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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	Case No.: 2012-CP-08-16
Richard Kitt,	)	
	)	
Plaintiff,	)	**ORDER DISMISSING THE STATE OF SOUTH CAROLINA WITH PREJUDICE**
	)	
v.	)	
	)	
Solicitor of the Ninth Judicial Circuit; Berkeley County, S.C.; and the State of South Carolina,	)	
	)	
Defendants.	)	

FILED 2012 JUL 23 PM 1:41 MARY P. [illegible] CLERK OF COURT BERKELEY COUNTY, S.C.
RECEIVED SEP 20 2013 SC Court of Appeals

This matter came before me on July 10, 2012 on a motion hearing on the State of South Carolina's motion to dismiss the State of South Carolina as a defendant in this declaratory judgment action. The State of South Carolina was represented at the motion hearing by Assistant Attorney General Adam L. Whitsett and the *Pro Se* Plaintiff was also present at the hearing. I have reviewed all materials filed in connection with this action and I have considered all of the arguments set forth by the respective parties at the hearing. For the following reasons, the State of South Carolina's motion to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure is granted and the State of South Carolina is hereby dismissed from this action with prejudice.

"To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 16, 567 S.E.2d 881, 888-89 (Ct. App. 2002) *citing* Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 459 S.E.2d 844 (1995). "A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." *Id.* I find and conclude that the Plaintiff has failed to state facts sufficient to demonstrate that a

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justiciable controversy exists in this matter. Accordingly, I find and conclude that the Plaintiff has failed to state a valid cause of action upon which relief can be granted in this matter.

It appears that the Plaintiff is attempting to challenge his conviction for Criminal Sexual Conduct with a Minor 2nd Degree because the "age of consent" in South Carolina was formerly fourteen years of age. The Plaintiff claims that his victim was 15 years old at the time of the offense. This challenge appears to rely exclusively on former Article III, § 33 of the South Carolina Constitution, which was not in existence on the date that this action was initiated. Effective June 2, 2010, Article III, § 33 was amended by a favorable vote of the qualified electors of the State of South Carolina and this section was removed from the South Carolina Constitution. A copy of the current text of Article III, § 33 of the South Carolina Constitution is attached hereto and incorporated by reference herein. In addition, this Court notes that the Plaintiff's argument was specifically rejected by the South Carolina Supreme Court in 1936 in the case of *State v. Smith*, 181 S.C. 485, 188 S.E. 132 (1936). Accordingly, I find and conclude that the Complaint fails to set forth any facts sufficient to state a valid cause of action upon which relief can be granted in this matter as the Complaint fails to set forth any facts to demonstrate that a justiciable controversy exists in this matter.

In addition, the Plaintiff appears to assert that the statute under which he was convicted, S.C. Code § 16-3-655, did not provide a sentencing provision for the Plaintiff's offense. I find that this assertion is incorrect. At the time of the Plaintiff's conviction, which was in 2007, § 16-3-655 of the South Carolina Code of Laws read as follows:

(B) A person is guilty of criminal sexual conduct with a minor in the second degree if:

(1) the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age; or

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(2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in illicit but consensual sexual conduct with another person who is at least fourteen years of age....

(C)(3) A person convicted of a violation of subsection (B) is guilty of a felony and, upon conviction, must be imprisoned for not more than twenty years according to the discretion of the court.

S.C. Code § 16-3-655 (2006 Supp.). As such, it would appear that the Plaintiff's conviction is denoted as a Class "C" Felony and a "No Parole Offense." *See* S.C. Code § 16-1-20 and § 24-13-400. Accordingly, as to this assertion, I find and conclude that the complaint fails to set forth any facts sufficient to state a valid cause of action upon which relief can be granted as to the State of South Carolina in this matter.

Further, to the extent the Plaintiff attempts to claim that the establishment of or operation of the community supervision program set forth in S.C. Code § 24-21-500 violates separation of powers, due process, or equal protection; I find and conclude that the Complaint sets forth no facts supporting such a claim, nor could it as such a claim does not exist. S.C. Code § 24-21-500 established a community supervision program. Paragraph (A) indicates, "Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, any sentence for a "no parole offense" as defined in Section 24-13-100 must include any term of incarceration and completion of a community supervision program operated by the Department of Probation, Parole, and Pardon Services." Paragraph (B) further states:

> A community supervision program operated by the Department of Probation, Parole and Pardon Services must last no more than two continuous years. The period of time a prisoner is required to participate in a community supervision program and the individual terms and conditions of a prisoner's participation shall be at the discretion of the department based upon guidelines developed by the director; however, the conditions of participation must include the requirement that the offender must permit

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> the search or seizure, without a search warrant, with or without cause, of the offender's person, any vehicle the offender owns or is driving, and any of the offender's possessions....

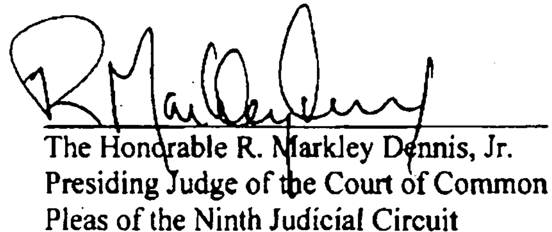
S.C. Code § 24-21-500. I find and conclude that there is and can be no constitutional violation in the establishment of this program, and that the complaint clearly fails to set forth any facts sufficient to support a plausible or valid cause of action or a justiciable controversy for such. As such, I find and conclude that no justiciable controversy exists in this matter and that this action, which does not set forth facts sufficient to state a cause of action upon which relief can be granted, should be dismissed with prejudice as to the State of South Carolina at this time.

The State's motion to dismiss also raised technical procedural issues based on Rules 12(b)(2), 12(b)(4), and 12(b)(5) of the South Carolina Rules of Civil Procedure. While the record is devoid of any documentation regarding service, I hereby deny the State's motion as to these issues at this time.

Accordingly, based on the above, this Court finds that the complaint in this matter fails to set forth a justiciable controversy and fails to state facts sufficient to constitute a cause of action upon which relief can be granted in this matter.

THEREFORE, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and the applicable statutory and common laws of the State of South Carolina, IT IS HEREBY ORDERED, DECREED and ADJUDGED that the State of South Carolina's motion to dismiss is GRANTED and that the State of South Carolina is DISMISSED from this action with prejudice.

IT IS SO ORDERED.



The Honorable R. Markley Dennis, Jr.
Presiding Judge of the Court of Common
Pleas of the Ninth Judicial Circuit

Moncks Corner, South Carolina
July 23, 2012

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