

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Clifton Newman, Circuit Court Judge

Appellate Case No. 2012-212355

THE STATE, ...RESPONDENT

v.

CURTIS J. MCKIE, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether Appellant's argument that the trial court erred in placing him on the sex offender registry without allowing him to present the testimony of a doctor about his risk to re-offend is preserved for appellate review where the argument was neither raised to nor ruled upon by the trial court and whether, to the extent the argument is preserved, the procedure employed by the trial court comports both with constitutional procedural due process and with the requirements of the South Carolina Code?

STATEMENT OF THE CASE

Appellant was indicted by the grand jury of Lexington County for indecent exposure (2011-GS-32-3251). He was represented by Bennett E. Casto, Esquire, of the Eleventh Circuit Public Defender's Office. On June 19-20, 2012, Appellant proceeded to trial by jury pursuant to which he was found guilty as indicted. He was sentenced by the Honorable Clifton Newman to three (3) years' imprisonment and was ordered to be placed on the Sex Offender Registry (the Registry) pursuant to section 23-3-430 of the South Carolina Code. Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief challenging his placement on the Registry. This Brief of Respondent follows.

STATEMENT OF FACTS

At trial, the victim (Victim) identified Appellant and described the incident that led to his arrest. She testified that on May 25, 2011, while she was working her third day on the job as a library assistant in the Irmo branch of the Lexington County Library, Appellant exposed himself to her. Victim spoke to Appellant briefly when he approached and asked her if he could stay all day at the library. Shortly thereafter, while Victim was shelving books in the adult fiction section, she noticed someone in her peripheral vision, and turned to see Appellant standing in the aisle. He was directly facing her and was masturbating with his penis fully exposed. Victim testified Appellant was fully erect and was stroking his penis up and down. She said Appellant did not react, turn away, or attempt to cover up or put his penis away when he saw her looking. Victim immediately walked to the workroom and called the police. (R.p.5, line 15-p.25, line 4).

After trial but prior to sentencing, the solicitor asked the trial court to consider placing Appellant on the Registry pursuant to Section 23-3-430 of the Code. She argued the State had shown "good cause" for including Appellant on the Registry. (R.p.27, line 16-p.29, line 8). Victim also asked the court to put Appellant on the Registry. (R.p.30, lines 13-20). Appellant's counsel then presented arguments in mitigation. He explained he had hired Dr. Donna Schwartz-Watts to delve into Appellant's case to gain a better understanding of Appellant's developmental issues. Counsel provided the trial judge and the solicitor with a copy of a letter/report written by Dr. Schwartz-Watts, which the judge took some time to review during a pause in the proceeding. Counsel described the doctor's findings that Appellant suffered from developmental delays but that he was not "beyond repair" and could benefit from some type of sex education classes. Counsel said: "If the Court is considering having [Appellant] register, we would ask that the

Court - - if the Court is leaning in that way, we would ask the Court to hold that issue is abeyance so that the Court can inquire from Dr. Schwartz-Watts herself with regard to that issue.” (R.p.34, line 15-p.36, line 24).

Next, Appellant answered a series of questions from the court. He and Counsel both referenced the findings in the report from Dr. Schwartz-Watts. (R.p.54, line 15-p.55, line 13). Counsel noted, “The doctor felt like there was still hope here,” (R.p.59, lines 19-20) and said: “Judge, if the Court is leaning - - inclined and leaning towards the registry, we’d ask that the sole issue be held in abeyance so that the Court, if the Court would so choose, to hear from Dr. Schwartz-Watts in her personal testing and analysis of [Appellant].” (R.p.69, lines 13-18). The trial court reviewed and recited the relevant portions of section 23-3-430, and heard again from the solicitor, Appellant, and Appellant’s counsel in regard to whether Appellant should be ordered to register as a sex offender. (R.p.71, line 14-p.73, line 24). The trial judge found, “I don’t see any point in deferring this issue with Dr. Schwartz-Watts,” noting that her “report” outlines Appellant’s situation. Ultimately, the trial court ordered that Appellant be placed on the Registry. (R.p.76, line 18-p.77, line 8).

ARGUMENT

Appellant's argument that the trial court erred in placing him on the sex offender registry without allowing him to present the testimony of a doctor about his risk to re-offend is not preserved for appellate review because the argument was neither raised to nor ruled upon by the trial court, and to the extent the argument is preserved, the procedure employed by the trial court comports both with constitutional procedural due process and with the requirements of the South Carolina Code.

Appellant argues the trial court erred in placing him on the Registry without allowing him to present a full defense on the issue, including the testimony of the doctor who evaluated him prior to sentencing. He argues the trial court's refusal to hold the matter in abeyance to take testimony from Dr. Schwartz-Watts: (1) violated his procedural due process rights, and (2) failed to comport with the statutory requirements that certain findings be made prior to placing a defendant convicted of indecent exposure on the Registry. Respondent (the State) disagrees.

Issues not Preserved

Initially, the State submits Appellant's arguments are not preserved for appellate review because they were neither raised to nor ruled upon by the trial court. State v. Brown, 402 S.C. 119, 125 n.2, 740 S.E.2d 493, 496 n.2 (2013) (describing the four basic requirements to preserving issues at trial for appellate review, including the requirement that the issue must have been raised to and ruled upon by the trial court); State v. Policao, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal."). After trial, when the trial court was considering whether to order Appellant to register as a sex offender, Appellant twice asked the trial court to hold the Registry issue in abeyance so he could offer testimony from Dr.

Schwartz-Watts. However, he never claimed to have a constitutional procedural due process right, or a statutory right, to present that testimony before the court could render a decision. Indeed, Appellant failed to object or otherwise take exception when the court declined to defer the decision on whether to order sex offender registration and instead relied solely on a review of Dr. Schwartz-Watts's report. By failing to specifically raise or articulate the current appellate arguments to the trial court, Appellant failed to secure a ruling below. Therefore, the arguments are not preserved for appellate review and this appeal should be dismissed. Brown, supra; Policao, supra. In any event, the State submits Appellant's arguments are without merit and that the procedure employed by the trial court comports both with procedural due process under the Constitutions of the United States and South Carolina, and with the requirements of the South Carolina Code.

Procedural Due Process

The State submits a defendant has no constitutional due process right to present witnesses or testimony during the court's post-conviction consideration of whether to order registration as a sex offender pursuant to the discretionary provisions of section 23-3-430 of the South Carolina Code. Both the United States and the South Carolina Constitutions provide that "no person shall be deprived of life, liberty, or property without due process of law." U.S. Const. amends. V and XIV, § 1; S.C. Const. art I, § 3. "Substantive due process" relies upon a line of United States Supreme Court cases that interprets the Fourteenth Amendment's guarantee of "due process of law" to include a substantive component which forbids the government from infringing upon certain "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. Reno v. Flores, 507

U.S. 292, 301 (1993). Thus, the due process clause protects individual liberty against “certain government actions regardless of the fairness of the procedures used to implement them.” Washington v. Glucksberg, 521 U.S. 702, 719 (1997) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

By comparison: “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the due process clause of the Fifth or Fourteenth Amendment.” Mathews v. Eldridge, 424 U.S. 319, 322 (1976); see also Harbit v. City of Charleston, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009). “Application of this prohibition requires a familiar two-stage analysis: the court must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment’s protection of “life, liberty or property”; if protected interests are implicated, the court then must decide what procedures constitute “due process of law.” Ingraham v. Wright, 430 U.S. 651, 672 (1977). Absent state interference with a protected property or liberty interest, an individual is entitled to no pre-deprivation process whatsoever.

Appellant claims the Registry infringes upon his protected liberty interests because he would face a possibility of imprisonment if he fails to register. The State acknowledges: “It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.” Id. at 674. However, the Registry itself involves no physical restraint, and the South Carolina Supreme Court has repeatedly found that it imposes no punishment. See State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) (holding the Registry “is not so punitive in purpose or effect as to constitute a criminal penalty”); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320,

325 (2003) (finding the lifetime registration requirements of the Registry do not violate substantive due process because “the length of time one must be listed” on the Registry does not alter its non-punitive nature and therefore “cannot constitute a deprivation of a constitutionally protected liberty interest”). Thus, the State submits this Court should reject Appellant’s due process argument and hold that the Registry does not implicate a liberty interest in being free from punishment without due process of law.

To the extent this Court finds an individual does have an attenuated liberty interest because his placement on the Registry could ultimately result in his confinement based on a future conviction for failure to register, the State submits due process is already provided by the full criminal trial process such a conviction would encompass. The person would have the opportunity to be heard, the right to introduce evidence, and the right to confront and cross-examine witnesses, and his confinement could only result from proof at trial beyond a reasonable doubt. Therefore, procedural due process is satisfied, and Appellant’s procedural due process claim should be denied.

Alternatively, the State submits the procedure employed by the trial court in Appellant’s case in fact provided Appellant with all the constitutional process he was due. The fundamental requirements of due process include fair notice and proper standards for adjudication, such as an opportunity to be heard in a meaningful way and judicial review. State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012); Stono River Envtl. Prot. Ass’n v. S.C. Dep’t of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991); Harbit, 382 S.C. at 393, 675 S.E.2d at 781. However, procedural due process requirements are not technical, and no particular form of procedure is necessary. Jones v. S.C. Dep’t of Health and Envtl. Control, 384 S.C. 295, 682 S.E.2d 282 (2009). Indeed,

due process is flexible and calls for such procedural protections as the particular situation demands. State v. Binnar, 400 S.C. 156, 165, 733 S.E.2d 890, 894 (2012); Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008); Harbit, 382 S.C. at 393, 675 S.E.2d at 781.

Appellant alleges “the purpose of the Act is to protect communities from sex offenders who ‘pose a high risk of re-offending’” and claims testimony from Dr. Schwartz-Watts would have shown Appellant “did not have a risk of re-offending and could be rehabilitated.” (Brief of Appellant, p.7). Appellant acknowledges the United States Supreme Court’s decision in Connecticut Dep’t of Pub. Safety v. Doe, 538 U.S. 1, 8 (2003), which rejected a sex offender’s procedural due process argument requesting a hearing on his “current level of dangerousness” because those “who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in the hearing are relevant to the statutory scheme.” However, he argues Connecticut v. Doe is inapposite because, unlike in Doe, the testimony Appellant requested to offer here “would have been directly relevant to the purpose of the Act – the risk of re-offending.” The State disagrees and submits Appellant’s argument is precluded by the South Carolina Supreme Court’s decision in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013), reh’g denied, (July 24, 2013).¹

Jennifer Dykes, a registered sex offender who admitted violating the terms of her probation in several respects, appealed the circuit court’s order requiring that she be subject to satellite monitoring for the rest of her life pursuant to sections 23-3-540(C) and (H) of the South Carolina Code of Laws. She asserted in part that such an order, without

¹ The State further submits there is no relevant distinction between an individual’s “current level of dangerousness” as described in Doe, and his “risk of re-offending” as characterized by Appellant. The concepts are one and the same.

an initial opportunity for judicial review to assess the risk of re-offending, would constitute a constitutional violation of procedural due process. The Supreme Court relied upon Connecticut v. Doe in rejecting Dykes' procedural due process claim out of hand, Dykes, 403 S.C. at ___, 744 S.E.2d at 511 n.9, despite the Court having previously identified "the legislature's stated purpose of protecting the public from those with a high risk of re-offending." Dykes, 403 S.C. at ___, 744 S.E.2d at 510.² Appellant has failed to give a valid reason for this Court to reach a different conclusion in regard to the circuit court's initial decision to place him on the Registry. This is particularly true where the lower court in fact reviewed the conclusions in Dr. Schwatz-Watts' report and engaged in "judicial review" before deciding to exercise its discretion to place Appellant on the Registry. In Dykes, the circuit court imposed lifetime satellite monitoring, in accordance with the statute, without any judicial review at all. By comparison, the process given to Appellant certainly provided him with all procedural protections the circumstances demanded, and his due process argument should be denied.

² For purposes of this argument the State acknowledges this finding in Dykes; however, in the broader context of the Registry, it continues to question whether the finding is supported by the statutory language employed by the Legislature. Section 23-3-400 provides:

The intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens. Notwithstanding this legitimate state purpose, these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws.

The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

S.C. Code Ann. § 23-3-400 (2007) (emphasis added). Although the statute mentions statistical support for the notion that sex offenders pose a high risk of re-offending, it does not appear to limit its stated purpose of protecting the public from only those sex offenders who pose a high risk of re-offending.

Statutory Requirements

In criminal cases, the appellate court sits to review errors of law only. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by any evidence. Wilson at 6, 545 S.E.2d at 829 (emphasis added); see also State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below."). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-86 (Ct. App. 2001). An abuse of discretion occurs when the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

The Registry provides that:

Any person, regardless of age, residing in the State of South Carolina who in this State has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to an offense described below, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere, or found not guilty by reason of insanity in any comparable court in the United States, or a foreign country, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere, or found not guilty by reason of insanity in the United States federal courts of a similar offense, or who has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere, or found not guilty by reason of insanity to an offense for which the person was required to register in the state where the conviction or plea occurred, shall be required to register pursuant to the provisions of this article.

S.C. Code Ann. § 23-3-430(A) (2007) (emphasis added). It goes on to enumerate the specific crimes that either require or may result in inclusion on the Registry. Specifically in regard to indecent exposure it provides:

A person, regardless of age, who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in this State, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in a comparable court in the United States, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in the United States federal courts of indecent exposure or of a similar offense in other jurisdictions is required to register pursuant to the provisions of this article if the court makes a specific finding on the record that based on the circumstances of the case the convicted person should register as a sex offender.

S.C. Code Ann. § 23-3-430(C)(14) (2007) (emphasis added). Additionally it includes a general provision that:

Upon conviction, adjudication of delinquency, 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 solicitor.

S.C. Code Ann. § 23-3-430(D) (2007). Thus, where discretion to order sex offender registration is allowed, it must be determined post-conviction and, in the case of indecent exposure, the court must make a specific finding on the record that the person should register based on the circumstances of the case.

Here, although the solicitor incorrectly focused on the general Registry provision allowing court-ordered registration for “an offense not listed in this article” rather than the subsection specifically addressing indecent exposure, the trial court ultimately referenced the correct portion of the Registry before making its ruling. (R.p.73, lines 16-22). After hearing the evidence from the trial and Appellant’s criminal history, hearing extensively from Appellant and his attorney in mitigation, reviewing the report from Dr.

Schwartz-Watts, and discussing the purpose of the Registry, the trial court ordered Appellant to register as a sex offender. The State submits this procedure certainly met the requirements of section 23-3-430 for discretionary placement on the Registry. Nothing in the statute indicates a defendant has the right to “offer a full defense” including testimony from experts or other witnesses. To the contrary, it merely requires that the court find sex offender registration is warranted by the “circumstances of the case.” Here, the trial court clearly considered those circumstances, including the doctor’s report, in rendering a decision. Additionally, the trial itself provided substantial evidence to support the trial court’s ruling. Therefore, that ruling should not be disturbed on appeal. Wilson, supra; Sheldon, supra.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the conviction, sentence, and order of the trial court placing Appellant on the South Carolina Sex Offender Registry, be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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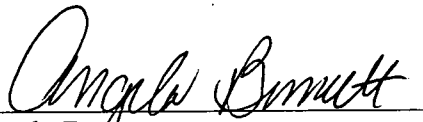
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PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated September 17, 2013, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served.
This 17th, day of September, 2013.


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