration.

Respectfully submitted,

/s/ Elizabeth Franklin-Best
Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
3710 Landmark Drive, Suite 113
Columbia, South Carolina 29204

September 11, 2024.