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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to 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)

Lower Court Case No. 2022-GS-38-00611

THE STATE,

RESPONDENT,

V.

BOWEN GRAY TURNER,

PETITIONER.

APPELLATE CASE NO. 2025-000671

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

ROBERT M. DUDEK
Chief Appellate Defender

LARA M. CAUDY
Senior Appellate Defender

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

ATTORNEYS FOR PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 10, 2025.

QUESTIONS PRESENTED

1.

Did the Court of Appeals err by holding neither the sentencing judge nor the probation revocation judge abused his discretion for his role in ordering petitioner to register as a sex offender where the state has never shown good cause exists for placing petitioner on the registry, specifically, where there has never been any evidence presented that petitioner is at risk of reoffending?

2.

Did the Court of Appeals err by holding the probation revocation judge did not abuse his discretion by ordering petitioner to register as a sex offender where the revocation judge did not have the statutory authority to place petitioner on the registry pursuant to the plain language of S.C. Code Ann. § 23-3-430(D) and State v. Davis, 375 S.C. 12, 649 S.E.2d 178 (Ct. App. 2007)?

3.

Did the Court of Appeals err by holding the probation revocation judge did not abuse his discretion when he refused to exercise his discretion at all, maintaining he had no “leeway” in the matter and must order petitioner to register as a sex offender?

4.

Did the Court of Appeals err by holding the probation revocation judge did not abuse his discretion by denying petitioner’s motion for a continuance to allow Dr. Jeffrey McKee to conduct a psychosexual evaluation of petitioner before the judge determined whether petitioner should be required to register as a sex offender, particularly when Dr. McKee had already been retained, a funding order had been signed, and Dr. McKee was able to begin the evaluation the following week?

STATEMENT OF THE CASE

Petitioner, Bowen Turner, then fifteen or sixteen years old, allegedly assaulted a minor female on June 2, 2019, after she attended a house party in Orangeburg County. R. 13, ll. 4-21; R. 32, ll. 20-23. On April 7, 2022, petitioner waived presentment to the grand jury and pled guilty before the Honorable R. Markley Dennis, Jr. to first degree assault and battery. Petitioner was represented by C. Bradley Hutto. Assistant Solicitor David W. Miller represented the state. R. 1.

At the conclusion of the hearing, Judge Dennis sentenced petitioner to an indeterminate period not to exceed six years pursuant to the Youthful Offender Act (YOA). That sentence was suspended upon the service of five years' probation with various conditions attached. The judge also ordered that "the sex offender conditions of probation shall apply for all five years" and if petitioner violated any of the sex offender conditions of probation, he would be required to register as a sex offender. R. 33, l. 24 – 35, l. 4. The judge clarified, as seen infra, at defense counsel's request, that a minor violation, such as a speeding ticket, would not result in petitioner having to register as a sex offender. R. 37, l. 25 – 39, l. 9.

Notably, the state did not present any evidence that petitioner was a risk to reoffend sexually to support a good cause finding for the sex offender registry condition. Whether petitioner must register as a sex offender was not at issue during the plea proceeding, so it was not necessary -- and indeed would have been a waste of judicial and economic resources -- to present expert testimony or other evidence on petitioner's likelihood to reoffend.

On May 9, 2022, petitioner was charged with violating the terms and conditions of his probation after he was arrested for public disorderly conduct, the underlying allegations of which did not involve a sexual component. R. 59. Law enforcement claimed petitioner went to Tad's

Place, a local bar, where he purchased alcohol and became intoxicated. After being asked to leave the bar, petitioner allegedly staggered in the roadway and law enforcement arrested him. R. 65.

A probation revocation hearing was held on July 13, 2022, before the Honorable Roger M. Young. R. 42. Jason Turnblad represented petitioner. Agent Gregory Whittaker appeared on behalf of the Department of Probation, Parole, and Pardon Services (the Department). R. 42.

At the beginning of the revocation hearing, petitioner admitted he willfully violated the terms of his probation. R. 44, ll. 15-17. Defense counsel told the judge that petitioner was “prepared” for the judge “to possibly activate his YOA sentence.” However, counsel requested the judge consider revoking only the time petitioner had served since his arrest on the violation warrant, which was sixty-five days. R. 45, ll. 18-24.

Defense counsel further requested the judge hold the decision on whether petitioner should have to register as a sex offender in abeyance to allow Dr. Jeffrey McKee to conduct a psychosexual evaluation of petitioner. Counsel explained that he had retained the services of Dr. McKee, who indicated he could begin the evaluation in “the next week or so,” and another circuit court judge had already signed a funding order. R. 45, l. 25 – 46, l. 15.

The judge maintained that his understanding of one of the “special conditions” of petitioner’s underlying sentence “was that by the end of probation [if] there have been no violations of the sex offender conditions then the Defendant is not required to register as a sex offender.” He emphasized that number eleven of the “standard sex offender conditions” stated, “I will not consume alcohol beverages and will submit to testing as instructed by my agent.” R. 47, ll. 17-20; R. 64. The judge inquired, “[I]f the basis for his [petitioner’s] revocation is he went to this bar and was drinking and he was underage and got drunk . . . and that was the basis for [his arrest for]

public disorderly conduct, wouldn't that violate I will not consume alcoholic beverages condition?" R. 47, l. 21 – 48, l. 1.

Defense counsel acknowledged that such conduct “may” have violated the condition barring the consumption of alcoholic beverages, but requested “the opportunity to mitigate that issue” by having the psychosexual evaluation done. R. 48, ll. 2-4. Counsel asserted the evaluation was “necessary” for him “to be able to mitigate and argue . . . why . . . that provision [of petitioner’s sentence] shouldn’t be activated.” R. 48, ll. 4-8. He explained that all he was requesting was “a full and fair opportunity to put together mitigation.” Counsel emphasized that because petitioner was going to be on probation for five years anyway that there would be an abundance of time to address the issue of whether petitioner must register as a sex offender. R. 50, ll. 11-16.

The judge found petitioner willfully violated the terms of his probation, revoked his probation, and activated petitioner’s sentence pursuant to the Youthful Offender Act. R. 54, l. 24 – 55, l. 17. The judge further denied petitioner’s motion for a continuance to present expert testimony and “mitigating” evidence as to the sex offender registry legal issue, and he ruled petitioner must register as a sex offender maintaining he had no “leeway” in the matter. R. 55, l. 18 – 56, l. 8. He asserted, “I understand your [defense counsel’s] request for having an evaluation done, but the bottom line is . . . the conditions were clear that *if he [petitioner] violated any of the terms of the standard sex offender conditions then he would have to register as a sex offender. And that is, I will not consume alcoholic beverages.* [There] really isn’t a lot of negotiating room there. He violated. He admits he violated. . . . So *I really don’t see where I have any leeway in that no matter what the doctor [Dr. McKee] says.*” R. 55, l. 18 – 56, l. 6 (emphasis added). Lastly, the judge ordered petitioner shall not receive credit for the time he served since his arrest on the violation warrant, which was sixty-five days. R. 56, ll. 9-13.

At the conclusion of the hearing, defense counsel noted his objection to the judge “going forward on the decision about sex offender” registration. R. 56, ll. 15-17.

The state again presented zero evidence that petitioner was a risk to reoffend to support a finding of good cause for placing petitioner on the sex offender registry. Petitioner’s “strict liability” drinking alcohol violation was the only reason the revocation judge ordered petitioner be placed on the sex offender registry.

On appeal, petitioner argued the probation revocation judge erred by denying petitioner’s motion for a continuance to allow Dr. McKee to conduct a psychosexual evaluation of petitioner before the judge determined whether petitioner should be required to register as a sex offender. Petitioner also argued the revocation judge abused his discretion by ordering petitioner to register as a sex offender when (1) the judge refused to exercise his discretion at all maintaining he had no “leeway” in the matter; (2) the state failed to show good cause existed for placing petitioner on the registry, specifically, there was no evidence petitioner was at risk of reoffending; and (3) as the probation revocation judge, the judge was without the statutory authority to order petitioner to register. Lastly, petitioner argued the sentencing judge erred by ruling any violation of the sex offender conditions of probation would automatically result in petitioner having to register as a sex offender when the state did not show at the sentencing hearing that any violation of the sex offender conditions would constitute good cause for petitioner to register.

After briefing and oral argument, the Court of Appeals affirmed in an unpublished opinion. State v. Turner, 2025-UP-010 (S.C. Ct. App. filed January 8, 2025); App. 1-3. Initially, the Court of Appeals held the revocation judge did not abuse his discretion in refusing petitioner’s request for a continuance. The court reasoned that “any opinion evidence that would have been obtained from a medical evaluation should have been presented to the sentencing court at Turner’s

[petitioner's] guilty plea.” The court concluded that the sentencing judge’s order was final and the revocation judge was not permitted to alter petitioner’s sentence. App. 2.

Additionally, the Court of Appeals held the revocation judge did not abuse his discretion by ordering Petitioner to register as a sex offender. The Court wrote that the sentencing judge ruled “any violation of the sex offender conditions of probation’ would cause Turner [petitioner] to have to register as a sex offender” and that petitioner “signed a plea agreement when he pled guilty, notifying him of his placement on the registry if he violated the conditions of his probation.” App. 2. The Court of Appeals held the revocation judge did not err in requiring petitioner to register as a sex offender because the “sentencing court’s order was final.” App. 2. The court concluded the revocation judge “correctly declined to alter Turner’s [petitioner’s] sentence.” App. 2.

On January 23, 2025, petitioner filed a petition for rehearing with the Court of Appeals. App. 4-12. Petitioner emphasized on rehearing that good cause was never shown in this case to mandate that petitioner register as a sex offender. Petitioner argued it was unreasonable to hold that where good cause was not shown to place petitioner on the sex offender registry before the sentencing judge that the revocation judge had no discretion not to put petitioner on the sex offender registry regardless of the evidence. App. 5; Pet. for Rehearing at 2.

Moreover, petitioner emphasized that defense counsel had objected 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*. Underage drinking was a minor violation of the standard sex offender terms. Consequently, petitioner contended that counsel’s objection at sentencing should have been sufficient to protect petitioner procedurally against the strict liability imposition

of the sex offender registry by a future judge for a minor violation, such as drinking alcohol. App. 6; Pet. for Rehearing at 3.

Additionally, petitioner maintained that it defied common sense to expect an attorney who knows his client will be placed on probation following 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 it is not at issue during the guilty plea proceeding. App. 9; Pet. for Rehearing at 6. Petitioner suffered no harm at the time of the guilty plea sentencing vis-à-vis the sex offender registry, and there was nothing that made him an aggrieved party with the right or obligation to object or to appeal that provision of his probation. App. 9; Pet. for Rehearing at 6.

Petitioner further asserted that if the probation revocation judge had the authority to place petitioner on the sex offender registry as the Court of Appeals held, then 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 condition violation. App. 6; Pet. for Rehearing at 3.

Lastly, petitioner maintained that any argument he waived his right to have the state prove good cause for placing him on the registry as mandated by statute by agreeing to the recommended underlying probationary sentence fails because there was no showing in the record of an intentional relinquishment or abandonment of the statutory right to the predicate good cause showing. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(waiver of a constitutional right).¹ Further, as seen, defense counsel 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

¹ 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).

to have the state prove good cause for placing him on the registry. App 7-8; Pet. for Rehearing at 4-5.

By order filed March 10, 2025, the Court of Appeals denied the petition for rehearing. App. 18. This petition for writ of certiorari follows.

ARGUMENT

1.

The Court of Appeals erred by holding neither the sentencing judge nor the probation revocation judge abused his discretion for his role in ordering petitioner to register as a sex offender where the state has never shown good cause exists for placing petitioner on the registry, specifically, where there has never been any evidence presented that petitioner is at risk of reoffending.

Relevant Facts

During petitioner's guilty plea proceeding, Assistant Solicitor Miller said the state was making a sentencing recommendation that the judge could accept or reject. Defense counsel Hutto agreed the state was only offering a recommendation and this was not a "negotiated" sentence. R. 8, l. 3 – 9, l. 19. Miller told the sentencing judge that part of the state's sentence recommendation was that the decision as to whether to place petitioner on the sex offender registry would be held in abeyance. The solicitor stated, "If the Defendant successfully completes all probation requirements, he would not be required to register as a sex offender. If the Defendant violates the terms of probation and has a YOA sentence activated, he will be required to register as a sex offender. If the Defendant violates the terms of probation and does not have a sentence activated, a further hearing would be held to determine whether he had to register." R. 14, ll. 8-18.

When announcing sentencing, the judge asserted petitioner would not have to register as a sex offender if he completed all five years of probation without any violation and “done all of the counseling necessary.” However, if petitioner violated probation “one time,” he would have to register as a sex offender. R. 34, l. 24 – 35, l. 4. Defense counsel objected to petitioner being placed on the sex offender registry *in the future based on some minor violation, such as a speeding ticket, without a hearing*. Defense counsel Hutto said he understood a sex offender registry requirement for reoffending “[o]n an assault and battery or sexual, I understand that.” The judge then clarified that if petitioner violated any of the “sex offender conditions of probation” then he would “automatically” have to register as a sex offender. R. 37, l. 22 – 39, l. 9.

Notably, the sentencing judge never found good cause existed to place petitioner on the sex offender registry nor did the state present any evidence in an effort to persuade the judge that good cause existed to require petitioner to register as a sex offender. Defense counsel at sentencing was clearly attempting to protect petitioner from being placed on the sex offender registry in the future, without even a hearing, because of a minor or technical non-sexually based violation.

Petitioner was subsequently charged with violating the terms and conditions of his probation. The underlying allegation supporting the probation revocation was that petitioner purchased alcohol at a local bar, became intoxicated, and was staggering in the roadway after he was asked to leave the bar by staff. The probation revocation judge ordered petitioner to register as a sex offender only because he violated the sex offender condition of probation prohibiting the consumption of alcoholic beverages. Nothing about the violation suggested petitioner was at risk of reoffending nor did the state even argue petitioner was a risk to reoffend.

The Court of Appeals held the revocation judge did not abuse his discretion by ordering Petitioner to register as a sex offender. The court emphasized that the sentencing judge ruled “any violation of the sex offender conditions of probation’ would cause Turner [petitioner] to have to register as a sex offender” and that petitioner “signed a plea agreement when he pled guilty, notifying him of his placement on the registry if he violated the conditions of his probation.” App. 2. The Court of Appeals held the revocation judge did not err in requiring petitioner to register as a sex offender because the “sentencing court’s order was final.” App. 2. The court concluded the revocation judge “correctly declined to alter Turner’s [petitioner’s] sentence.” App. 2.

Discussion

The Court of Appeals erred by holding neither the sentencing judge nor the probation revocation judge abused his discretion by ordering petitioner to register as a sex offender where the state never attempted to show good cause exists for placing petitioner on the registry. At no point in the record has the state presented even a scintilla of evidence that good cause existed, sufficient to require petitioner’s placement on the registry.

In In re M.B.H., 387 S.C. 323, 692 S.E.2d 541 (2010), this Court held “good cause” for the purposes of placing an individual on the sex offender registry “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.” Id. at 327, 692 S.E.2d at 542. It is the burden of the state to prove good cause exists to order a defendant to register as a sex offender for an offense, as here, not listed in the statute that requires automatic sex offender registration. See S.C. Code Ann. § 23-3-430(D). This requirement speaks to the legislative intent that sufficient evidence be shown to support a court finding a defendant to be at risk of reoffending. In Int. of Christopher H., 432 S.C. at 606, 854 S.E.2d at 856. “It is axiomatic that a [defendant] with a history of a sexual

offense or offenses will be at some risk, even if the risk is very low.” Id. “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.

In the case of In Int. of Christopher H., the Court of Appeals found that the state failed to show good cause for placing a juvenile on the sex offender registry because the evidence indicated a low risk of reoffending. 432 S.C. at 607, 854 S.E.2d at 856. Christopher pled guilty to two counts of second-degree assault and battery. Id. at 602, 854 S.E.2d at 853-54. The plea court accepted the plea and ordered Christopher undergo an evaluation, including a sex offender risk assessment and a psychiatric evaluation, with a dispositional hearing to follow. Id. at 602, 854 S.E.2d at 854. At the hearing, the state failed to put forth any evidence that supported registration. In fact, the only witness the state offered provided testimony that the defendant would *not* qualify for placement on the registry and that placement on the registry would be detrimental. Id. at 602-03, 854 S.E.2d at 854. Accordingly, the Court of Appeals held the sentencing court abused its discretion in ordering Christopher be placed on the registry. Id. at 607, 854 S.E.2d at 856.

In State v. Fraley, the Court upheld the requirement for the defendant to register as a sex offender because the state’s evaluator cited factors indicating a diagnosable sex-related disorder and opined that registration should be required if the defendant was guilty of the allegations. 437 S.C. 135, 139, 876 S.E.2d 703, 705 (Ct. App. 2022). There, “dueling experts testified for and against requiring Fraley to register” and the Court of Appeals found no abuse of discretion because “[i]n 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.” Id. at 138, 876 S.E.2d at 705.

It follows that the state is required to show more than a “scintilla of evidence of risk” of reoffending, as in In Int. of Christopher H., 432 S.C. at 606, 854 S.E.2d at 856. And, dueling expert testimony is likely enough for a trial court to conclude that some evidence exists to satisfy a good cause showing of risk such that a court, in its discretion, can order inclusion on the registry. Fraley, 437 S.C. at 138-39, 876 S.E.2d at 705. At bottom, it is necessary that the court “consider all the facts and circumstances of the case, both aggravating and mitigating, in determining that there is risk of sexual reoffense.” In re M.B.H., 387 S.C. at 327, 692 S.E.2d at 542-43.

A. The sentencing judge erred by not requiring a good cause showing by the state.

A sentencing court “may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor.” State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500-501 (Ct. App. 2008); See S.C. Code Ann. § 23-3-430(D) (“Upon conviction, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, 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.”). Plainly speaking, the sentencing judge has discretion with non-automatic registry offenses whether to order sex offender registry a sentencing condition, *only if* the state makes a good cause showing.

The “presiding judge” for statutory purposes is the sentencing judge at the time of sentencing. State v. Davis, 375 S.C. 12, 16-17, 649 S.E.2d 178, 180 (Ct. App. 2007) (determining that the sentencing judge is the “presiding judge” not the probation revocation judge). “We agree and note a presiding judge cannot *sua sponte* place the person in the registry for a crime . . . which is not specifically listed in the statute as an offense requiring placement in the Registry.” Id. 375 S.C. at 15, 649 S.E.2d at 179. That said, neither the sentencing judge nor the probation revocation

judge has authority to alter a sentence once the sentencing order becomes final. *Id.* 375 S.C. at 16, 649 S.E.2d at 179.

Here, the sentencing judge abused his discretion when he failed to require the state to present a full and fair showing that good cause existed, sufficient to require petitioner's placement on the registry *before* sentencing was closed. Petitioner accepted the state's offer and pled guilty to first degree assault and battery—an offense which does not carry automatic sex offender registry. Because there is not an automatic registry requirement, the state carried the burden to establish good cause if it intended for the registry to be a part of petitioner's sentence. The state failed to do so here. There was no evidence presented showing petitioner was at risk of reoffending sexually.

Thus, because the state failed to show good cause existed to place petitioner on the sex offender registry, this Court should grant certiorari and hold the sentencing judge abused his discretion by *sua sponte* including automatic registry triggered by a violation of a sex offender condition of probation.

B. The probation revocation judge erred by not requiring a good cause showing by the state.

As above, here too the probation revocation judge abused his discretion by failing to exercise his vested discretion and require a hearing on whether good cause existed to place petitioner on the sex offender registry. The probation revocation judge could have ordered that “good cause” hearing held before the sentencing court if he did not think he had any discretion to consider sex offender “reoffending evidence” or the lack of it.

Probation is a legal status that suspends the imposition or execution of a sentence and allows a convicted individual to remain in the community under supervision instead of serving time in prison. S.C. Code Ann. § 24-21-410. It is considered a form of clemency. *Id.* The sentencing judge may impose probationary conditions consistent with those set forth by the

legislature as well as impose additional or specific restrictions within limits. S.C. Code Ann. § 24-21-430; Allen, 370 S.C. at 96, 634 S.E.2d at 656-57.

“Probation is a matter of grace; revocation is the means to enforce the conditions of probation.” State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999). But “the revocation of probation or parole is not a stage of criminal prosecution.” Allen, 370 S.C. at 96, 634 S.E.2d at 657. Upon violation of probation, the court *may* revoke probation and require enforcement of the original sentence as if probation never existed. S.C. Code Ann. § 24-21-460. The determination to revoke probation, whether in whole or in part, falls within the sound discretion of the court. Id. Courts have discretionary authority when dealing with probationers. State v. Lee, 350 S.C. 125, 131, 564 S.E.2d 372, 375 (Ct. App. 2002).

In short, the probation revocation judge has the discretion to fully revoke probation and require a violator to complete their full original sentence, to revoke a part of probation, or to order no change in probation due to a violation. In a case such as this, the probation revocation judge has the authority to modify or terminate probation conditions imposed by the sentencing judge. However, the probation revocation judge here refused to require the state to meet its burden to show good cause existed to place petitioner on the registry by either holding the hearing himself, or sending the parties back to the sentencing judge if he took the position -- which he did -- that he had no discretion or “leeway.”

The underlying allegation supporting the probation revocation was that petitioner purchased alcohol at a local bar, became intoxicated, and was staggering in the roadway after he was asked to leave the bar by staff. Petitioner was ordered to register only because he allegedly violated the sex offender condition of probation prohibiting the consumption of alcoholic beverages. Nothing about the violation suggested petitioner was at risk of reoffending sexually.

As stated above, the sentencing judge's ruling that sex offender registry was automatic if a condition was violated was legally erroneous and the probation revocation judge should have exercised his broad discretion and required a hearing as to good cause. Therefore, this Court should grant certiorari and hold that the probation revocation judge abused his discretion by not requiring the state to show good cause existed to place petitioner on the registry.

2.

The Court of Appeals erred by holding the probation revocation judge did not abuse his discretion by ordering petitioner to register as a sex offender where the probation revocation judge did not have the statutory authority to place petitioner on the registry pursuant to the plain language of S.C. Code Ann. § 23-3-430(D) and *State v. Davis*, 375 S.C. 12, 649 S.E.2d 178 (Ct. App. 2007).

Relevant Facts

The Court of Appeals held the probation revocation judge did not abuse his discretion by requiring petitioner to register as a sex offender. App. 2. The court essentially found the revocation judge merely implemented the sentencing judge's order and the sentencing judge's order was final. App. 3.

Discussion

“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.” S.C. Code Ann. § 23-3-430(D). The “presiding judge” for statutory purposes is the sentencing judge at the time of sentencing, not the probation revocation judge. *Davis*, at 16-17, 649 S.E.2d at 180. Revocation of probation is the means of enforcing *probation* conditions, not a means of adding to the original sentence. *Lee*, 350 S.C. at 130, 564 S.E.2d at 375 (emphasis added). A probation revocation judge

lacks statutory authority to place a defendant on the sex offender registry during revocation proceedings, though they may modify existing probation conditions. Davis, 375 S.C. at 17, 649 S.E.2d at 180.

In fact, there is a crucial distinction between conditions that are part of the sentence itself and conditions that are merely probationary. While a court has discretion to modify existing probation conditions, ordering a defendant to register as a sex offender during revocation proceedings would constitute an impermissible alteration of the sentence rather than a modification of probation conditions.

In Davis, 375 S.C. 12, 649 S.E.2d 178, the Court of Appeals held the probation revocation judge erred by placing Davis on the sex offender registry. Davis was indicted for first degree criminal sexual conduct with a minor. Id. at 13, 649 S.E.2d at 178-79. He pled no contest to the lesser included offense of assault and battery of a high and aggravated nature. Id. at 14, 649 S.E.2d at 179. The sentencing judge accepted the plea and sentenced Davis to six years imprisonment suspended upon the service of two years' probation. Id. He further ordered that Davis was not required to register as a sex offender. Id.

Davis was later charged with violating his probation for failing to admit guilt during his sex offender counseling sessions. Id. The probation revocation judge revoked thirty days of Davis's probation. However, she held the decision on whether to place Davis on the registry in abeyance for thirty days to allow the parties to brief the issue. Id.

A month later, Davis was brought before the probation judge again with the state seeking to revoke his probation for his noncompliance with his treatment plan. On this occasion, Davis failed to attend several counseling sessions, although he had admitted his guilt. Id. After hearing recommendations from Davis's counselor and probation agent, the judge revoked Davis's

probation, “converted his sentence to youthful offender status,” and ordered Davis be placed on the registry “as a condition of his probation.” Id. at 14-15, 649 S.E.2d at 179.

The Court of Appeals held the probation revocation judge did not have the authority to place Davis on the registry based on the plain language of S.C. Code Ann. § 23-3-430(D), which states only the “**presiding judge** may order **as a condition of sentencing** that the person be included in the sex offender registry.” Id. at 17, 649 S.E.2d at 180 (emphasis in original). Because the revocation judge was not the presiding judge at the time of sentencing, the court held the judge was “without statutory authority” to add placement on the registry as a condition of probation. Id.

Like the probation revocation judge in Davis, the probation revocation judge here did not have the statutory authority to place petitioner on the sex offender registry. Section 23-3-430(D) is clear that only the presiding judge at the time of sentencing may order that the person be included in the sex offender registry.

A probation revocation judge lacks the authority to order a defendant to register as a sex offender during probation revocation proceedings when registration was not a legally valid condition of the original sentence. Such an addition would constitute an impermissible modification of the sentence rather than an exercise of the court’s discretionary authority to enforce probation conditions.

The proper procedure for imposing sex offender registration is for the state to show good cause at the time of sentencing for non-automatic offenses and for the sentencing judge to “consider all the facts and circumstances of the case, both aggravating and mitigating, in determining that there is risk of sexual reoffense.” In re M.B.H., 387 S.C. at 327, 692 S.E.2d at 542-43. Once the sentencing order becomes final, the opportunity to impose sex offender

registration has passed, and neither the sentencing judge nor the probation revocation judge would have the authority to impose sex offender registration at that time.

The probation revocation judge had the authority to revoke petitioner's probation and activate his YOA sentence. However, the revocation judge did not have statutory authority to order petitioner to register as a sex offender. Respectfully, this Court should grant certiorari, and hold the probation revocation judge abused his discretion by ordering petitioner to register as a sex offender.

3.

The Court of Appeals erred by holding the probation revocation judge did not abuse his discretion when he refused to exercise his discretion at all, maintaining he had no "leeway" in the matter and must order petitioner to register as a sex offender.

Relevant Facts

When ordering petitioner to register as a sex offender, the probation revocation judge maintained he had no "leeway" in the matter. He asserted, "[T]he bottom line is that . . . the conditions were clear that if he [petitioner] violated any of the terms of the standard sex offender conditions then he would have to register as a sex offender. And that is, *I will not consume alcoholic beverages*. [There] really isn't a lot of negotiating room there. He violated. He admits he violated. . . . So I really don't see where I have any leeway." R. 55, l. 18 – 56, l. 7 (emphasis added).

In its unpublished opinion, the Court of Appeals noted the sentencing court ruled "any violation of the sex offender conditions of probation' would cause Turner [petitioner] to have to register as a sex offender." App. 2. The appellate court held the revocation judge did not err in requiring petitioner to register as a sex offender because the "sentencing court's order was final."

App. 2. The court concluded the revocation judge “correctly declined to alter Turner’s [petitioner’s] sentence.” App. 2.

Discussion

The Court of Appeals erred by holding the probation revocation judge did not abuse his discretion when he refused to exercise his discretion at all, maintaining he had no “leeway” in the matter and must order petitioner to register as a sex offender.

“A failure to exercise discretion amounts to an abuse of that discretion.” Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) (citing Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) (“When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.”)); See State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) (“It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.”); Balloon Planation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct. App. 1990).

Petitioner has never challenged the revocation of his probation. The revocation judge properly exercised his discretion when he revoked petitioner’s probation and activated his YOA sentence. However, the judge erred when he altogether refused to exercise his discretion regarding whether petitioner must register as a sex offender. It is well established that a probation revocation judge has the discretion to (1) revoke probation, in full or in part; (2) continue probation, with or without modification; or (3) terminate probation. S.C. Code Ann. § 24-21-460. The statute explicitly states, “the court . . . *may* revoke the probation” and “that the circuit judge . . . shall have the right, in his *discretion*” to determine the outcome of the proceedings. Id. (emphasis added).

The legislature clearly intended for a probation revocation judge to have “leeway” regarding the outcome of the proceedings.

It is apparent here that the probation revocation judge did not exercise his discretion when he ordered petitioner to register as a sex offender. The judge altogether refused to exercise his discretion, erroneously maintaining he had no choice but to order petitioner be placed on the registry due to the prior sentencing condition ordered by Judge Dennis.

The Court of Appeals in State v. Davis, 375 S.C. 12, 16, 649 S.E.2d 178, 180 (Ct. App. 2007) held 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, the Court of Appeals approved 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. Respectfully, this Court should grant certiorari and hold the probation revocation judge abused his discretion by failing to exercise his discretion at all.

4.

The Court of Appeals erred by holding the probation revocation judge did not abuse his discretion by denying petitioner’s motion for a continuance to allow Dr. Jeffrey McKee to conduct a psychosexual evaluation of petitioner before the judge determined whether petitioner should be required to register as a sex offender, particularly when Dr. McKee had already been retained, a funding order had been signed, and Dr. McKee was able to begin the evaluation the following week.

Relevant Facts

Petitioner requested the probation revocation judge hold the decision regarding whether petitioner should be placed on the sex offender registry in abeyance to allow time for Dr. McKee,

who had already been retained, to conduct a psychosexual evaluation of petitioner. The judge denied the request maintaining he had no “leeway . . . no matter what the doctor says.” R. 56, ll. 5-6. After the judge ordered petitioner must register as a sex offender, counsel for petitioner noted his objection to “going forward on the decision about sex offender today.” R. 56, ll. 15-17.

The Court of Appeals held the revocation judge did not abuse his discretion in refusing petitioner’s request for a continuance. App. 2. The court maintained that “any opinion evidence that would have been obtained from a medical evaluation should have been presented to the sentencing court at Turner’s [petitioner’s] guilty plea.” App. 2. The court concluded that the sentencing judge’s order was final and the revocation judge was not permitted to alter petitioner’s sentence. App. 2.

Discussion

The Court of Appeals erred by holding the probation revocation judge did not abuse his discretion by denying petitioner’s motion for a continuance to allow Dr. McKee to conduct a psychosexual evaluation of petitioner before the judge determined whether to require petitioner to register as a sex offender. Petitioner should have been permitted “a full and fair opportunity” to present mitigation evidence as to why he should not be placed on the sex offender registry, including evidence regarding his risk of reoffending. See R. 55, ll. 11-13. The judge’s decision to go forward with the determination regarding whether petitioner must register as a sex offender was unreasonable, particularly when Dr. McKee had already been retained, funding was secured, and Dr. McKee was able to begin the evaluation the following week. As defense counsel emphasized at the hearing, there was “plenty of time to address the issue” as petitioner was facing a significant revocation and nearly five more years of probation. See R. 50, ll. 13-16.

In State v. Downs, 369 S.C. 55, 631 S.E.2d 79 (2006), this Court held the trial judge did not abuse his discretion by denying Downs's motion for a continuance in order to allow a defense expert opportunity to further evaluate whether Downs was competent to dismiss his appeals and be executed. The trial court had already heard the testimony of three experts in forensic psychiatry who testified Downs was competent to waive his appeals. Id. at 60-62, 631 S.E.2d at 81-82. A fourth expert, Dr. Melikian, also a forensic psychiatrist, testified Downs understood the nature of the proceedings, what he was tried for, and the reason for and nature of his punishment. Id. at 62-63, 631 S.E.2d at 83. However, Dr. Melikian stated Downs's "wish to waive his appeals process may be a rational decision or a product of his depression." Id. at 63, 631 S.E.2d at 83. She opined he should be offered treatment for depression and then have his competency reevaluated. Id. For that reason, she stated she could not offer an opinion on his competency. She wanted to see if treatment would cause him to change his mind. Id.

The trial judge ultimately denied the motion for a continuance to allow Dr. Melikian to provide Downs with medication and reevaluate him, finding Downs was clearly competent to waive his appeals under the standard set forth by this Court. Id. 64, 631 S.E.2d at 83-84. This Court held the trial judge did not abuse his discretion by denying the motion for a continuance as he had properly "determined that more time was not needed to determine [Downs's] competency." Id. at 65, 631 S.E.2d at 84. This Court emphasized that three experts had testified Downs was mildly depressed but this condition did not affect his competency. Id.

Unlike in Downs where the trial judge denied Downs's motion for a continuance after hearing from four expert witnesses, the probation revocation judge here denied petitioner's motion for a continuance and ordered petitioner must register as a sex offender without hearing any testimony whatsoever on the matter. Petitioner was denied an opportunity to present expert

mitigation evidence as to why he should not be placed on the registry. If a continuance had been properly granted, Dr. McKee would have conducted a psychosexual evaluation of petitioner, which would have allowed petitioner to present evidence at a future hearing regarding his risk of reoffending, the determining factor in whether he should be placed on the registry. See In Int. of Christopher H., 432 S.C. 600, 854 S.E.2d 853 (Ct. App. 2021); In re M.B.H., 387 S.C. 323, 327, 692 S.E.2d 541, 542 (2010).

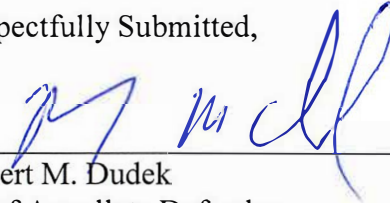
It is hard to imagine any prejudice to the state, or risk to the safety of the community, by continuing the matter since petitioner would be incarcerated due to the revocation and was subject to nearly five more years of probation. Moreover, as emphasized above, Dr. McKee had already been retained, a funding order was secured, and Dr. McKee was available to start the evaluation the following week.

Respectfully, this Court should grant certiorari and hold the probation revocation judge abused his discretion by denying petitioner's motion for a continuance to allow Dr. McKee to perform a psychosexual evaluation of petitioner.

CONCLUSION

Based on the foregoing argument, petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the questions presented.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

Lara M. Caudy
Senior Appellate Defender

ATTORNEYS FOR PETITIONER

This 25th day of April, 2025.