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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GREGORY LAMONT BENJAMIN,

APPELLANT

APPELLATE CASE NO. 2024-001017

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant was indicted at the October 6, 2022 term of the Darlington County grand jury for the offense of indecent exposure. R. p. *. Appellant appeared on June 10, 2024, and pled guilty in front of the Honorable R. Ferrell Cothran. Ashley N. Berry represented appellant. Jason Bridges was the assistant attorney general appearing for the state. Tr. 1.

At the beginning of the plea, the assistant attorney general told the judge that the state recommended a sentence of time served. Tr. 2, ll. 2-13. At the conclusion of the plea proceeding, the judge ruled, over strenuous defense objections, that appellant would be placed on the sex offender registry. The judge sentenced appellant to time served as recommended. Tr. 15, l. 17 – 16, l. 4. An order "Finding Defendant To Be Place (sic) on Sex Offender Registry Per 23-3-340" was later filed on July 23, 2024. R. p. *.

This appeal follows.

STANDARD OF REVIEW

Sentencing: "'In criminal cases, the appellate court sits to review errors of law only.'" State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009)(quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "'bound by the trial court's factual findings unless they are clearly erroneous.'" Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." State v. Slocumb, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

ARGUMENT

The plea court erred by ruling appellant having masturbated in the presence of his former public defender in the county jail during an attorney-client visit was good cause or cause to order appellant placed on the sex offender registry pursuant to S.C. Code Ann. § 23-3-430 (C)(1)(f) for indecent exposure at the behest of that attorney, where appellant's plea attorney, Ms. Berry, a former public defender, told the judge "this kind of thing happens all the time," she noted that appellant had no prior convictions for crimes of a sexual nature, and there was no competent evidence appellant was a risk to reoffend sexually since the state failed to prove appellant should be placed on the sex offender registry under these circumstances.

Relevant facts

At the beginning of the guilty plea proceeding, assistant attorney general Bridges told the judge that appellant was waiving venue for this Darlington County indecent exposure charge and pleading guilty in Sumter, South Carolina. The recommendation was time served. As seen below, the assistant attorney general only referred to the potential for the sex offender registry as something appellant's former public defender, M.W., wanted to address with the court. It was not a state's recommendation. Tr. 1; Tr. 2, ll. 5-14.

Bridges told the judge that Darlington County public defender M.W. represented appellant in his probation violation case. M.W. went to visit appellant on August 1, 2022, at the Darlington County Detention Center. At about 10:30 a.m., defense counsel M.W. and appellant were seated "across from each other at a small rectangular table." Tr. 4, ll. 15-24. Bridges offered:

> After about ten to fifteen minutes Ms. M.W. noticed that Gregory Benjamin was moving his arm in an up and down motion. Ms. M.W. stood up and moved to exit the interview room and as she did she saw that Mr. Benjamin had continued to move his hands in

> an up and down motion like he was masturbating. And when she turned and looked at him he, his penis was visible. Ms. M.W. exited the room and stood in the vestibule waiting to leave because it was, at that jail you have to get the guards to buzz you out. While she was waiting Mr. Benjamin continued to expose himself and he also spoke to Ms. M.W. to try to get her to come back into the room. Ms. M.W. was then released from the room and she reported to the Darlington County Sheriff's Deputies that were there at the jail. The following day she gave a statement to Investigator Charles Cusack and she described what had happened. He obtained an arrest warrant for indecent exposure. That was served on him on August 2nd, 2022. He has remained in custody ever since. *Ms. M.W. is here, she would like to address the Court at the appropriate time about the potential for sex offender registry.* He has not bonded out so he has 540 days time credit, that is why the State is recommending time served. I have his prior record too if you would like me to read later, Your Honor.
>
> THE COURT: Are those facts correct, Mr. Benjamin?
>
> MR. BENJAMIN: Not all but yeah.

Tr. 4, l. 24 – 5, l. 25. (emphasis added).

After some discussion about the indictment, the judge accepted appellant's guilty plea as freely and voluntarily tendered. Tr. 9, ll. 9-18. Appellant's former public defender, Ms. M.W., was given the opportunity to address the court. Ms. M.W. then asked the judge to order her former client placed on the sex offender registry for his actions at the Darlington County Detention Center during their attorney-client visit that August 1, 2022 morning:

> M.W.: M.W. As they said, I am a Public Defender in Darlington. So you know, I understand that my job comes with a certain level of expecting bad things to happen. But this shouldn't be one of them, you know. I was trapped in a tiny little vestibule, didn't have anywhere to go. This wasn't something, you know, this was sexually motivated. This is something that a predator would do. He belongs on the registry, Your Honor. If he hasn't done this or worse to somebody outside of a controlled setting like a jail I would be shocked. And he has a history of doing this. We pulled his SCDC disciplinary, that is what he does, Your Honor. You know, I don't think that this should be a job hazard. And I was asked, oh, this is the first time this has happened to you? That

shouldn't, that shouldn't happen to anybody. You know, I just, I think that he needs to be monitored for a significant period, if not the rest of his life. He belongs on the registry. Again, I know he has already satisfied his time, I am not asking for time, I am asking for somebody to watch this man because he needs to be monitored. It is not an isolated incident, it will happen again.

Tr. 9, l. 22 – 10, l. 18.

Defense counsel Ashley Berry then told the judge:

MS. BERRY: [Y]our Honor. So this case has been a little bit strange for me because like Ms. S., Ms. M.W., I am also a female attorney. I was a Public Defender for the first four years of my practice, now I am a private attorney. And I can tell you that this kind of thing happens all the time. Whenever I was a Public Defender this sort of thing happened to me, I would say at least once a month, once every other month. I don't even remember all of their names anymore, I don't even remember all of the circumstances in which this happened to me. And whenever we are having, you know, the attorney and equivalent of water cooler discussions with other female attorneys such as at the Public Defender Conference that we have once a year in Myrtle Beach, this is something that we talk about. And one of the eternal questions that the female attorneys discuss with each other is how do you handle it. *And over my years serving as a Public Defender I found ways of handling it, I found ways of telling clients that that was not appropriate and I am shutting it down. I will say that while I have been representing Mr. Benjamin I have had several in-person interactions with him and have never had him be aggressive towards me, I have never had him make a comment that I consider to be derogatory or sexual and he has certainly never masturbated at me during one of our meetings. I understand the fact, you know, that he did do this with Ms. M.W. and he does have a history of doing it while in SCDC as you can see from his disciplinary record. But he does not have anything of the sort on his record outside of SCDC, outside of a place where he is confined. And I find that that has been true not only for Mr. Benjamin but also for most of the other clients with him, I have had these sort of experiences.* They don't happen with my clients that are charged with sex crimes, like they tend to happen frankly most frequently with my clients that are charged with very low non-serious crimes *who have been in jails for a month or more.* They seem to be the ones who struggle the most with, you know, not doing this very inappropriate thing.

Tr. 11, l. 12 – 12, l. 25. (emphasis added).

Defense counsel Berry continued that she went to visit appellant in prison near the border in North Carolina. She had a long conversation with appellant about the improper nature "[o]f doing those sorts of things and in particular it doesn't really make your attorney want to work very hard for you whenever the person that you're doing that at is your lawyer who is supposed to be helping defend you on a probation violation or on a pending charge. I think that he understands that, I think that he just kind of had a lapse in judgment due to confinement. You do see that happen with men sometimes but outside of confinement he has no record." Tr. 13, ll. 1-12. Berry went on to explain:

> You do see that happen with men sometimes but outside of confinement he has no record. *I mean,* Ms. M.W.'s argument for putting him on the record *is essentially, well, what if he has done this before or he is probably done this before. But that is not what Your Honor has in front of you.* Your Honor has to make a decision based on the facts as we know them to be which is that, yes, *he did commit this crime but he has no sexual priors and he does not show any inclination towards predatory behavior.* I mean, none of these are assaults. Even his SCDC disciplinary record, my memory is that they are exposures. *I mean these are things where people have seen him pleasuring himself, not incidents where he has gone after another person or attacked another person or forced himself on another person. I do not think that this is the kind of person that needs to be on our sex offender registry. The purpose of the registry is to notify the community of predators, to notify the community of people that are dangerous. I do not believe that Mr. Benjamin falls into that category.* I would also just bring out for the Court the fact that Mr. Benjamin has alerted to me that the fact that he does have minor children but because he was never married to their mothers he doesn't have any custody of those children. So if Your Honor were to put him on the registry he is not going to be able to see those children either until they turn 18 or best-case scenario if he gets let off of the registry 15 years from now. That is when he would be able to see his children again. He told me just this morning that apparently one of his children and her nine-month-old daughter was involved in a shooting in Bishopville and they buried his grandson and his daughter is still in the hospital. He wants to be able to interact with his children and

> his grandchildren. He doesn't want to be separated from them because of this. I think that, you know, this has been, I also just want to remark, I know that Your Honor has seen him show some reluctance to plead guilty this morning. It is not because he disputes the underlying facts of the case, he agrees that he masturbated in front of Ms. M.W. *He is terrified of being on the registry, he is terrified of having that mark [on] him for the rest of his life.* It is not, it is not that he is unwilling to plead guilty to this offense and take responsibility for it. And I think that this has told him something about, you know, things that are appropriate and things that are not. So I would ask that you not put him on the registry. *My client has stated that he doesn't want to make any statements to the Court but he does wish [for] me to apologize to Ms. M.W. on his behalf which I will do.*

Tr. 13, l. 12 – 15, l. 11 (emphasis added).

After hearing from defense counsel Berry, the judge stated: "I want to go think about this," and there was a short recess.

The judge then stated that defense counsel "[m]ade a compelling argument about him not having any sexual crimes in the past. But he has got at least two issues in the Department of Corrections, even with public masturbation. And it is, you know, a scenario that is somebody who will do that with their lawyer who is a court appointed official, I just think that is a grievance [sic] situation. I'm going to put him on the registry, he can apply. He can make it without getting in any more trouble, he can petition the court to get off."[1] Tr. 15, l. 17 – 16, l. 3.

Discussion

The burden is on the state to prove good cause exists to order a defendant to register as a sex offender. This Court in In the Interest of Christopher H., 432 S.C. 600, 605, 854 S.E.2d 853, 855 (Ct. App. 2021), noted that our Supreme Court in In re M.B.H., 387 S.C. 323, 327, 692 S.E.2d 541, 542 (2010), stated "'good cause' for purposes of placing a juvenile offender on the

[1] The truncated written order issued later added nothing of substance to the judge's oral order placing appellant on the sex offender registry. In fact, the order specifically referred to "specific findings of fact" the court made during the guilty plea proceeding. See R. p. * (order).

private sex offender registry 'means only that the [sentencing court] must consider the facts and circumstances of the case to make a determination of whether or not the evidence indicates a risk to offend sexually.'" 387 S.C. at 327, 692 S.E.2d at 542. Whether it is a juvenile or an adult, the pertinent "good cause" inquiry is whether the state has shown through the evidence it presented to the court that the defendant poses a risk to reoffend sexually. See State v. Fraley, 437 S.C. 135, 138, 876 S.E.2d 703, 705 (2022).

As to the crime of indecent exposure, the statute states that sexual offender registry is required only "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." See S.C. Code Ann. § 23-3-430 (C)(1)(f). The written order erroneously cited S.C. Code Ann. § 23-3-340, but it did cite the conclusory language that "the court made a specific finding of fact on the record that, based on the circumstances of this case, it was warranted that the Defendant be required to register as a sex offender." R. p. *. (order).

In Wiesart v. Stewart, 379 S.C. 300, 665 S.E.2d 187 (2008), this Court noted that prior to 1996, sex offender registration was required for any person convicted of indecent exposure. However, in 1996, the statute was amended to require registration only "**if** the court makes a specific finding on the record **based on the circumstances of the case the conviction person should register as a sex offender.**" (emphasis added).

Thus, a cause standard now exists for showing that a person convicted of indecent exposure should be placed on the sex offender registry. Appellant submits that cause standard should be "good cause."

In a sexually violent predator civil commitment case, the state must prove the defendant is an SVP by the standard of beyond a reasonable doubt. See S.C. Code Ann. §44-48-100 (A).

This civil commitment continues until the defendant is deemed no longer a danger to the public, and it is based on the finding by the General Assembly that the risk of reoffending by certain people convicted of sexual offenses is significant if they are not treated for their "mental conditions." See S.C. Code Ann. §44-48-20.

A person placed on the sex offender registry, as explained below, cannot live a normal life once released from prison. A person on the sex offender registry has significant restrictions on his freedom, as does a committed sexually violent predator, and these real-life detriments detract from the ability of the person to be rehabilitated or reformed which is a legitimate purpose of punishment. Consequently, the cause necessary for a person to be placed on the sex offender registry for the crime of indecent exposure under S.C. Code Ann. § 23-3-430 (C)(1)(f) should be more than proof by a preponderance of the evidence that he is likely to reoffend.

"It is axiomatic that a [defendant] with a history of sexual offense or offenses will be at some risk [to reoffend], even if the risk is very low." In the Interest of Christopher H., 432 S.C. at 606, 854 S.E.2d at 856. The Court in In the Interest of Christopher H., also observed that "if any risk is sufficient to establish good cause, the statute requiring the solicitor to show good cause would be of no purpose because all [defendants] would automatically be placed on the registry." Id. 432 S.C. at 606-07, 854 S.E.2d at 856.

The purpose of the sex offender registry is to protect the public against an offender reoffending sexually, and the state in this case failed to present "good cause" or "cause" or even proof by a preponderance of the evidence that appellant was a real risk to reoffend. This is not surprising since the state did not present any evidence appellant was a risk to reoffend, and it merely let the victim/attorney address the court about the propriety of the sex offender registry.

In this case, the judge correctly noted that the defense made a "compelling argument about him [appellant] not having any sexual crimes in the past." Tr. 15, ll. 17-19. The state presented no competent evidence that appellant was a risk to reoffend, much less a real risk to reoffend. Appellant's former public defender was driving the sex offender registry bus in this case, not the prosecutor, who only recommended time served for the offense.

Defense counsel noted that appellant's prior public defender urged the judge to put appellant on the sex offender registry because, based on this one incident, she surmised he had probably done it before and guessed that it would happen again. Tr. 13, ll. 12-16. His former public defender's belief, respectfully, was pure speculation about appellant's prior and future conduct from a lawyer who turned her own client in for his "inappropriate" behavior during their attorney-client meeting. Her belief that appellant should be on the sex offender registry was the opinion of an angry victim to which she was undoubtedly entitled, but it was not competent evidence of appellant's risk of reoffending sexually.

Defense counsel argued that appellant had no prior sexual convictions, and he did not show any inclination towards predatory behavior. Defense counsel Berry told the judge she recognized as a defense attorney that masturbation was a common occurrence in jail or prison and that she had counseled appellant about the negative impact such behavior had when it occurred within the viewing distance of his defense attorney whose job was to advocate for the best outcome for him.

The indecent exposure in this case did not involve a direct, aggressive course of sexual behavior by appellant. There was no evidence appellant tried to touch his former attorney. It was a crime because a prison or detention center can technically be considered a "public place"

within the meaning of S.C. Code Ann. § 16-15-130, the indecent exposure statute.[2] Again, not excusing appellant's conduct, it is also more than fair to point out that a criminal client expects his or her attorney not to do anything to harm him which contributes to the highly unusual nature of this case.

Defense counsel Berry specifically said that appellant wished for her to apologize to his former public defender for his wrongful behavior in this case. This showed appellant was remorseful for his improper behavior during a jail meeting with his former public defender, and plea counsel also said she had talked to and counseled appellant about why his behavior was harmful.

Our Supreme Court has indicated that, "[t]he intent of the legislature in enacting the sex offender registry law is to protect the public from those offenders who may reoffend." In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003). The sex offender registry is meant to protect the public from a person who is a risk to reoffend sexually and the requirement to register is non-punitive. See In the Interest of Justin B., 419 S.C. 575, 583, 799 S.E.2d 675, 679 (2017).

As stated, this is a most unusual case since defense counsel Berry correctly told the judge that behavior such as that of the appellant in this case was not unusual *in prison*. Although this behavior being normal in prison does not make it right -- it is an undeniable fact of incarcerated life. As defense counsel argued, there was no competent evidence in this case that appellant was a risk to reoffend -- expose himself to another person -- outside of prison. As such, the judge

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[2] An Attorney General's opinion dated August 22, 2007, 2007 WL 3244890 (S.C.A.G.) cited Brown v. Genesee County Board of Commissioners, 628 N.W.2d 471 (Mich., 2001), for the proposition that "a jail is generally considered a public place. The court stated that ...a jail is open for use by members of the public. Family, friends, and attorneys may generally visit inmates. Members of the public may also enter a jail for other reasons, e.g., to apply for a job or make a delivery...The fact that public access to a jail is limited does not alter our conclusion. 628 N.W.2d at 474.

erred by ordering appellant be placed on the sex offender registry. In the Interest of Christopher H., 432 S.C. 600, 605, 854 S.E.2d 853, 855 (Ct. App. 2021); In re M.B.H., 387 S.C. 323, 327, 692 S.E.2d 541, 542 (2010).

In the final analysis, given the precedent of this Court and the Supreme Court, the state failed to prove "good cause" -- or "cause" -- should a lower standard of proof ultimately be decided upon for the crime of indecent exposure pursuant to S.C. Code Ann. § 23-3-430(C)(1)(f).

Defense counsel also correctly argued that being on the sex offender registry would make it nearly impossible for appellant to function in society as a normal person and father once he was released. In other words, while the sex offender registry is not meant to be punitive, it strongly diminishes the likelihood of one other purpose of punishment -- and the societal goal of -- rehabilitation. See Owens v. Stirling, 443 S.C. 246, 268, 904 S.C. 580, 592 (2024) (reform or rehabilitation was one of the three purposes of punishment recognized by Sir Blackstone in 4 William Blackstone, Commentaries *11-12).

Defense counsel's concern about appellant being able to live something approaching a normal life when he is ultimately released from prison is supported by a plethora of available research and writings. It is well known that "sex offender registration and notification have serious negative consequences for registrants and their families, including for their social relationships, education, employment, and psychological health. Sex offender registrants experience humiliation and isolation, lost or jeopardized employment, employment opportunities, and housing opportunities." Fallen v. United States, 290 A.3d 486, 496 (D.C. 2023) (citing E.B. v. Verniero, 119 F.3d 1077, 1102 (3d Cir. 1997) and J.J. Prescott & Jonah E. Rockoff, Do Sex Offender Registration and Notification Laws Affect Criminal Behavior? 54 J.L.

& Econ. 161, 168 (2011)). "Sex offender registration identifies the registrant as dangerous and disseminates information to the public that allows them to be shunned and denied opportunities to live and work in their communities." Id.; See Wayne A. Logan, Database Infamia: Exit from the Sex Offender Registries, 2015 Wis. L. Rev. 219, 223 (2015) (Sex offender registration "has major adverse personal consequences for registrants, including social ostracism, lost job and housing opportunities, and even harassment and vigilantism."); see also Moe v. Sex Offender Registry Bd., 6 N.E.3d 530, 536 (Mass. 2014) ("public identification of a sex offender poses a risk of serious adverse consequences to that offender, including the risk that the sex offender will suffer discrimination in employment and housing, and will otherwise suffer from the stigma of being identified as a sex offender, which sometimes means the additional risk of being harassed or assaulted.").

Moreover, "state supreme courts have reached the conclusion that SORA registration results in harm to the registrant distinct from that resulting from the underlying conviction." Fallen, 290 S.3d at at 497-98 (citing Doe v. Dep't of Pub. Safety & Corr. Servs., 62 A.3d 123, 142 (Md. 2013) (concluding that "the harms caused by dissemination . . . rendered" Maryland's sex offender registration law "the equivalent of the punishment of shaming" and noting examples of lost housing "quite similar to expulsion from the community") and Doe v. State, 189 P.3d 999, 1011 (Alaska 2008) (citing evidence that sex offenders "had lost their jobs, been forced to move from their residences, and received threats of violence following establishment of the registry, even though the facts of their conviction had always been a matter of public record")).

The only reason for there being a sex offender registry is it will purportedly help protect the public from reoffending sex offenders. The state in this very unusual case failed to prove "good cause" to place appellant on the sex offender registry. Further, the damage the sex

offender registry would cause to appellant's ability to lead a rehabilitated or reformed life outside of prison, as noted by defense counsel, was worthy of consideration.

In sum, the judge found it compelling evidence that appellant had no previous convictions for sexual offenses, and he only noted appellant had "issues" in the Department of Corrections with "public masturbation" which appellant's counsel had noted were instances of "exposure" but not sexually predatory behavior. The judge also apparently found it concerning that the exposure or masturbation in this case occurred in the presence of his former public defender who was a "public appointed official." Tr. 13, l. 16 – 14, l. 7; Tr. 15, l. 17 – 16, l. 1. These extremely limited findings of fact, and his former attorney being a "public appointed official," did not, as explained above, constitute good cause or cause to place appellant on the sex offender registry, and the judge's order should therefore be vacated. See S.C. Code Ann. § 23-3-430 (C)(1)(f); In the Interest of Christopher H., 432 S.C. 600, 605, 854 S.E.2d 853, 855 (Ct. App. 2021); In re M.B.H., 387 S.C. 323, 327, 692 S.E.2d 541, 542 (2010).

CONCLUSION

By reason of the foregoing arguments, the order placing appellant on the sex offender registry should be vacated.

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This 17th day of March, 2025.