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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari from Greenville County
The Honorable Edward W. Miller, Trial Judge
The Honorable J. Derham Cole, Post-Conviction Relief Judge

KEVIN MARK WILLSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2024-000161

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF THE ISSUE

Whether the PCR court erred in finding counsel was effective when counsel failed to raise an objection or advise Petitioner concerning an unconstitutional total ban on internet access that was added by the solicitor as a new condition to a five-year period of probation during a "negotiated" guilty plea?

RESPONDENT'S COUNTER STATEMENT OF THE ISSUE

Whether the PCR court properly found plea counsel was not deficient in his representation or advice regarding the negotiated plea's probationary condition restricting internet access because the restriction was not unconstitutional, was part of the voluntary negotiation, and the restriction was a permissible condition considering Petitioner used the internet to commit the offense?

STATEMENT OF THE CASE

Petitioner is not incarcerated, however he filed his PCR action while serving an active sentence. The records before this Court show Petitioner was indicted in August 2017 for five counts of sexual exploitation of a minor, 3rd degree, and two counts of sexual exploitation of a minor, 2nd degree. (App. 8-11; 390-393). James W. Bannister, Esq., and Marcelo Torricos, III, Esq., represented Petitioner on the charges. (App. 1). David Collier and R. Kyle Senn of the Internet Crimes Against Children (ICAC) Section of the South Carolina Attorney General's Office prosecuted the case. (App. 1).

A jury was impaneled on December 3, 2018, and the trial on all seven charges began and continued into December 4, 2018, with the Honorable Edward W. Miller presiding. On the second day of trial, after both the State and Defense rested, Judge Miller was informed there was an "offer on the table for a nine-year sentence to a nonviolent offense," and ordered a break in the proceedings for Petitioner to consult with counsel. (App. 242-243). Upon further negotiation, Petitioner opted to accept an agreement with the State to plead guilty to two counts of sexual exploitation of a minor, 3rd degree, (2017-GS-23-7094 and 7095). (App. 243). The State placed on the record the following specifics of their negotiations:

> ... Mr. Willson is pleading guilty to two counts of sexual exploitation of minor in the third degree. These are mandatory sex offender registry offenses. Those indictment numbers are 2017-GS- 23-07094-07095.
>
> Pursuant to the plea agreement, we're going to dismiss two counts of sexual exploitation of a minor in the second degree and three counts of sexual exploitation of a minor in the third degree. Those indictment numbers are 2017-GS-23-07089-07093.
>
> ... we've agreed to a negotiated sentence of 20 years suspended to eight years incarceration and five years probation with conditions of probation to include no unsupervised contact with minors and no Internet access. Also, the defendant is going to waive any rights to appeal that he might have.

(App. 245-246). Judge Miller asked Petitioner if the State's presentation constituted a "full and complete understanding of the negotiations" from his view, and Petitioner responded that it was. (App. 246).

Judge Miller also advised Petitioner, for clarity, "there is no offense here which I can give ... 20 years [on], so in order to effect that agreement, I will give you eight years on one []count and ten years consecutive on the other suspended with probation" and asked if Petitioner understood. (App. 246). Petitioner responded in the affirmative. (App. 246). As negotiated, Judge Miller sentenced Petitioner to 10 years, on service of 8, the balance suspended in favor of 5 years on probation, (2017-GS-23-0795) and 10 years consecutive, suspended during probation, (2017-GS-23-07094). (App. 247-248; 394-395). Petitioner did not appeal, as he agreed.

STATEMENT OF FACTS

As noted, Petitioner ultimately pled guilty to two of the seven charges on which he proceeded to trial. Judge Miller advised he would consider the facts as presented during the trial proceedings for purposes of the guilty plea. (App. 245). The trial transcript sets out the evidence offered in support of Petitioner's guilt.

Investigator Kevin Atkins with the South Carolina Attorney General's Office, Internet Crimes Against Children Section, testified during a file-sharing investigation in June of 2015, he identified hash values which identified values in a data base known to be child pornography. (App. 91-94, 97). Investigator Atkins used a software program designed for law enforcement to connect to a single computer that connects to a downloaded video and further shows a view of the video to confirm it violates the statute. (App. 94-95). After identifying the video as illegal and containing child pornography, Investigator Atkins identified the IP address and submitted a court order to the service provider to obtain subscriber information including a name and physical address. (App. 94-97). During this investigation, Investigator Atkins generated downloads for five files that were labeled consistent with child pornography and received information from Charter that the IP address was associated with the account of Kevin Willson at his Watkins Circle address in Taylors, South Carolina. (App. 97-106). After corroborating Petitioner lived at the residence, Investigator Atkins obtained and served a search warrant on August 18, 2015. (App. 106).

Forensic Investigators Hal Harris and Chris Bomar assisted with the execution of the search warrant. (App. 149, 151 and 157-159). They informed Investigator Atkins there were "hundreds, if not thousands" of files containing child pornography on Petitioner's electronic devices. (App. 107 and 151). Investigator Grubbs was then assigned to conduct the full forensic

exam on the items seized from Petitioner's residence which consisted of two MacBook laptops, an external hard drive, and a DVD. (App. 158 and 184). Investigator Grubbs confirmed Investigator Bromar's findings of video and picture files containing children engaged in sexual activity, as well as information found tying the devices to Petitioner including the username "Kevin Willson," work-related emails sent to and from Petitioner, and a Skype account. (App. 191-198). Investigator Grubbs also reported the most recent creation date (the day the file was downloaded) was the day before the search warrant was served. (App. 197).

Petitioner called one witness, Lynda Sams, who was the broker in charge at Keller-Williams Greenville Upstate, Petitioner's prior place of employment. (App. 232). After Ms. Sams testimony, the defense rested and jury instructions were discussed. (App. 235-242). Subsequently, Judge Miller was advised as to the negotiated plea, which Petitioner ultimately accepted. (App. 242-244).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436,440 (2018); *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443,448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed de novo without deference to the lower court. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will only reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR court made a proper finding that the imposition and application of the probationary condition restricting Petitioner's internet usage without supervision was constitutional, thereby properly finding Petitioner failed to carry his *Strickland* burden of proof as to the ineffective assistance allegation.

In his PCR action, Petitioner alleged plea counsel was ineffective for failing to object to a probationary condition restricting Petitioner from internet usage without supervision. Petitioner fails to draw parallels between the authorities he relies on and the facts of his case and fails to show error in the PCR court's analysis addressing the presented authorities. Petitioner argues the "absolute internet ban" is not narrowly tailored and does not advance the goals of protecting the public or rehabilitating the offender. (Petition at 7).

The PCR Court reasonably articulated the probationary internet restriction was a product of the negotiated plea agreement and should be analyzed in accordance with probationary conditions rather than a post-custodial provision. Even so, the PCR court properly noted the inaccuracy of suggesting broad internet restrictions to be per se unconstitutional, as there is authority that allows internet restrictions, and Petitioner failed to show the restriction in his case is unenforceable. Based on these findings, the PCR court reasonably determined Petitioner had failed to carry his *Strickland*[1] burden of proof.

A. Petitioner knowingly, voluntarily and intelligently plead guilty in accordance with the negotiated terms of the plea.

Petitioner presented no evidence to support he entered the plea agreement involuntarily or unknowingly. The plea court noted the facts presented throughout the trial would be considered, which included testimony regarding Petitioner downloading files containing child pornography. (App. 245). The State relayed an agreement had been reached to a negotiated

[1] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

sentence of 20 years suspended to 8 years incarceration and 5 years probation with conditions of probation to include no unsupervised contact with minors and no Internet access. (App. 246). Petitioner affirmed that agreement was his understanding of the negotiated sentence. (App. 246). As previously noted, the court clarified the sentencing parameters, and the probation conditions were not further queried. (App. 246-247). The sentence was again repeated by the plea court as follows:

> Sentenced to ten years in the Department of Corrections provided upon the service of eight years, the balance is suspended with probation for five years, random drug and alcohol testing, no Internet access, sex offender caseload, no unsupervised contact with minors, placed on the sex offender registry. Is there any other -- is that fully -- and then on the other indictment, ten years consecutive suspended during probation. Does that comply with all of the terms of the negotiated agreement?

(App. 248). The State, plea counsel and Petitioner again affirmed. (App. 248-249).

At the PCR evidentiary hearing, Petitioner testified had he known the internet restriction would exist he would have not plead guilty and would have proceeded to trial. (App. 314-315). Plea counsel testified after the jury was presented with the graphic child pornography found downloaded on Petitioner's computer, it was clear Petitioner would be found guilty on all counts. (App. 350-351). At that point, his focus was to reduce the amount of time Petitioner would have to serve. (App. 357). He testified he was able to negotiate for a nonviolent statute down to 8 years and at that point, probation became part of the deal. (App. 352-353). Plea counsel testified he spoke with Petitioner and his family about the likelihood of conviction and advised it was best to attempt to mitigate his sentence. (App. 353). Plea counsel testified he had a conversation with Petitioner about entering the guilty plea and Petitioner affirmed he understood. (App. 354). He further noted there was no indication of any misunderstanding on Petitioner's behalf regarding

the plea terms as it was described in the transcript, and Petitioner now appears to have "buyer's remorse" as to the conditions. (App. 354-355).

The PCR Court accurately addressed the knowing and voluntariness of the guilty plea and its terms noting the colloquy between Petitioner and the court as well as plea counsel's testimony at the evidentiary hearing. There was no misunderstanding or confusion at the time of the plea and Petitioner affirmed the wished to enter a guilty plea and did not have any further questions for the court or counsel. (App. 387). *See Dalton v. State*, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) ("[]Statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements."). The PCR Court found plea counsel's testimony to be credible and Petitioner's assertion he did not understand the basis for the charges, and additionally the defense, to be illogical. *See Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 435 (2018) (Great deference is afforded to a PCR court's credibility findings.). The record undoubtedly shows Petitioner plead guilty to avoid a significant amount of time if convicted at trial, and the PCR Court properly concluded the nature of his plea was entered voluntarily and intelligently.

B. The authorities Petitioner relies upon do not compel a finding that the internet restriction is unconstitutional, and on the contrary, allows for such a restriction.

Though the PCR Court properly concluded Petitioner received the benefit of the bargain of the plea agreement and entered the plea voluntarily, Petitioner argues the PCR court erred in its findings because the internet restriction infringes upon his First Amendment rights rendering the probation condition unenforceable as unconstitutional. The authority Petitioner relies on to support his contention confuses statutory sentencing provisions with independent probation requirements that are enforced separately. The PCR court addressed Petitioner's

misapprehension, and properly rejected Petitioner's argument that *Packingham*[2] compels a finding the restriction is unconstitutional.

Petitioner argues again that plea counsel should be found ineffective for allowing an unconstitutional ban to be added on the fly as a probation condition, especially one which makes successfully completing probation a practical impossibility. (Petition at 9). Again, he misconstrues *Packingham*. *Packingham* held that a North Carolina statute making it a felony for registered sex offenders to access social media web sites violated the First Amendment. Such a finding created a "permanent restriction in the form of a criminal statute applicable to all registered sex offenders." *United States v. Eaglin*, 913 F.3d 88, 95 (2d Cir. 2019); *See Packingham*, 137 S.Ct. at 1737 (noting the "troubling fact" that the offending statute-imposed restrictions on persons who were no longer subject to the supervision of the criminal justice system). As the PCR court pointed out, *Packingham* did not address restrictions as part of sentencing, particularly sentencing resulting from crimes where the internet was used. *See United States v. Carson,* 924 F.3d 467, 473 (8th Cir. 2019) (collecting cases supporting that "*Packingham* invalidated only a *post*-custodial restriction and expressed concern that the statute applied even" to post-sentencing, concluding that "*Packingham* does not render a district court's restriction on access to the internet during a term of supervised release plain error"); *see also United States v. Bobal*, 981 F.3d 971, 977 (11th Cir. 2020) (distinguishing *Packingham* as not only post-sentence but also because it "applied to all registered sex offenders, not only those who had used a computer or some other means of electronic communication to commit their offenses"). As such, the PCR Court properly concluded the holding in *Packingham* does not guide the issue presented, much less render the internet restriction unconstitutional.

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[2] *Packingham v. North Carolina*, 582 U.S. 98, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017).

Petitioner also alleges error of the PCR court's reliance in *United States v. Arce*, 49 F.4th 382 (4th Cir. 2022) specifically referring to the Fourth Circuit's finding that a "complete internet ban is almost always excessive for 'non-contact child pornography activity, or similar conduct' where there was no actual contact with the victim." *Id.*, 49 F.4th at 396. (Petition at 8). Again, Arce's circumstances are not applicable to Petitioner's. A lifetime ban on internet and computer use was an imposed condition upon supervised release in *Arce*, and while the Fourth Circuit remanded for reconsideration of the conditions because the case did not involve contact with children, it clarified "[t]he district court may still set other computer restrictions that are more appropriately tailored to this case." *Id.*, 49 F.4th at 396. *See United States v. Holm*, 326 F.3d 872, 878 (7th Cir. 2003) ("Various forms of monitored Internet use might provide a middle ground between the need to ensure that [the defendant] never again uses the Worldwide Web for illegal purposes and the need to allow him to function in the modern world.").

Also criticizing the PCR court's reliance on *United States v. Bobal*, 981 F.3d 971 (11th Cir. 2020), Petitioner suggests the Eleventh Circuit dictated internet bans unconstitutional by upholding the restriction against internet use with exceptions for "work and with the prior permission of the district court." *Id.*, 981 F.3d at 976. (Petition at 8). Specifically, Petitioner references the Eleventh Circuit's finding that "computer restrictions are not overly broad when a sex offender on supervised release can "still use the Internet for valid purposes by obtaining his probation officer's prior permission.'" *Id.*, 981 F.3d at 976. However, such a conclusion plainly disregards the consideration of the circumstances of the offense and fails to account for the rationale behind special conditions.

> A district court does not commit plain error by imposing a computer restriction as a special condition of supervised release, even if the term of supervised release is life. We held in *United States v. Zinn* that a limited restriction on a sex offender's ability to

> use the internet while on a three-year period of supervised release was "a necessary and reasonable condition of supervised release" that did not burden the offender's rights under the First Amendment. 321 F.3d 1084, 1086, 1093 (11th Cir. 2003). Such restrictions are reasonably related to legitimate sentencing considerations, namely "the need to protect both the public and sex offenders themselves from ... potential abuses" of the internet. Id. at 1093. And computer restrictions are not overly broad when a sex offender on supervised release can "still use the Internet for valid purposes by obtaining his probation officer's prior permission." *Id.* Later, in *United States v. Carpenter*, we held that a district court did not plainly err by imposing a computer restriction as a special condition of supervised release for a period of life. 803 F.3d 1224, 1239–40 (11th Cir. 2015).

Bobal, 981 F.3d at 976.

As there is no authority explicitly finding an internet restriction as a special condition of supervised release - even if the term of supervised release is life - to be per se unconstitutional, the PCR court reasonably rejected Petitioner's First Amendment argument.

C. The internet restriction is reasonable considering Petitioner used the internet to commit the crime, the restriction is not indefinite, and the inconvenience of the restriction does not outweigh the value of its application.

Further, the internet restriction in this case is not a condition applied post-custodial on supervised release but a condition to the probationary term agreed upon by negotiated plea and accepted and imposed by the court. "The Legislature has set forth certain conditions of probation which may be imposed by the court, and the court has the discretion to impose additional or specific restrictions within limits." S.C. Code Ann. § 24–21–430 (Supp. 2005). *See State v. Brown*, 284 S.C. 407, 410, 326 S.E.2d 410, 411 (1985) ("[Trial judges] are allowed a wide, but not unlimited, discretion in imposing conditions of suspension or probation and they cannot impose conditions which are illegal and void as against public policy."). *See also Beckner v. State*, 296 S.C. 365, 366, 373 S.E.2d 469 (1988) ("a trial judge has broad discretion in imposing

conditions of probation, and the conditions which he may impose are not limited to those enumerated in the statute."). "Conditions of probation must, however, be reasonable." *Id.*, 296 S.C. at 366, 373 S.E.2d at 469 (citing 24 C.J.S. Criminal Law § 1571(8) (1961); 21 Am. Jur.2d, Criminal Law § 570 (1981).

This Court found in *State v. Allen*, 370 S.C. 88, 97, 634 S.E.2d 653, 657 (2006),

> Various conditions of probation generally have been upheld unless (1) the condition is so unreasonable or overly broad that compliance is virtually impossible and the burden imposed on the probationer is greatly disproportionate to any rehabilitative function the condition might serve; (2) the condition has no relationship to the crime of which the offender was convicted; (3) the condition requires or forbids conduct which is not reasonably related to future criminality; (4) the condition relates to conduct which is not in itself criminal unless the prohibited conduct is reasonably related to the crime of which the offender was convicted or to future criminality; (5) the condition violates due process because it is overly broad or void for vagueness; or (6) the condition unnecessarily or excessively tramples upon First Amendment rights of free association.

Petitioner specifically argues the internet restriction makes compliance with probationary conditions, such as finding and maintaining employment, to be practically impossible, and reintegration into society unlikely. (Petition at 12). The reason for prohibiting Petitioner from accessing the internet without supervision is a reflective condition in consideration of his crime. Thousands of disturbing images of child pornography were identified on Petitioner's computer to which he accessed via the internet. (App. 342). Petitioner is not entirely void of internet access throughout his probation term and he testified a community service coordinator had been assigned to assist in applying for jobs on his behalf. (App. 314, 343). The inconvenience in the restriction does not render it unreasonable – he has assistance with finding employment and complains he cannot have a computer-oriented job. *See Eaglin*, 913 F.3d at 97 (holding "the imposition of a total Internet ban for the eleven-year period of Eaglin's supervised release is

substantively unreasonable as it has not been shown to be 'reasonably related' to the statutory factors governing sentencing nor to be reasonably necessary to effectuate the sentencing objectives.").[3] Further, considering Petitioner was employed as a real estate agent for approximately 14 years, and appears to be educated and intelligent, reintegration into society does not appear to be an issue - - nor does his understanding of the terms he agreed to as part of the plea. (App. 331).

In its assessment of the circumstances of Petitioner's case, the PCR court reasonably concluded Petitioner had failed to meet the *Strickland* burden of proof. The PCR court analyzed the underlying authority permitting the internet restriction, properly concluding plea counsel did not act unreasonably by not objecting to the internet restriction as negotiated. As such, the PCR court did not err in concluding there is no prohibition of the imposition and application of the restriction in this case.

CONCLUSION

Based on the foregoing reasons, Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

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[3] Eaglin was originally convicted in 2003 and 2004 in New Hampshire state court on four counts of felonious sexual assault. His convictions stem from his sexual relationships with two thirteen-year-old girls in that state when he was twenty-one and twenty-two years old. In the fifteen years that have passed since his first convictions, Eaglin has struggled to comply fully with the multiple conditions of his supervised release, which have been renewed and revised on several occasions. Ultimately, as a result of these violations, the District Court then imposed conditions barring Eaglin from "access[ing] the Internet from any computer or Internet-capable device in any location unless authorized by the Court or as directed by the U.S. Probation Office upon approval of the Court," upon request of the government.

Eaglin, 913 F.3d at 91-94.

Respectfully submitted,

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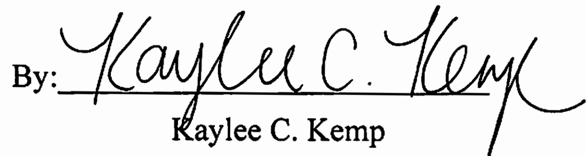
By: 
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