STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Honorable Roger M. Young, Circuit Court Judge

Opinion No. 2025-UP-010
(S.C. Ct. App. Filed January 8, 2025)

THE STATE,

RESPONDENT,

V.

BOWEN GRAY TURNER,

PETITIONER.

APPELLATE CASE NO. 2022-001018

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Bowen Gray Turner moves for rehearing because this Court may have overlooked or misapprehended the fact that *good cause* must be proven to place an individual on the sex offender registry. See S.C. Code Ann. § 23-3-430 (D) ("upon conviction, guilty plea, or plea of nolo contendre of a person of an offense not listed in this article, the presiding judge may order the condition of sentencing that the person be included in the sex offender registry if good cause is shown by the prosecution."); State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500-501 (Ct. App. 2008).

In the Interest of Christopher H., 432 S.C. 600, 854 S.E.2d 853 (Ct. App. 2021), this Court held that the sentencing judge erred by finding good cause existed to place Christopher H. on the private sex offender registry because there was insufficient evidence showing he was at risk of reoffending. Good cause was never proven in this case to mandate that petitioner register as a sex offender.

Further, neither State v. Davis, 375 S.C. 12, 16, 649 S.E.2d 178, 180 (Ct. App. 2007) nor State v. Best, 257 S.C. 361, 373-74, 186 S.E.2d 272, 277-78 (1972) mandate the holding of this Court that the probation revocation court had *no discretion not to place petitioner on the sex offender registry* where the violation of the sex offender condition of probation did not constitute good cause to place him on the registry. In Davis, this Court reasoned that because the state failed to prove good cause to place Davis on the sex offender registry at the plea hearing -- indeed the state seemingly admitted no good cause existed -- that the plea revocation judge could not place Davis on the registry nor make it a condition of his probation.

It respectfully does not follow that where good cause was not shown to place petitioner on the sex offender registry before the sentencing plea judge that the plea revocation judge had no discretion not to put petitioner on the sex offender registry where he violated the no drinking standard condition. Violations of standard conditions of probation are considered each week at probation revocation hearings throughout this state, and revocation judges are not required to revoke the person's probation and revoke it in full. The revocation hearing judge has discretion to hear any evidence in explanation or mitigation of the violated term of probation.

A holding that a revocation judge has no discretion whatsoever to hear evidence in explanation or mitigation and not to order sex offender registry where a standard sex offender condition is violated is illogical, particularly where the "good cause" requirement is never proven

by the state. Petitioner drinking alcohol was not indicative of his likelihood to reoffend or to commit a sexual crime.

Further, defense counsel Hutto did object at the guilty plea proceeding to petitioner being placed on the sex offender registry *in the future based on some minor violation such as a speeding ticket.* Respectfully, underage drinking was a minor violation of the standard sex offender terms. Consequently, defense counsel's objection at sentencing during the guilty plea should have been sufficient to protect petitioner procedurally against the strict liability imposition of the sex offender registry by a future revocation judge for this minor violation of drinking alcohol.

Again, *if the probation revocation judge had the authority to place petitioner on the sex offender registry* as this Court found, that revocation judge should have had to find "good cause" to place petitioner on the sex offender registry after hearing his case in explanation or mitigation of the sex offender term violation.

In addition, State v. Best, 257 S.C. 361, 373-74, 186 S.E.2d 272, 274-78 (1972) is an outlier case where the sentencing judge, without notice to the state, directed the three sentenced defendants be brought back before him again, and he lowered their sentences. This was not lawful since the term of court had ended, and court was adjourned.

Best does not dictate that the probation revocation court here had no discretion to impose a sanction of less than the sex offender registry where good cause was never shown to place petitioner on the registry as mandated by statute and precedent because the prior term of court had ended. The probation revocation judge was not a potted plant wholly without any discretion if petitioner violated a condition of his probation -- sex offender or otherwise.

Moreover, petitioner has correctly argued in this case that the probation revocation judge did not, given this Court's opinion in State v. Davis, 375 S.C. 12, 649 S.E.2d 178 (Ct. App. 2007), have the authority to order petitioner be placed on the sex offender registry. Only the guilty plea sentencing judge had that authority and that judge did not order sex offender registry. For this reason, also, rehearing should be granted.

In this case, petitioner was ordered to register as a sex offender without a showing of good cause. He was ordered to register as a sex offender on the antithesis of good cause – strict liability. Meaning, the guilty plea sentencing judge who placed petitioner on probation ruled if petitioner violated any condition of the standard sex offender conditions, here not to drink alcohol, that petitioner would automatically have to register as a sex offender. The probation revocation court would have no discretion to allow petitioner to avoid the most draconian result possible from this violation, sex offender registry. Petitioner would have to register as a sex offender for life regardless of the fact that no good cause was shown for registry as mandated by statute and precedent.[1]

Any argument that petitioner waived his right to have the state prove good cause for placing him on the sex offender registry as mandated by statute by agreeing to the negotiated probationary sentence fails because there is no showing in this record of an intentional relinquishment or abandonment of that statutory right to the predicate good cause showing. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(waiver of a constitutional right).[2] Further, as seen,

[1] The state's allegation that petitioner engaged in obnoxious behavior such as asking women for a ride and "harassed" women in a bar are respectfully irrelevant and they do not change the fact that the standard sex offender condition petitioner allegedly violated was not to drink alcohol while on probation.

defense counsel Hutto objected to any future placement of petitioner on the sex offender registry for a minor reason such as a speeding ticket which also evidences petitioner was not waiving his right to have the state prove good cause for placing him on the registry.

As stated, during other probation revocation hearings, if the probationer violated probation, the revocation judge has the ability to hear evidence in mitigation or explanation and to continue the probationer on probation or impose a lesser sanction than a full revocation. Yet, in petitioner's case, respectfully given this Court's opinion, the probation revocation judge had no discretion and indeed he was obligated to place petitioner on the sex offender registry even if, as here, the state did not prove good cause existed to place petitioner on the registry based on his likelihood to reoffend. The probation revocation judge had no discretion when it came to placing petitioner on the sex offender registry -- forget good cause as required by statute and case law. Given this Court's present opinion, petitioner had to placed on the sex offender registry if he drank a sip of beer or any other type of alcohol. This Court should respectfully reconsider its holding in this case that the revocation court has no discretion to hear evidence in mitigation and must place an individual on the sex offender registry even where no good cause exists for that registration.

Further, as argued in petitioner's reply brief and otherwise before this Court, being placed on the sex offender registry essentially ruins a person's life. It is a far worse punishment than a short prison term for a probation violation regardless of whether courts want to recognize what has over time become obvious – the sex offender registry has been proven to be punitive even if it was not at its inception. The person on the registry is exposed to vigilante threats and violence.

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2 Overruled on other grounds by Edwards v. Arizona, 451 U.S. 477 (1981) which established a per se bright line rule on waiving the right to counsel. See Solem v. Stumes, 465 U.S. 638, 652 (1984).

See Abigail E. Horn, Wrongful Collateral Consequences, 87 Geo. Wash. L. Rev. 315, 333 (2019). The person likely will be fired from their job once it is learned he or she is a sex offender, and the person will likely suffer discrimination in housing and, as this petitioner's family has, ongoing harassment in the community.[3] See Moe v. Sex Offender Registry Bd., 467 Mass. 598, 604, 6 N.E.3d 530, 536 (2014).

Further, and respectfully, although defense counsel Hutto objected here to petitioner being placed on the registry in the future for some minor violation, it defies common sense to expect an attorney whose client is being placed on probation during a guilty plea to insist on presenting a full case in mitigation as to why his or her client should not be placed on the sex offender registry when that is not at issue during the guilty plea proceeding. Petitioner suffered no harm at the time of the guilty plea sentencing vis a vis the registry, and there was nothing that made him an aggrieved party with the right or obligation to object or to appeal.

Yet, given this Court's present opinion, petitioner's attorney would need to present the expensive expert testimony of Dr. McKee or another expert and lay testimony as to why petitioner was not a risk of reoffending sexually during the guilty plea hearing where sex offender registration was not being requested at the time.

This Court essentially holds that all evidence, including expert testimony, must be presented to the sentencing court on the issue of sex offender registration even though the state is not asking for sex offender registration before the sentencing court. Leaving the probation revocation court without any discretion – even when a standard condition violation was not good

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3 The state's Pollyanna-like assertion that, under new legislation, Petitioner will have a chance to be removed from the sex offender registry after more than a decade or two if he meets certain conditions, does not change the draconian reality – as argued before this Court -- that many individuals are fired from their jobs, unable to live in certain locations, and are harassed, threatened and exposed to violence once it is discovered that they are on the sex offender registry.

cause for registration – violates statutory law and case law. See S.C. Code Section 23-3-439 (D) (Supp 2022); In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). The sentencing court is mandated to consider all evidence and information that bears on a proper sentence, yet the probation court has no discretion not to impose sex offender registration even though good cause has not been shown to either the sentencing court or the revocation court.

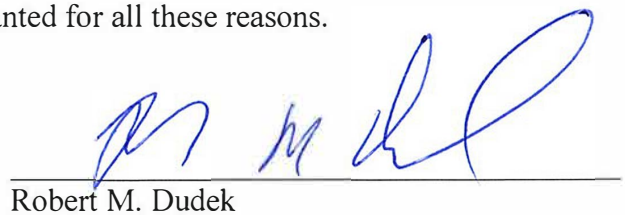
Finally, this Court should reconsider and grant rehearing as to its holding that it was not an abuse of discretion to deny petitioner's motion for a continuance so that he could present the expert testimony of Dr. McKee after a psychosexual evaluation on petitioner's risk of reoffending to show lack of good cause to order petitioner to register as a sex offender. Respectfully, expert testimony in this situation was necessary for a judge to make an educated decision on whether petitioner presented a real risk of reoffending sexually, which petitioner strongly submits he does not.

Again, however, the abuse of discretion for denying a continuance argument runs into the same obstacle that this Court has constructed by holding that all mitigating evidence must be presented to the sentencing court even though the state is not requesting the sentencing court place the defendant on the sex offender registry at that hearing. This holding and procedure is respectfully illogical, and, as seen, it violates the statute and case law that good cause must be shown to place an individual, here petitioner, on the sex offender registry.

Moreover, State v. Davis, 375 S.C. 12, 16, 649 S.E.2d 178, 180 (Ct. App. 2007) holds that the probation revocation court cannot order sex offender registry where it was not ordered by the sentencing court at the guilty plea proceeding. Yet, in this case, this Court approves of a revocation court ordering petitioner to register as a sex offender as long as the revocation court

does not have any discretion to determine whether good cause has ever been shown to order such registration.

Rehearing should respectfully be granted for all these reasons.



Robert M. Dudek
Chief Appellate Defender

Lara Caudy
Senior Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEYS FOR PETITIONER

This 23rd day of January 2025.

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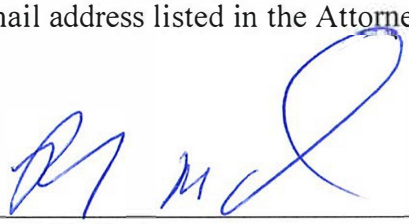
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Matthew C. Buchanan, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS) this 23rd day of January 2025.



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER