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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Honorable Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BOWEN GRAY TURNER,

APPELLANT.

APPELLATE CASE NO. 2022-001018

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Did the probation revocation judge err by denying appellant's motion for a continuance to allow Dr. Jeffrey McKee to conduct a psychosexual evaluation of appellant before the judge determined whether appellant 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?

2.

Did the probation revocation judge abuse his discretion by refusing to exercise his discretion at all when he ordered appellant to register as a sex offender maintaining he had no "leeway" in the matter?

3.

Did the probation revocation judge abuse his discretion by ordering appellant to register as a sex offender where the state failed to show good cause existed for placing appellant on the registry, specifically, where there was no evidence appellant was at risk of reoffending?

4.

Did the probation revocation judge abuse his discretion by ordering appellant to register as a sex offender where the judge was without the statutory authority to do as the probation revocation judge?

5.

Did the sentencing judge err by ruling any violation of the sex offender conditions of probation would automatically result in appellant having to register as a sex offender since the state should have been forced to show at the sentencing hearing that the violation of the sex offender conditions constituted good cause for appellant to register?

STATEMENT OF THE CASE

Appellant, 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. The state and appellant reached a plea agreement and a guilty plea proceeding was held on April 7, 2022, before the Honorable R. Markley Dennis, Jr. R. 1. C. Bradley Hutto represented appellant. Assistant Solicitor David W. Miller represented the state. R. 1.

Appellant waived grand jury presentment on the charge of assault and battery in the first degree pursuant to the recommended sentence agreement. R. 68. At the conclusion of the hearing, Judge Dennis sentenced appellant 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. Judge Dennis also ordered that "the sex offender conditions of probation shall apply for all five years," and if appellant 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, at defense counsel Hutto's request, that a minor violation, such as a speeding ticket, would not result in appellant having to register as a sex offender. R. 37, l. 25 – 39, l. 9.

On May 9, 2022, appellant was charged with violating the conditions of his probation after he was arrested for public disorderly conduct, the underlying facts of which did not involve a sexual component. R. 59. A revocation hearing was held on July 13, 2022 before the Honorable Roger M. Young. R. 42. Jason B. Turnblad represented appellant. Agent Gregory Whittaker appeared on behalf of the Department of Probation, Parole, and Pardon Services (the Department). R. 42.

Defense counsel Turnblad asked the judge to "take into consideration Mr. Turner's young age, his lack of a prior record before pleading to these charges. He had no record before this plea." R. 46, ll. 16-19. Turnblad said while appellant was prepared for the judge to activate the YOA sentence, he requested the judge hold the sex offender registry legal issue in abeyance to allow for Dr. Jeffrey McKee "to conduct a psychosexual evaluation of Mr. Turner before we have that determination of whether he would have to register as a sex offender." R. 45, l. 18 – 46, l. 9. The judge refused this continuance request as to the sex offender registry legal issue, and, at the conclusion of the hearing, revoked appellant's probation, activated his YOA sentence, and ordered appellant register as a sex offender, maintaining he had no "leeway" in the matter. R. 55, l. 18 – 56, l. 8.

This appeal follows.

STATEMENT OF FACTS

The state alleged that appellant violated the terms and conditions of his probation after he was arrested for public disorderly conduct, again the underlying facts of which did not involve a sexual component. As will be seen infra, condition eleven was not to consume alcoholic beverages while on probation and this became of the focus of the sex offender registry discussion. Law enforcement claimed appellant went to Tad's Place, a local bar, where he purchased alcohol and became intoxicated. R. 65. Staff at the establishment asked appellant to leave due to his behavior. After leaving the establishment on foot, appellant allegedly staggered in the roadway until law enforcement arrived and arrested him. R. 65.

At the beginning of the revocation hearing, appellant admitted he willfully violated the terms of his probation. R. 44, ll. 15-17. Defense counsel told the judge that appellant was "prepared" for the judge "to possibly activate his YOA sentence." However, counsel requested the judge consider revoking only the time appellant 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 appellant must register as a sex offender in abeyance to allow Dr. Jeffrey McKee to conduct a psychosexual evaluation of appellant. 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 appellant'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" says, "I will not consume

alcohol beverages and will submit to testing as instructed by my agent." R. 47, ll. 17-20. The judge inquired, "[I]f the basis for his [appellant'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 "should have been done long ago" and was "necessary" for him "to be able to mitigate and argue . . . why . . . that provision [of appellant's sentence] shouldn't be activated." R. 48, ll. 4-8. He maintained that all he was requesting was "a full and fair opportunity to put together mitigation," emphasizing that because appellant will be on probation for five years there would be plenty of time to address the issue of whether appellant must register as a sex offender. R. 50, ll. 11-16.

The judge found appellant willfully violated the terms of his probation, revoked his probation, and activated appellant's sentence pursuant to the Youthful Offender Act. R. 54, l. 24 – 55, l. 17. The judge further denied appellant's motion for a continuance and he ruled appellant 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 [appellant] 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 appellant 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.

ARGUMENT

1.

The probation revocation judge erred by denying appellant's motion for a continuance to allow Dr. Jeffrey McKee to conduct a psychosexual evaluation of appellant before the judge determined whether appellant 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

As stated above, appellant requested the probation revocation judge hold the decision regarding whether appellant should be placed on the sex offender registry in abeyance to allow time for Dr. Jeffrey McKee, who had already been retained, to conduct a psychosexual evaluation of appellant. The judge denied the request maintaining he had no "leeway . . . no matter what the doctor says." R. 56, ll. 5-6. After subsequently ordering appellant register as a sex offender, counsel for appellant noted his objection to "going forward on the decision about sex offender today." R. 56, ll. 15-17.

Standard of Review

"The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." State v. Morris, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (quoting State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Colden, 372 S.C. 428, 435, 641 S.E.2d 912, 917 (Ct. App. 2007) (citing State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001)).

Discussion

The probation revocation judge erred by denying appellant's motion for a continuance to allow Dr. McKee to conduct a psychosexual evaluation of appellant before the judge determined whether to require appellant to register as a sex offender. Appellant 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 appellant 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 emphasized at the hearing, there was "plenty of time to address the issue" as appellant 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), our Supreme 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 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 our Supreme Court. Id. 64, 631 S.E.2d at 83-84. The Supreme 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. The 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 appellant's motion for a continuance and ordered appellant must register as a sex offender without hearing any testimony whatsoever on the matter. Appellant was denied an opportunity to present 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 appellant, which would have allowed appellant 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 by continuing the matter since appellant 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 hold the probation revocation judge abused his discretion by denying appellant's motion for a continuance, reverse the ruling placing appellant on the sex offender registry, and remand for a new hearing.

2.

The probation revocation judge abused his discretion by refusing to exercise his discretion at all when he ordered appellant to register as a sex offender maintaining he had no "leeway" in the matter.

Relevant Facts

As seen above, when ordering appellant to register as a sex offender, the 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 [appellant] 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.

Standard of Review

"A [sentencing court] has broad discretion in sentencing within statutory limits." Int. of Christopher H., 432 S.C. 600, 605, 854 S.E.2d 853, 855 (Ct. App. 2021), *reh'g denied* (Mar. 11, 2021), *cert. granted* (Dec. 10, 2021), *cert. dismissed*, 436 S.C. 503, 873 S.E.2d 773 (2022) (quoting In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010)) (alteration in original). "The sentence imposed will not be overturned on appeal absent an abuse of discretion." Id. (citing In re M.B.H., 387 S.C. at 326, 692 S.E.2d at 542). "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. (citing In re M.B.H., 387 S.C. at 326, 692 S.E.2d at 542).

Discussion

The probation revocation judge abused his discretion by refusing to exercise his discretion at all when he ordered appellant to register as a sex offender maintaining he had no "leeway" in the matter.

"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).

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

Respectfully, because the probation revocation judge wholly failed to exercise his discretion, this Court should reverse the order placing appellant on the sex offender registry.

3.

The probation revocation judge abused his discretion by ordering appellant to register as a sex offender where the state failed to show good cause existed for placing appellant on the registry, specifically, where there was no evidence appellant was at risk of reoffending.

Relevant Facts

The underlying allegation supporting the probation revocation was that appellant purchased alcohol at a local bar, became intoxicated, and was staggering in the roadway after he was asked to leave the bar by staff. Appellant was ordered to register as a sex offender only because he allegedly violated the sex offender condition of probation prohibiting the consumption of alcoholic beverages. Nothing about the violation suggested appellant was at risk of reoffending nor did the state argue appellant was a risk to reoffend.

Standard of Review

"A [sentencing court] has broad discretion in sentencing within statutory limits." Int. of Christopher H., 432 S.C. 600, 605, 854 S.E.2d 853, 855 (Ct. App. 2021), *reh'g denied* (Mar. 11, 2021), *cert. granted* (Dec. 10, 2021), *cert. dismissed*, 436 S.C. 503, 873 S.E.2d 773 (2022) (quoting In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010)) (alteration in original). "The sentence imposed will not be overturned on appeal absent an abuse of discretion." Id. (citing In re M.B.H., 387 S.C. at 326, 692 S.E.2d at 542). "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. (citing In re M.B.H., 387 S.C. at 326, 692 S.E.2d at 542).

Discussion

The probation revocation judge abused his discretion by ordering appellant to register as a sex offender when the state failed to show good cause existed to require appellant to register.

There was no evidence presented that appellant was at risk of reoffending sexually. Notably, the underlying grounds for appellant's probation revocation did not involve a sexual component.

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.").

In In re M.B.H., 387 S.C. 323, 692 S.E.2d 541 (2010), our Supreme 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.

Four juvenile petitions were filed against M.B.H., a minor, 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. M.B.H. pled guilty to two counts of assault and battery of a high and aggravated nature and all other charges were dismissed. Id. at 325, 692 S.E.2d at 542. The solicitor recommended to the family court judge that M.B.H. undergo an inpatient evaluation and be placed on the private sex offender registry. Id. The judge ordered M.B.H. undergo an inpatient sex offender evaluation to determine his risk of reoffending and what treatment measures were necessary. Id. at 326, 692 S.E.2d at 542.

After the evaluation, M.B.H. appeared for a dispositional hearing. Id. The family court judge ordered he be committed to the Department of Juvenile Justice suspended upon probation and required him to register as a sex offender. Id. The judge enumerated the issues identified in

the evaluation report that constituted good cause for requiring M.B.H. to register, including multiple offenses, multiple younger, same sex victims, a sense of victimization, denial of harm to others, borderline intellectual functioning, and the recommendation from the evaluators that M.B.H. receive inpatient sexual offender treatment. Id.

Our Supreme Court held there was evidence in the record to support the judge's determination that good cause existed for placing M.B.H. on the registry. Id. at 327, 692 S.E.2d at 542-43. It emphasized that the judge considered all the facts and circumstances, both aggravating and mitigating, in determining that there was "a risk of sexual reoffense." Id. at 327, 692 S.E.2d at 543. Accordingly, the Court held the judge did not abuse his discretion. Id.

In Int. of Christopher H., 432 S.C. 600, 854 S.E.2d 853 (Ct. App. 2021), this Court held the sentencing judge erred by finding good cause existed to place Christopher on the private sex offender registry because there was insufficient evidence showing he was at risk of reoffending. The state filed a juvenile petition alleging Christopher committed two counts of first degree criminal sexual conduct and two counts of second degree assault and battery against his six-year-old cousin and her nine-year-old friend. Id. at 602, 854 S.E.2d at 853. Christopher was between the ages of twelve and thirteen years old at the time of the offenses. Id. He 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.

After the evaluation, the sentencing court committed Christopher to the Department of Juvenile Justice for an indeterminate sentence not to exceed his twenty-first birthday, suspended upon alternative placement at Generations, an inpatient sex offender treatment facility, and two

years of probation. Id. Christopher was discharged from Generations after sixteen months of inpatient sex offender treatment. Id.

A hearing was subsequently held to determine whether Christopher should be placed on the private sex offender registry. Id. The state relied on its brief and supporting documentation, which consisted of Christopher's records. Id. at 603, 854 S.E.2d at 854. "Christopher called four witnesses as fact or expert witnesses who either testified to his low risk to reoffend, that risk of reoffending can never be eliminated, or that Christopher should not be placed on the registry. Dr. McKee[, who conducted a forensic psychological assessment of Christopher,] testified there is never no risk of reoffending and there was no basis to place Christopher on the registry. . . . The sentencing court noted the testimony indicted Christopher was at a low risk of reoffending, but found 'a' risk of reoffending existed; thus, good cause was established." Id. at 606, 854 S.E.2d at 855-56.

This Court emphasized that placement on the registry is "not automatic and requires the solicitor to show good cause." Id. at 606, 854 S.E.2d at 856. It concluded the state failed to show good cause existed since the "only evidence of risk indicated a low risk, and the evidence overwhelmingly indicated registry . . . was not appropriate." Id. at 607, 854 S.E.2d at 856. Accordingly, this Court held the sentencing court abused its discretion in ordering Christopher be placed on the registry. Id.

In State v. Hicks, 377 S.C. 322, 659 S.E.2d 499 (Ct. App. 2008), which predated our Supreme Court's opinion in In Re M.B.H., this Court held the sentencing judge did not abuse his discretion when he ordered Hicks to register as a sex offender. Hicks was indicted for criminal sexual conduct with a minor. Id. at 324, 659 S.E.2d at 500. He pled guilty to assault and battery of a high and aggravated nature (ABHAN), although he admitted to having sex with a fourteen-

year-old. Id. The minor's parents told the sentencing judge that Hicks had been to the minor's house on numerous occasions, both before and after the ABHAN, and that "during the course of several of these occurrences, Hicks made gestures towards [the minor's] father that could be interpreted as confrontational or predatory." Id. at 327, 659 S.E.2d at 501. The minor's mother also informed the judge that many girls, similar in age, lived in the same neighborhood within a half mile of Hicks. Id. This Court held this evidence supported the sentencing judge's finding that good cause was shown. Id.

Recently, in State v. Fraley, 437 S.C. 135, 876 S.E.2d 703 (Ct. App. 2022), this Court held the trial court did not abuse its discretion in determining the state showed good cause for ordering Fraley to register as a sex offender. Fraley was "accused of four sex crimes but pled guilty to first degree assault and battery" pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). Id. at 136-37, 876 S.E.2d at 704. "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." Id. at 137, 876 S.E.2d at 705. This Court asserted that it may not have come to the same conclusions as the plea court, but it could not say that the plea court abused its discretion. Id. The Court emphasized that there was some evidence supporting the plea court's bottom line conclusion that there was good cause for Fraley to register. Id. (citing In re M.B.H., 387 S.C. at 327, 692 S.E.2d at 542 ("The judge relied on the professional findings and recommendations in [the appellant's psychosocial] report in concluding good cause existed for placing appellant on the registry.")).

In this case, the state wholly failed to show good cause existed to require appellant to register as a sex offender. There was no evidence presented showing appellant was at risk of reoffending. The underlying allegation supporting the probation revocation was that appellant purchased alcohol at a local bar, became intoxicated, and was staggering in the roadway after he was asked to leave the bar by staff. Appellant 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 appellant was at risk of reoffending. Further, as stated above, the judge's ruling that sex offender registry was automatic if a condition was violated was also legally erroneous. Consequently, the probation judge, if he had the authority to place appellant on the registry, abused his discretion by doing so as good cause was not shown.

Respectfully, because the state failed to show good cause existed to place appellant on the sex offender registry, this Court should hold the probation revocation judge abused his discretion by ordering appellant to register.

4.

The probation revocation judge abused his discretion by ordering appellant to register as a sex offender where the judge was without the statutory authority to do as the probation revocation judge.

Standard of Review

"A [sentencing court] has broad discretion in sentencing within statutory limits." Int. of Christopher H., 432 S.C. 600, 605, 854 S.E.2d 853, 855 (Ct. App. 2021), *reh'g denied* (Mar. 11, 2021), *cert. granted* (Dec. 10, 2021), *cert. dismissed*, 436 S.C. 503, 873 S.E.2d 773 (2022) (quoting In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010)) (alteration in original). "The sentence imposed will not be overturned on appeal absent an abuse of discretion." Id. (citing In re M.B.H., 387 S.C. at 326, 692 S.E.2d at 542). "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. (citing In re M.B.H., 387 S.C. at 326, 692 S.E.2d at 542).

Discussion

The probation revocation judge abused his discretion by ordering appellant to register as a sex offender where the judge was without the statutory authority to do as the probation revocation judge. See State v. Davis, 375 S.C. 12, 649 S.E.2d 178 (Ct. App. 2007).

In State v. Davis, 375 S.C. 12, 649 S.E.2d 178 (Ct. App. 2007), this Court 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 Dr. William Burke, with whom Davis attended counseling, and Davis's 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.

This Court 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 probation revocation judge was not the presiding judge at the time of sentencing, this 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 appellant 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.

An additional basis for reversal is that the probation revocation judge's erroneous ruling that appellant must register as a sex offender -- when he lacked the statutory authority to do so -- constituted a structural error. In State v. Harrison, 432 S.C. 448, 474, 854 S.E.2d 468, 482 (2021), our Supreme Court held that the solicitor's lack of authority to prosecute one of the charges presented a structural error and it vacated the defendant's indictments. In that case, the current Attorney General bestowed upon a solicitor to prosecute the case as the acting Attorney General. The Court held that the solicitor had the authority to prosecute the defendant for the perjury charge but not for the misconduct in office charge. Accordingly, the Court held that prosecuting the misconduct in office charge constituted a structural error.

Additionally, in State v. Cottrell, 421 S.C. 622, 809 S.E.2d 423 (2017), our Supreme Court held that it was *not* a structural error when the trial judge acted within its discretion to remove the defendant's appointed attorneys to ensure the defendant received a fair trial with adequate representation and to maintain the integrity of the judicial process. However, the Supreme Court clarified that the *erroneous* deprivation of a defendant's counsel of choice was a structural error but it is not a structural error when the trial judge properly does so within its discretion as the Court held the judge did in Cottrell.

The probation revocation judge had the authority to revoke appellant's probation and activate his YOA sentence. However, the revocation judge did not have statutory authority to order appellant to register as a sex offender and his erroneous order that appellant must register therefore also constituted a structural error. This Court should vacate the order mandating that appellant register as a sex offender.

Accordingly, this Court should hold the probation revocation judge abused his discretion by ordering that appellant be placed on the sex offender registry, that the judge's order also

constituted a structural error, and reverse the decision of the lower court requiring appellant to register.

5.

The sentencing judge erred by ruling any violation of the sex offender conditions of probation would automatically result in appellant having to register as a sex offender since the state should have been forced to show at the sentencing hearing that the violation of the sex offender conditions constituted good cause for appellant to register.

Relevant Facts

During appellant's guilty plea proceeding, the assistant solicitor told the sentencing judge that part of the state's sentence recommendation was that the decision as to whether to place appellant 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 appellant 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 appellant violated probation "one time," he would have to register as a sex offender. R. 34, l. 24 – 35, l. 4. The judge later clarified that if appellant 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 appellant 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 appellant to register.

Standard of Review

"A [sentencing court] has broad discretion in sentencing within statutory limits." Int. of Christopher H., 432 S.C. 600, 605, 854 S.E.2d 853, 855 (Ct. App. 2021), *reh'g denied* (Mar. 11, 2021), *cert. granted* (Dec. 10, 2021), *cert. dismissed*, 436 S.C. 503, 873 S.E.2d 773 (2022) (quoting In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010)) (alteration in original). "The sentence imposed will not be overturned on appeal absent an abuse of discretion." Id. (citing In re M.B.H., 387 S.C. at 326, 692 S.E.2d at 542). "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. (citing In re M.B.H., 387 S.C. at 326, 692 S.E.2d at 542).

Discussion

The sentencing judge erred by ruling any violation of the sex offender conditions of probation would automatically result in appellant having to register as a sex offender since the sentencing judge never found good cause existed to place appellant on the registry.

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.").

As discussed above, in State v. Davis, 375 S.C. 12, 649 S.E.2d 178 (Ct. App. 2007), this Court held the probation revocation judge erred by placing Davis on the sex offender registry after he violated the terms of his probation because the revocation judge did not have the authority to do so. 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 and the probation 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.

This Court 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 probation revocation judge was not the presiding judge at the time of sentencing, this Court held the judge was "without statutory authority" to add placement on the registry as a condition of Davis's probation. Id. Additionally, this Court held the state failed to show good cause why Davis should be placed on the registry *at the plea hearing*. In so holding, the Court emphasized the state's admission that Davis had not been evaluated prior to the plea hearing. Id. at 16, 649 S.E.2d at 180.

Pursuant to § 23-3-430(D) and State v. Davis, 375 S.C. 12, 649 S.E.2d 178 (Ct. App. 2007), only the sentencing judge had the authority to place appellant on the sex offender registry. The sentencing judge ruled at the time of the plea that appellant did not have to register. However, he ruled that if appellant violated any of the sex offender conditions of probation, he would automatically have to register. R. 39, ll. 3-18 (April 7, 2022). This was error since, pursuant the statute, a subsequent probation revocation judge did not have the authority to do so. Because only the sentencing judge had the statutory authority to place appellant on the registry and the

sentencing judge ruled at the plea hearing that appellant did not have to register, that decision was final. Accordingly, this Court should reverse the decision of the probation revocation judge finding appellant must register as a sex offender.

Moreover, the sentencing judge never found good cause existed to place appellant on the registry nor did the assistant solicitor even attempt to show the judge during the plea hearing that good cause existed. Consequently, the sentencing judge erred by ordering appellant must register as a sex offender if he violated *any* of the sex offender conditions of probation since no finding of good cause was made. In In re M.B.H., 387 S.C. 323, 692 S.E.2d 541 (2010), our Supreme 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. (emphasis added).

Four juvenile petitions were filed against M.B.H., a minor, 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. M.B.H. pled guilty to two counts of assault and battery of a high and aggravated nature and all other charges were dismissed. Id. at 325, 692 S.E.2d at 542. The judge ordered M.B.H. undergo an inpatient sex offender evaluation to determine his risk of reoffending and what treatment measures were necessary. Id. at 326, 692 S.E.2d at 542. After the evaluation, M.B.H. appeared for a dispositional hearing. Id. The family court judge ordered he be committed to the Department of Juvenile Justice suspended upon probation and required him to register as a sex offender. Id. The judge enumerated the issues identified in the evaluation report that constituted good cause for requiring M.B.H. to register, including multiple offenses, multiple younger, same sex victims, a

sense of victimization, denial of harm to others, borderline intellectual functioning, and the recommendation from the evaluators that M.B.H. receive inpatient sexual offender treatment. Id.

Our Supreme Court held there was evidence in the record to support the judge's determination that good cause existed for placing M.B.H. on the registry. Id. at 327, 692 S.E.2d at 542-43. It emphasized that the judge considered all the facts and circumstances, both aggravating and mitigating, in determining that there was "a risk of sexual reoffense." Id. at 327, 692 S.E.2d at 543. Accordingly, the Court held the judge did not abuse his discretion. Id.

In Int. of Christopher H., 432 S.C. 600, 854 S.E.2d 853 (Ct. App. 21), this Court held the sentencing judge erred by finding good cause existed to place Christopher on the private sex offender registry because there was insufficient evidence showing he was at risk of reoffending. The state filed a juvenile petition alleging Christopher committed two counts of first degree criminal sexual conduct and two counts of second degree assault and battery against his six-year-old cousin and her nine-year-old friend. Id. at 602, 854 S.E.2d at 853. Christopher was between the ages of twelve and thirteen years old at the time of the offenses. Id. He 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. Id. at 602, 854 S.E.2d at 854.

A hearing was subsequently held to determine whether Christopher should be placed on the private sex offender registry. Id. The state relied on its brief and supporting documentation, which consisted of Christopher's records. Id. at 603, 854 S.E.2d at 854. "Christopher called four witnesses as fact or expert witnesses who either testified to his low risk to reoffend, that risk of reoffending can never be eliminated, or that Christopher should not be placed on the registry. Dr. McKee[, who conducted a forensic psychological assessment of Christopher,] testified there is

never no risk of reoffending and there was no basis to place Christopher on the registry. . . . The sentencing court noted the testimony indicted Christopher was at a low risk of reoffending, but found 'a' risk of reoffending existed; thus, good cause was established." Id. at 606, 854 S.E.2d at 855-56.

This Court emphasized that placement on the registry is "*not automatic* and requires the solicitor to show *good cause*." Id. at 606, 854 S.E.2d at 856. (emphasis added). It concluded the state failed to show good cause existed since the "only evidence of risk indicated a low risk, and the evidence overwhelmingly indicated registry . . . was not appropriate." Id. at 607, 854 S.E.2d at 856. Accordingly, this Court held the sentencing court abused its discretion in ordering Christopher be placed on the registry. Id.

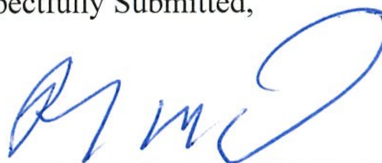
Here, pursuant to § 23-3-430(D), before the sentencing judge ordered appellant must "automatically" be placed on the registry if he violated any of the sex offender conditions of probation, the sentencing judge should have found whether good cause existed to require appellant to register. Defense counsel at the probation revocation hearing made clear that appellant had not previously been evaluated to determine whether he was at risk of reoffending sexually. R. 48, ll. 2-8 (July 13, 2022). Consequently, like in Davis, it is apparent the sentencing judge did not determine good cause existed to place appellant on the registry.

Respectfully, this Court should hold the sentencing judge erred by ruling appellant would automatically be required to register as a sex offender if he violated the terms of the sex offender conditions of probation without requiring the state show good cause for placing appellant on the sex offender registry.

CONCLUSION

Based on the foregoing argument, appellant respectfully requests this Court reverse the circuit court's order requiring him to register as a sex offender.

Respectfully Submitted,



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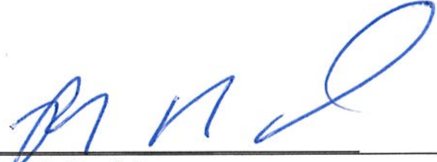
ATTORNEYS FOR APPELLANT

This 14th day of June, 2023.

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."

June 14, 2023



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Honorable Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BOWEN GRAY TURNER,

APPELLANT.

APPELLATE CASE NO. 2022-001018

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 Matthew C. Buchanan, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 14th day of June, 2023.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT