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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

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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ARGUMENT IN REPLY

1.

The underlying facts supporting petitioner's plea to first degree assault and battery resulted in his guilty plea and probation with sex offender conditions. Petitioner was not an aggrieved party after his plea and he could not have appealed at that time. The reason or cause for petitioner's sex offender registry was his violation of the "no alcohol" clause of the probationary sex offender terms. Assertions to the contrary by the state in its return are a fanciful desire to obtain an affirmance at any cost.

In its return, the state argued the solicitor showed good cause existed to place petitioner on the sex offender registry during the plea proceeding by merely recounting the basic underlying allegations supporting petitioner's plea to first degree assault and battery. Return at 4-5. The state maintained that "with these facts of sexual assault placed on the record, the Court of Appeals rightly discounted Petitioner's assertion that good cause was not shown by the solicitor." Return at 5. The state's argument totally mischaracterizes what happened in this case and ignores this Court's interpretation of the meaning of "good cause" as used in S.C. Code Ann. § 23-3-430(D).

Petitioner pled guilty to first degree assault and battery, and received a Youth Offender Act (YOA) sentence, which was suspended to probation with sex offender conditions attached. R. 68-71. The solicitor did not seek sex offender registration as a result of the underlying facts of petitioner's assault and battery plea, and asking for sex offender registration was consciously waived by the state at that time. At the conclusion of those proceedings, defense counsel Hutto objected to any interpretation of the sex offender conditions that could result in petitioner being placed on the sex offender registry in the future as a result of some "minor" -- in fairness -- "non-sexual" violation. R. 37, l. 22 – 39, l. 9.

Later, a probation revocation hearing was held, petitioner's probation was revoked, and he was order placed on the sex offender registry based on his violation of the "no consuming alcohol" provision, condition number eleven, of the standard sex offender conditions. R. 63. The revocation judge also ruled he did not have any discretion or "leeway" not to order petitioner to register as a sex offender given his violation of this "no consuming alcohol" standard provision. R. 55, l. 18 – 56, l. 8. That is what occurred in this case, and any assertion that the underlying facts of the guilty plea constituted the good cause for sex offender registration is, respectfully, intellectually dishonest.

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 (emphasis added). As the Court of Appeals emphasized in Int. of Christopher H., 432 S.C. 600, 606, 854 S.E.2d 853, 856 (Ct. App. 2021), the language in the statute requiring the solicitor to show good cause "indicates an intent by the legislature to require more than a scintilla of evidence of risk."

Further, even if the state's present argument is given credence, which it should not, the solicitor's recitation of the underlying facts at the guilty plea may have shown petitioner had some risk to reoffend sexually, however, the evidence certainly did not rise to the level of "good cause." See Int. of Christopher H., 432 S.C. at 606, 854 S.E.2d at 856 ("It is axiomatic that a juvenile with a history of a sexual offense or offenses will be at some risk, even if the risk is very low."). Notably, the solicitor failed to present any expert testimony or other evidence beyond the basic facts of petitioner's offense to attempt to show that petitioner was at risk to reoffend sexually for

the obvious reason that sex offender registration was not even on the table at the time of the guilty plea.

The state further argued in its return that the Court of Appeals correctly determined that because petitioner did not appeal the sentencing court's order requiring him to register as a sex offender if he violated the sex offender conditions of probation, the order "became the law of the case." Return at 4. However, because petitioner was not ordered to register as a sex offender during the plea proceeding, petitioner was not an aggrieved party and he could not appeal the order at that time. See Rule 201(b), SCACR ("Who May Appeal. Only a party aggrieved by an order, judgment, sentence or decision may appeal."). Until petitioner was actually ordered to register as a sex offender, he was not an "aggrieved party" within the meaning of Rule 201, SCACR. "The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or *the imposition on a party of a burden or obligation.*" Shaw v. City of Charleston, 351 S.C. 32, 36, 567 S.E.2d 530, 532 (Ct. App. 2002) (quoting Beaufort Realty Co. v. Beaufort County, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001)) (internal quotation marks omitted) (emphasis added). Because the sentencing court did not impose the sex offender registry at the time of the plea, petitioner could not appeal a probationary sentence where he had suffered no prejudice.

Moreover, an appeal from the sentencing court's order would have been interlocutory. "As a general rule, only final judgments are appealable." Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) (citing Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996)); See Ex parte Cap. U-Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006) ("An appeal ordinarily may be pursued only after a party has obtained a final judgment."). "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Id. (citing Mid-State Distribs., Inc. v. Century Importers, Inc., 310

S.C. 330, 336, 426 S.E.2d 777, 780 (1993)). Because the sentencing court had not imposed sex offender registration on petitioner, the judgment was not yet final and petitioner could not appeal the decision. See Mid-State Distributors, 310 S.C. at 334-35, 426 S.E.2d at 780 (order denying motion to dismiss case based on lack of personal jurisdiction was not immediately appealable, as the litigant had "not arrived at the end of the road"). See State v. Rearick, 417 S.C. 391, 790 S.E.2d 192 (2016) (even a motion denying double jeopardy grounds is interlocutory and not appealable unless and until the defendant is convicted and sentenced in violation of his Constitutional protection against being subjected to double jeopardy).

Again, during the plea proceeding, petitioner's counsel, Bradley Hutto, objected to petitioner being placed on the sex offender registry for a future minor violation of probation, such as a speeding ticket. R. 37, l. 22 – 39, l. 9. Drinking alcohol was the equivalent of a speeding ticket. It was a minor, non-sexual violation, and it should not have resulted in petitioner being required to register as a sex offender since it did not amount to a showing of "good cause." The state wholly failed to show at the revocation hearing that petitioner was at risk to reoffend *sexually*.

Interestingly, another "standard sex offender condition," condition four, of petitioner's probation was not to have contact with a person under the age of eighteen. See R. 63. It would have been strange indeed to require petitioner to register as a sex offender merely for having contact with peers his own age. Petitioner was only nineteen years old at the time he pled guilty. Counsel Hutto specifically objected during the plea proceeding to protect petitioner from being required to register as sex offender based on such a minor, non-sexual violation. Surely, hypothetically, some evidence would have been needed at the revocation hearing on whether petitioner's contact with a seventeen-year-old contemporary of his constituted good cause to require him to register as a sex offender for a violation of this standard sex offender condition.

2.

The state's reliance on *State v. Herndon*, 403 S.C. 84, 742 S.E.2d 375 (2013), in support of its argument that the probation revocation judge had the authority to impose the sex offender registry is misplaced since *Herndon* is not on point.

The state's reliance on State v. Herndon, 403 S.C. 84, 742 S.E.2d 375 (2013), in support of its argument that the probation revocation judge had the authority to impose the sex offender registry is misplaced. Herndon was indicted for first degree criminal sexual conduct with a minor but pled pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to assault and battery of a high and aggravated nature. He was sentenced to ten years' imprisonment suspended upon the service of five years' probation. A special condition of Herndon's sentence required him to successfully complete sex abuse counseling. Id. at 85-86, 742 S.E.2d at 376. According to the terms of the negotiated plea, Herndon "would face lifetime sex offender registration if he failed to successfully complete sex abuse counseling." Id. at 86, 742 S.E.2d at 376. The sex abuse counseling required Herndon to admit his guilt, but Herndon refused. Consequently, the circuit court found Herndon failed to successfully complete sex offender counseling and ordered Herndon to register as a sex offender. Id. at 87-89, 742 S.E.2d at 377-78.

Herndon argued on appeal that the circuit court failed to provide adequate notice that a condition of his probation required him to admit guilt. The "gravamen" of Herndon's complaint on appeal was that his Alford plea allowed him to maintain his innocence, and therefore, he should not have had to comply with a probation sanction that required him to accept responsibility for the crime. Id. at 89, 742 S.E.2d at 378.

This Court emphasized that in South Carolina there is no significant distinction between a standard guilty plea and an Alford plea. Accordingly, the Court held the circuit court properly ordered Herndon to register as a sex offender.

However, importantly, this Court never addressed whether the revocation court had the authority to impose sex offender registration as it was not an issue before the Court. Herndon did not challenge the authority of the revocation court to impose sex offender registration nor argue the state failed to show good cause. Herndon's sole complaint was that he should not have to admit guilt as a condition of his probation because he entered an Alford plea. Consequently, Herndon is not helpful to the state's position.

As argued in the petition for writ of certiorari, 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) the revocation judge here did not have the statutory authority to place petitioner on the sex offender registry.

3.

The revocation judge had discretion not to place petitioner on the sex offender registry. However, the salient point is that the state made no effort to show "good cause" during the revocation hearing to place petitioner on the sex offender registry.

The logical and correct flip side of the state's argument that the probation revocation judge here had the authority to impose sex offender registration certainly must be that he had discretion *not* to impose sex offender registration. See Return at 7-8. However, the revocation judge erroneously concluded he had no "leeway" in the matter and ordered petitioner to register. The judge altogether refused to exercise his discretion, which was an abuse of discretion in and of itself. Probation violations, by their very nature, call upon the judge to exercise discretion.

As seen, the state made no effort to show good cause existed to place petitioner on the sex offender registry during the revocation hearing. The only violation alleged at the hearing was drinking alcohol, which surely does not amount to evidence that petitioner was at risk to reoffend sexually. Because the state failed to show good cause existed to place petitioner on the sex offender registry and the revocation judge maintained he had "no leeway" in the matter, the Court of Appeals erred by affirming the court's ruling.

4.

The state's argument that petitioner was not prejudiced by the revocation judge's refusal to grant a continuance is erroneous since petitioner was never allowed to present evidence, including expert testimony, that he was not a risk to reoffend sexually.

The state argued in its return that petitioner was not prejudiced by the revocation judge's refusal to grant a continuance because petitioner admitted he violated his probation. Return at 10. The state's argument ignores the fact that petitioner did not seek a continuance on whether he violated his probation. He admitted he violated his probation and indicated he was "prepared" for the judge "to possibly activate his YOA sentence." That was never at issue. R. 45, ll. 18-21. Sex offender registration was the focus and the issue.

Petitioner recognizes that a probation revocation hearing is different in nature from a trial. However, petitioner's motion for a continuance was solely on the issue of whether he should be required to register as a sex offender, not on whether he violated the terms of his probation. The revocation judge ultimately denied petitioner's motion for a continuance and ordered petitioner must register without requiring the state to show good cause or allowing petitioner to present evidence in mitigation against registry, such as the results of the psychosexual evaluation he was prepared to undergo the following week. This was an abuse of discretion and the Court of Appeals erred by holding otherwise. See State v. Nelson, 431 S.C. 287, 847 S.E.2d 480 (Ct. App. 2020) (holding trial court abused its discretion by denying defendant's motion for a continuance when a defense witness was unavailable due to a medical condition since the witness was material and pertinent to defendant's claim of self-defense); State v. McMillian, 349 S.C. 17, 561 S.E.2d 602 (2002) (holding trial court abused its discretion by denying defendant's motion for a continuance

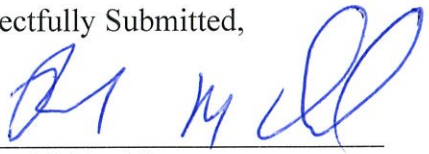
to allow defendant to obtain transcript of a prior mistrial since the transcript could have been used to impeach a critical witness whose credibility was essential to defendant's defense).

Under the unusual facts of this case, the revocation hearing was the only opportunity for petitioner to present evidence, including testimony from the expert he had retained, that he was not a risk to reoffend sexually.

CONCLUSION

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

Respectfully Submitted,



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This 2nd day of June, 2025.