RECEIVED
Mar 04 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES ORIAN GREGORY,

APPELLANT

APPELLATE CASE NO. 2024-000072

FINAL BRIEF OF APPELLANT

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

Whether the circuit court abused its discretion by placing Appellant on the sex offender registry where the court denied defense counsel's motion to allow for a psycho-sexual examination prior to Appellant being placed on the registry to determine Appellant's risk to reoffend and where the State failed to make a showing of good cause because there is no evidence in the record showing that Appellant was a risk to reoffend sexually?

STATEMENT OF THE CASE

Appellant was indicted for one count of criminal sexual conduct with a minor first degree during the July 2019 term of the Greenville County grand jury. R. 18-19. On December 6, 2023, Appellant appeared before the Honorable Perry H. Gravely, to enter a negotiated guilty plea to the lesser included offense of assault and battery first degree. R. 1-2. The State was represented by Christine K. Sustakovitch. Appellant was represented by Michael G. Martinez. R. 1.

Under the terms of the plea negotiations Appellant pled pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), for seven-years imprisonment with the determination of whether he would be required to register as a sex offender left to the circuit court's discretion. R. 10, l. 21-R. 11, l. 2. The court accepted Appellant's plea pursuant to Alford and ordered he register as a sex offender. R. 16, ll. 16-20. Counsel Martinez filed a motion to reconsider the registry requirement on December 13, 2023. R. 22-24. By written order file on January 3, 2024, the court denied the motion to reconsider. R. 25).

This appeal follows.

STANDARD OF REVIEW

"A [sentencing court] has broad discretion in sentencing within statutory limits." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). "A [sentencing court] *must* be permitted to consider *any and all information that reasonably might bear on the proper sentence* for a particular defendant." Id. (emphasis added). The sentence imposed will not be overturned on appeal absent an abuse of discretion. Id. An abuse of discretion occurs when the sentence imposed was based on either an error of law or a factual conclusion not supported by evidence in the record. Id.

ARGUMENT

The circuit court abused its discretion by placing Appellant on the sex offender registry where the court denied defense counsel's motion to allow for a psycho-sexual examination prior to Appellant being placed on the registry to determine Appellant's risk to reoffend and where the State failed to make a showing of good cause because there is no evidence in the record showing that Appellant was a risk to reoffend sexually.

Relevant Facts

In August 2018, charges were filed against Appellant accusing him of criminal sexual conduct with a minor first degree for incidents alleged to have occurred in July 2014 and July 2016.[1] R. 18-19. On December 6, 2023, Appellant appeared in court to plead pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to one count of assault and battery first degree. Under the negotiated terms of the plea, Appellant would be sentenced to seven years of incarceration.[2] However, the question of whether Appellant would be placed on the sex offender registry (SOR) was left to the discretion of the court. R. 10, l. 24-R. 11, l. 2. Appellant was thirty-four years old at the time he entered the Alford plea. R. 3, ll. 13-19. His prior record consisted of a 2008 unlawful carrying of a weapon, a 2009 receiving stolen goods, a 2010 domestic violence first offense, and a 2013 receiving stolen goods. R. 10, ll. 4-7.

---

[1] According to the public index, Appellant was arrested and charged in April 2018. See https://www2.greenvillecounty.org/SCJD/PublicIndex/PISearch.aspx (Search Case No: 2017A2310100426); See also Wise v. Wise. 394 S.C. 591, 601, 716 S.E.2d. 117, 122 (Ct. App. 2011) (noting an appellate court can take judicial notice of a fact that was not before the lower court if the fact is indisputable); Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984) (stating a court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records).

[2] Appellant received 1,398 days of pre-trial time served credit.

In support of the plea the State alleged that on September 5, 2017, Minor was having a sleepover with her cousins. During the sleepover the girls read Minor's diary in which she alleged that Appellant had put his penis into her rearend. When they returned home from the sleepover the cousins told their mother about what they had read in Minor's diary. Their mother subsequently informed Minor's mother of the allegations against Appellant that were in Minor's diary. Law enforcement became involved, Minor was taken for a forensic interview, and charges were eventually brought against Appellant. R. 8, l. 19-R. 9, l. 9.

During the plea, Solicitor Sustakovitch informed the court that there were "issues with the case. And that is the only reason, Judge, that this case is being resolved in this manner." The Solicitor continued, "[t]here are real concerns based on how old it is that there could be some things that could come up down the road on – on appeal should this Defendant be convicted." R. 11, ll. 11-16. She also informed the court that "the State has been very clear with Defense Counsel that we believe this Defendant should be on the sex offender registry." R. 11, ll. 2-5. The State requested a permanent restraining order (PRO) barring Appellant from any form of contact – direct or indirect – with Minor or her mother for the remainder of Appellant's natural life. R. 11, l. 23-R. 12, l. 3. Minor's mother then spoke and requested that Appellant be placed on the SOR. R. 12, l. 10-R. 13, l. 1.

Defense counsel agreed that there were problems with the case which would have been brought out at trial. However, Appellant had considered the State's evidence and believed the State could probably secure a conviction against him if he went to trial. He had therefore decided that he would plead to a lesser included offense pursuant to Alford, *supra*, instead of risking a trial on a charge that carried a potential sentence of twenty-five years to life imprisonment. Counsel Martinez requested that the court delay any order regarding the SOR

until Appellant could undergo a psycho-sexual evaluation with Dr. Geoff McKee to determine Appellant's risk, if any, of reoffending sexually. Dr. McKee had informed Counsel Martinez that he could evaluate Appellant within two months of the December plea. Dr. McKee had also stated that he could potentially evaluate Appellant within the month of December if his schedule allowed. Counsel Martinez requested that the court sign a funding order for Dr. McKee to perform the evaluation, as well as an order keeping Appellant in the local detention center pending the evaluation report by Dr. McKee. R. 13, l. 14-R. 15, l. 3. Appellant and Counsel Martinez both clarified for the court that Appellant understood and consented to the terms of the PRO. R. 15, l. 17-R. 16, l. 9.

The court accepted Appellant's plea pursuant to Alford, *supra*, and sentenced Appellant according to the negotiated terms of the plea. Regarding the SOR, the court stated,

> I am going to find that the sexual offender registry is appropriate. I'm not sure that a report from the doctor will change – would change my mind anyway. So I'm going to deny your request for any delay of time and find that he will be on the sex offender registry.

R. 16, ll. 13-20.

Counsel Martinez timely filed a motion to reconsider the order of the court requiring that Appellant be on the SOR. R. 22-24. Counsel Martinez argued that the State advocated for Appellant's placement on the SOR based solely on the underlying facts in the indictment. He argued that the underlying facts, without more, did not meet the "good cause" required by statute, especially considering Appellant had maintained his innocence by pleading pursuant to Alford, *supra*. He requested that the court reverse its order and hold the matter in abeyance pending the completion of a psycho-sexual exam which would determine Appellant's risk of reoffending. Counsel Martinez argued that without the psycho-sexual evaluation the court

lacked the necessary evidence on which to base its determination that Appellant should be placed on the SOR. R. 22-24.

In a written order filed January 3, 2024, the circuit court denied the motion to reconsider. The court, citing to State v. Herndon, 403 S.C. 84, 742 S.E.2d 375 (2013), reasoned that an Alford plea is treated the same as a guilty plea and was a sufficient basis for "good cause" to place Appellant on the SOR. The court wrote, "[t]he Court finds good cause was presented by the prosecution to require the Defendant to be placed on the Sex Offender Registry...". The court did not address the lack of a psycho-sexual evaluation or Appellant's risk to reoffend in the order denying the motion to reconsider. R. 25.

Discussion

Appellant entered an Alford plea to assault and battery first degree. Accordingly, he was not required to register as a sex offender unless the State showed good cause. The record before this Court wholly lacks a showing of cause, much less a showing of good cause, that would support the determination that Appellant must register as a sex offender. The linchpin of the good cause determination is an offender's risk to reoffend sexually. Counsel Martinez properly requested that the court delay its determination on the registry until Appellant could undergo a psycho-sexual evaluation to determine Appellant's risk to reoffend. The court denied the request, stating that a doctor's report would not change its mind. Without an evaluation, however, the court was left with no evidence indicating if Appellant was at a risk to reoffend. Consequently, the lower court lacked the necessary evidentiary support required to place Appellant on the SOR. The lower court's denial of Counsel Martinez's request for a psycho-sexual evaluation and the placement of Appellant on the SOR without any showing of good cause by the State was an abuse of the court's discretion.

In 1994, the South Carolina General Assembly enacted the SOR law. The purpose of the legislation was laid out in S.C. Code Ann. § 23-3-400, which states:

> 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.*

Powell v. Keel, 433 S.C. 457, 465, 860 S.E.2d 344, 348 (2021) (emphasis added). As made apparent by the plain language of the statute, the intent of the General Assembly in passing the SOR law was to register those offenders who posed a high risk of re-offending sexually. "Indeed, *a likelihood of re-offending lies at the core* of South Carolina's civil statutory scheme." Id. at 466, 860 S.E.2d at 349 (2021) (internal quotations and citations removed) (emphasis added). See Also State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) (From this language, it 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) (emphasis added). The statutory registry requirements bear out the legislative intent.

S.C. Code Ann. §23-3-430 sets forth the statutory requirements for placement of an individual on the SOR. When an individual is convicted of or pleads to an offense specifically enumerated in S.C. Code Ann. §23-3-430(C)(1)-(3), that individual is automatically required by law to register as a sex offender based on the nature and severity of the offense. However, when a person is convicted of, or pleads to, a non-enumerated offense, S.C. Code Ann. § 23-3-430(D)

directs that "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 prosecution.*" (emphasis added). Our Supreme Court has held "that a finding of good cause in this context means only that the judge must consider the facts and circumstances of the case to make the determination of *whether or not the evidence indicates a risk to reoffend sexually.*" In re M.B.H., 387 S.C. 323, 327, 692 S.E.2d 541, 542 (2010) (emphasis added).

In M.B.H., *supra*, four juvenile petitions were filed against M.B.H. alleging lewd acts with a minor, assault with intent to commit sexual battery, and sexual battery. Id. at 325, 692 S.E.2d at 541-542. M.B.H., who was fourteen at the time of the incidents, admitted delinquency to two amended charges of assault and battery of a high and aggravated nature (ABHAN). Id. At the hearing where M.B.H. admitted delinquency, the State recommended that M.B.H. undergo an inpatient evaluation and be placed on the private SOR. Id. The court agreed that M.B.H. should undergo an evaluation. However, the court withheld a final determination on whether M.B.H. would have to be on the private SOR until after the evaluation. The court reasoned that the evaluation would determine M.B.H.'s risk to reoffend and what treatment measures he needed. Id. at 326, 692 S.E.2d at 542. The court ultimately found good cause existed to require M.B.H. to register on the private SOR based on the evaluation and facts of the case. In ordering that M.B.H. register, the court listed numerous reasons supporting good cause, including: that M.B.H. had multiple offenses with multiple, younger, same-sex victims, that he had a sense of victimization and denied harming others, that he had borderline intellectual functioning, and that it was recommended that he receive inpatient sexual offender treatment. Id.

On appeal, M.B.H. argued that the State had failed to show good cause for his registration on the private SOR. Our Supreme Court disagreed with M.B.H. and held that the

lower court did not abuse its discretion in requiring him to register, where the solicitor showed good cause:

> At the dispositional hearing, the solicitor introduced the [Coastal Evaluation] Center's evaluation report to support the request for Appellant to be placed on the private sex offender registry. *The judge relied on the professional findings and recommendations in that report in concluding good cause existed for placing Appellant on the registry. The record is clear that the judge considered all of the facts and circumstances of this case, both aggravating and mitigating, in determining that there is a risk of sexual reoffense. Such a determination is supported by the evidence in the record.*

Id. at 327, 692 S.E.2d at 542-43 (emphasis added).

In State v. Fraley, 437 S.C. 135, 136-137, 876 S.E.2d 703, 704 (Ct. App. 2022), Fraley was accused of four sex crimes. He pled guilty pursuant to Alford to assault and battery first degree. As part of his sentence, Fraley was required to undergo an evaluation to determine if he should be placed on the SOR. The court ultimately ordered that he register, and Fraley appealed. Fraley presented two arguments on appeal: that because he pled under Alford, he did not commit a sex crime and was therefore not at a risk to reoffend, Id., and that the State failed to show good cause for him to register. Id. at 138, 876 S.E.2d at 705.

As to the first argument, this Court was unpersuaded. This Court noted that an Alford plea carries the same effect as a regular guilty plea or guilty verdict for the purposes of imposing punishment. Fraley pled to crimes of a sexual nature, as laid out clearly in the indictment. This Court held it was not an abuse of discretion for the circuit court to consider that fact in determining whether placement on the SOR was necessary. Id. at 137-138; 876 S.E.2d at 705.

As to the second argument, this Court concluded that the record established good cause. This Court wrote,

> Dueling experts testified for and against requiring Fraley to register. The State's evaluator, Dr. Lee, ultimately concluded that the court should require Fraley to register if the court was of the opinion that the original allegations made

> against Fraley were true. Fraley's expert, Dr. Gunter, saw no definitive data supporting that Fraley committed a sexual offense and believed the allegations brought by the alleged victim had serious credibility issues.
>
> We may or may not have come to the same conclusions as the plea court, but we do not see how we could say the court abused its discretion. In the written order denying reconsideration, *the court explained that it considered all of the facts and circumstances of the case, and there is undoubtedly some evidence supporting the court's bottom-line conclusion that there was "good cause" for Fraley to register.* While Dr. Lee did not give an unequivocal recommendation that Fraley should register, *she did recommend requiring registration if the court believed the allegations against Fraley were true.*

Id. at 138; 876 S.E.2d at 705 (emphasis added).

This Court distinguished Fraley's case from In re Christopher H., 432 S.C. 600, 607, 854 S.E.2d 853, 856 (Ct. App. 2021), in which this Court reversed the order requiring Christopher to register where the only evidence in the record indicated a low risk to re-offend and the evidence overwhelmingly indicated that registration was not proper. Unlike In re Christopher H., the State's expert in Fraley cited "certain factors indicating a diagnosable sex-related disorder and noted other factors as counseling against registration." Her ultimate opinion was that the court should require Fraley to register if it believed he was guilty of the allegations against him as that was proof of a diagnosable sex-related disorder. This Court concluded, "[w]e do not think the court gave the State a pass on the burden to show "good cause." If the burden proved lighter here, it was because Fraley's guilt was a key fact, and Fraley had already pled guilty." Id. at 139, 876 S.E.2d at 750.

M.B.H. and Fraley, are examples of cases where the lower court properly placed an individual on the SOR based upon a good cause showing. In each case, there were facts outside of the charged conduct and plea of the defendant that supported the lower court's determination of good cause – namely there was evidence of the individual's likelihood to reoffend sexually. The same cannot be said for the matter, *sub judice*. The lower court refused to allow Appellant

to undergo a psycho-sexual evaluation because it did not think a doctor's report would change its mind. Respectfully, the courts subjective opinion about Appellant or the case facts was not relevant in the determination of good cause. What the court was required to consider was Appellant's risk to reoffend sexually in connection with the facts and circumstances of the case. The only way for the court to properly make that determination was to allow for Appellant to undergo a psycho-sexual evaluation. The denial of Counsel Martinez's request to delay a determination on Appellant's SOR status to allow for an evaluation was not supported by the facts in the record and resulted in the lower court abusing its discretion.

Equally worrisome was the total lack of evidence or testimony presented by the State that would support a finding of good cause in this case. The only thing the State said regarding the SOR was that it had conveyed to defense counsel it believed Appellant should be on the SOR. The State offered no arguments, facts, or basis upon which to place Appellant on the registry, outside of the fact that he was charged with a crime of a sexual nature. The State made absolutely no showing that Appellant was at a risk to reoffend sexually. Critically, the State could not have made a showing of good cause without showing that Appellant was at a risk to reoffend sexually. When there is not good cause shown at the plea hearing, the sentencing judge lacks the statutory authority to sentence an offender to the SOR. See State vs. Davis, 375 S.C. 12, 16, 649 S.E.2d 178, 180 (Ct. App. 2007) ("With no good cause having been shown at the plea hearing, the Sentencing Judge would be without the statutory authority to either sentence Davis to be placed in the Registry or to make it a condition of probation."). Thus, the placement of Appellant on the SOR was an error of law, amounting to an abuse of discretion by the court.

Notably, the lower court did not explain or point to specific facts in evidence that supported placing Appellant on the SOR. Instead, the court concluded in a single sentence in the

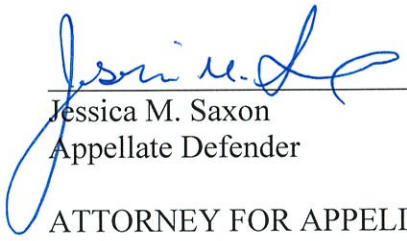
order denying reconsideration that the State had presented good cause. This determination was not supported by the record. Also, the lower court's reliance on Herndon, *supra*, is misplaced. Undoubtedly, an Alford plea is treated the same as standard guilty plea for the purposes of punishment. However, the entry of any plea alone does not rise to the level of good cause necessary to place an individual on the SOR. As our Supreme Court set out in M.B.H., the judge must be able to determine from the facts and circumstances of the case whether the individual is likely to reoffend sexually. Nothing before the lower court, or before this Court on appeal, indicates that Appellant has any risk of re-offending sexually.

In Powell v. Keel, 433 S.C. 457, 466, 860 S.E.2d 344, 348-349 (2021), our Supreme Court wrote "the lifetime inclusion of individual 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." The Court went on to hold that the lifetime registry requirement was unconstitutional because it lacked "any opportunity for judicial review to *assess the risk of re-offending*..." and was therefore arbitrary and not rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending. Id. If a determination that a registrant is a low risk to reoffend is necessary to remove an individual from the SOR, then surely a determination of a high-risk to reoffend is necessary to add an individual to the SOR.

The record in this matter is wholly void of evidence that Appellant is at a risk to reoffend sexually. Without a psycho-sexual evaluation there was no way for the court to determine that Appellant should be placed on the SOR. Further, the State failed to present the necessary good cause required by the statute. The court's finding that the State presented good cause is not supported by the record. The ruling of the lower court was an abuse of discretion.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests that this Court find the State failed to show the necessary good cause to require Appellant to register as a sex offender, reverse the circuit court's determination that he should be required to register, and order removal of Appellant's name from the sex offender registry.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of March, 2025.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

March 4, 2025.

Jessica Saxon
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

RECEIVED
Mar 04 2025
SC Court of Appeals

RECEIVED
Mar 04 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES ORIAN GREGORY,

APPELLANT

APPELLATE CASE NO. 2024-000072

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Brian H. Gibbs, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 4th day of March, 2025.

Jessica M. Saxon
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT