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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 REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

1.

The probation revocation judge erred by denying appellant's motion for a continuance and appellant was prejudiced by the denial.

The state argued appellant was not prejudiced by the probation revocation judge's refusal to grant a continuance because appellant admitted in court that he violated the terms of his probation. Brief of Respondent at 5. The state misconstrues the grounds for and argument in support of appellant's motion for a continuance.[1] Appellant did not seek a continuance on the issue of whether he violated the technical terms of his probation nor did he contest the judge's decision to revoke his probation and activate his sentence pursuant to the Youthful Offender Act (YOA). Appellant admitted at the beginning of the revocation hearing that he violated the technical 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." R. 45, ll. 18-24.

Appellant's continuance request was *solely* related to the legal issue concerning whether appellant should be required to register as a sex offender. Appellant sought additional time to permit Dr. McKee to conduct a psychosexual evaluation of appellant. The judge's decision to go forward with the determination regarding whether appellant must register as a sex offender was unreasonable, particularly where Dr. McKee had already been retained, funding was secured, and Dr. McKee was able to begin the psychosexual evaluation the following week.

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[1] The state's confusion is further demonstrated by its explanation of the standard of review. See Brief of Respondent at 3-4. Respondent cites the standard of review for the revocation of probation. Notably, appellant does not contest the revocation of his probation nor the activation of his suspended YOA sentence. This appeal concerns the revocation judge's finding that appellant must register as a sex offender when the state failed to show good cause existed during both the guilty plea proceeding and the subsequent revocation hearing.

"Registration as a sex offender is one of the most draconian consequences of a criminal conviction. A registrant's reputation is destroyed, eliminating most employment and housing prospects. Federal law bars lifetime registrants and their households from federally assisted housing. Some states and municipalities impose residency restrictions, which bar registered sex offenders from living--and sometimes working or even being located--within certain zones, such as within a few hundred or thousand feet from a school or park. These restrictions effectively bar registered sex offenders from residing in some high-density areas, as in parts of Miami and Los Angeles. Sex offenders are also at risk of vigilante threats and violence." Abigail E. Horn, Wrongful Collateral Consequences, 87 Geo. Wash. L. Rev. 315, 333 (2019)

In Moe v. Sex Offender Registry Bd., 467 Mass. 598, 604, 6 N.E.3d 530, 536 (2014), the Court noted that "public identification of a sex offender poses a risk of serious adverse consequences to that offender, including the risk that the sex offender will suffer discrimination in employment and housing, and will otherwise suffer from the stigma of being identified as a sex offender, which sometimes means the additional risk of being harassed or assaulted."

The state is wrong to assert that appellant was not prejudiced by the judge's refusal to grant a continuance because he was denied the 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, 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). 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.

The state failed to show the probation revocation judge exercised his discretion when he ordered appellant must register as a sex offender, erroneously maintained that the level of due process required for a court to impose the registry is now lessened, and incorrectly concluded that "due process was met by the circumstances of this case."

The state asserts that appellant alleged the revocation judge "refused to exercise discretion when imposing the registry requirement because of the relatively minor (as he claims) violations." Brief of Respondent at 7. Again, the state misconstrues appellant's argument. Appellant argued the revocation judge abused his discretion by refusing to exercise his discretion at all when he ordered appellant must register as a sex offender because the judge maintained he had no "leeway" in the matter. The revocation judge erroneously concluded he had no choice but to order appellant be placed on the registry due to the prior sentencing condition ordered by Judge Dennis. It is apparent from the record that the revocation judge did not exercise *any* discretion. See State v. Hawes, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) ("A failure to exercise discretion amounts to an abuse of that discretion.") (quoting Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997)).

Additionally, the state wants to appear dismissive of appellant's argument that the probation revocation judge abused his discretion by placing appellant on the registry because "the law regarding the sex offender registry has been amended so that registering as a sex offender is no longer the lifetime requirement that it used to be." Brief of Respondent at 7. The state maintained that as "a Tier 1 offender" under the revised law, appellant "will be eligible for removal from the registry fifteen years after the conclusion of his sentence, so long as he successfully completes his sex offender treatment, complies with the registry requirement, and is

not convicted of another sexual offense." Brief of Respondent at 8 (citing S.C. Code Ann. § 23-3-430(C)(1)(i) and S.C. Code Ann. § 23-3-462(A)). Because of this revision, the state maintains that the standard for placing an individual on the registry is now lessened and that due process was met by the circumstances of this case since appellant was ordered to register after he "admitted to sexual battery" and "violated his probation by being drunk underage at a bar, harassing women, and demanding a woman take him home." Brief of Respondent at 8.

Appellant fails to see the relevance of this revision of the law to appellant's claim that the probation revocation judge abused his discretion by placing appellant on the registry. This state's law and precedent are clear: *a sentencing court* may order as a condition of sentencing that a person be included in the sex offender registry *if good cause is shown* by the solicitor with "good cause" defined as "whether or not the evidence *indicates a risk to reoffend sexually.*" See In. Int. of Christopher H., 432 S.C. 600, 605, 854 S.E.2d 853, 855 (Ct. App. 2021) (citing S.C. Code Ann. § 23-3-430(D) and In re M.B.H., 387 S.C. 323, 692 S.E.2d 541 (2010)) (emphasis added). The revision of the law allowing an individual to apply for removal from the registry after certain stringent requirements have been met does not change the standard for placing an individual on the registry. The state is still required to show good cause exists to place a defendant on the registry, and due process demanding a possible exit ramp from the sex offender act for those ordered onto the registry is irrelevant to the legal issue before this Court.

In this case, there was no evidence presented showing appellant was at risk of reoffending sexually. Significantly, the state does not even attempt to argue on appeal that such evidence was presented. Unlike in In. Int. of Christopher H., 432 S.C. 600, 605, 854 S.E.2d 853, 855 (Ct. App. 2021), In re M.B.H., 387 S.C. 323, 692 S.E.2d 541 (2010), and State v. Fraley,

437 S.C. 135, 876 S.E.2d 703 (Ct. App. 2022), there was absolutely no expert testimony presented addressing appellant's likelihood to reoffend.

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 sexually. Consequently, the probation judge, even 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.

3.

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.

The state erroneously relies on State v. Herndon, 403 S.C. 84, 742 S.E.2d 375 (2013) in arguing the probation revocation judge had the authority to order appellant must register as a sex offender. Brief of Respondent at 9. As the state admitted, the primary issue in Herndon was the nature of a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) and what notice circuit court judges are required to provide to Alford defendants:

> Appellant [Herndon] claims that the circuit court failed to provide adequate notice that a condition of his probation required him to admit guilt. The gravamen of Appellant's claim is that his *Alford* plea allowed him to maintain his innocence, and therefore, he should not have to comply with a probation sanction which requires him to accept responsibility for the crime. Alternatively, Appellant argues that, at the very least, due process required the circuit court inform Appellant of this possibility. We disagree.

State v. Herndon, 403 S.C. 84, 89, 742 S.E.2d 375, 378 (2013).

Herndon did not argue on appeal nor did the Supreme Court analyze whether the probation revocation judge in Herndon had the statutory authority pursuant to S.C. Code Ann. § 23-3-430(D) to order Herndon to register as a sex offender. Additionally, Herndon did not argue before the circuit court or on appeal that the state failed to present good cause to place him on the registry nor did Herndon ask the probation revocation judge for a continuance so a retained expert could follow through with a psychosexual evaluation. In short, our Supreme Court in Herndon did not address the legal issues raised in this appeal.

As this Court emphasized in Davis, the plain language of § 23-3-430(D) unambiguously states that only the "**presiding judge** may order **as a condition of sentencing** that the person be

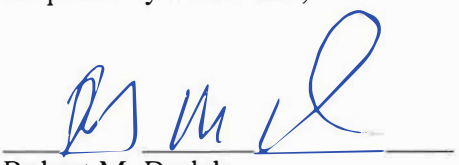
included in the sex offender registry." State v. Davis, 375 S.C. 12, 17, 649 S.E.2d 178, 180 (Ct. App. 2007) (emphasis in original). Like the probation revocation judge in Davis, the probation revocation judge here did not have the statutory authority to place appellant on the sex offender registry.

Accordingly, this Court should hold the probation revocation judge abused his discretion by ordering that appellant be placed on the sex offender registry and reverse the order of the lower court requiring appellant to register.

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 Reply 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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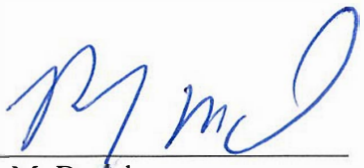
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Reply 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.



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