STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenwood County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY NATION,

APPELLANT

FINAL REPLY BRIEF OF APPELLANT

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The Appellant, Anthony Nation, filed his amended initial brief on May 3, 2012. After he filed, this Court decided State v. Dykes, 398 S.C. 351, 728 S.E.2d 455 (2012) (hereinafter "Dykes I"), which was the first of three opinions issued by this Court in that case. The controlling opinion held that due process required a hearing before any person could be placed on satellite monitoring, as well as review of the monitoring requirement after ten years. Counsel for the respondent, South Carolina Department of Probation, Parole, and Pardon Services (hereinafter "SCDPPPS") petitioned this Court to rehear Dykes I. Based on that petition, SCDPPPS also petitioned this Court to hold Mr. Nation's instant appeal in abeyance pending this Court's consideration of the rehearing petition in Dykes I, reasoning that Mr. Nation would be entitled to have his case remanded to the General Sessions Court for a hearing to determine whether satellite monitoring was proper in his case. Mr. Nation consented to SCDPPPS's request, anticipating that the trial court judge would not require satellite monitoring. Mr. Nation has the lowest possible risk of reoffending, R. 52, l. 25 – 54, l. 11; Defense Ex. 1, R. 219, and Judge Addy stated he "perhaps" would use his discretion if S.C. Code Ann. §23-3-540 was not mandatory, R. 18, ll. 12-21; R. 62, l. 1 – 63, l. 20.

This Court granted rehearing in Dykes I on July 12, 2013. With the consent of Ms. Dykes and SCDPPPS, Mr. Nation filed an *amicus curie* brief to explain why he believes our state's sex offender registry, and the satellite-monitoring requirement in particular, is punitive. Specifically, Mr. Nation was concerned that the opinion opened "with the premise that satellite monitoring is predominantly civil." Dykes, 398 S.C. at 372, 728 S.E.2d at 466 (citing Smith v. Doe, 538 U.S. 84 (2003)).

On May 22, 2013, this Court issued a second opinion in Ms. Dykes' case (hereinafter "Dykes II"). In Dykes II, this Court held the initial imposition of satellite monitoring was constitutional but maintained that portion of the decision holding that due process requires periodic review. Dykes II did not address other constitutional issues raised by Ms. Dykes in her brief, to include violations of the *ex post facto* clause, procedural due process, equal protection, and unlawful search and seizure. Ms. Dykes, accordingly, moved to reconsider. On July 24, 2013, this Court withdrew Dykes II and issued State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) (hereinafter "Dykes III"). Dykes III added footnote 9, summarily dismissing these constitutional arguments. This footnote relied on Smith v. Doe as "rejecting an *ex post facto* challenge where sex offender registration and monitoring requirements are civil in nature." 403 S.C. at 510 (fn. 9), 744 S.E.2d at 511 (fn. 9). Upon information and belief, Ms. Dykes plans to petition the Supreme Court of the United States for a writ of *certiorari.*

On August 28, 2013, this Court held "that Section 23–3–540's electronic monitoring requirement is a civil obligation similar to other restrictions the state may lawfully place upon sex offenders." In re Justin B., Shearouse Adv. Sheet. No. 38 (S.C.S.Ct. Op. No. 27306) (Filed Aug. 28, 2013), 2013 WL 4553976 (S.C. Aug. 28, 2013). Again, this Court relied on Smith v. Doe as "holding that the imposition of restrictive measures on sex offenders adjudged to be potentially dangerous is a legitimate non-punitive governmental objective." Upon information and belief, Justin B. has petitioned this Court for rehearing and, if necessary, plans to petition the United States Supreme Court for a writ of *certiorari.*

Additionally, on April 24, 2013, this Court decided In the Interest of David L., Memorandum Opinion No. 2013-MO-013 holding "the South Carolina Sex Offender Registry Act is not so punitive in purpose or effect to constitute a criminal penalty." This Court cited State v. Walls, 348 S.C. 26, 558 S.E.2d 524 (2002), and did not reference Smith v. Doe. David L. petitioned for rehearing, which this Court denied on June 10, 2013. On August 8, 2013, The Honorable John G. Roberts, Chief Justice of the United States, extended to time for David L. to petition for *certiorari* until November 7, 2013.

Appellant urges that this litigation will become unnecessary, as the following discussion should convince this Court that satellite monitoring is indeed punitive. As discussed in detail in Argument I, *infra*, the actual holding in Smith v. Doe does not support this Court's continued reliance on that case.

I
Ex Post Facto Clause

SCDPPPS relies on Smith v. Doe, Walls, and Dykes III[1] for the proposition that our state's sex offender registry is not punitive. Smith v Doe, however does not support such a conclusion about our state's current sex offender registry, and the holdings in Walls, Dykes III, and Justin B should be abandoned.

Smith v. Doe involved an *ex post facto* challenge to Alaska's sex offender registry. The majority, however, noted, "The Alaska statute, on its face, does not require these updates to be made in person." 538 U.S. at 101. The High Court reserved for another day "[w]hether other constitutional objections can be raised to a mandatory reporting requirement, and how those questions might be resolved." *Id.* at 102. Alaska, however, subsequently recognized that its sex offender registration requirement "treats offenders not much differently than the state treats probationers and parolees subject to continued state supervision." Doe v. State, 189 P.3d 999, 1009 (Alaska 2008) (holding sex offender registry violates *ex post facto* clause of state constitution).

Other states have reached the same conclusion as Alaska. Doe v. Dep't of Pub. Safety & Corr. Servs., 430 Md. 535, 568, 62 A.3d 123, 143 (2013) ("The application of the statute has essentially the same effect upon Petitioner's life as placing him on probation and imposing the punishment of shaming for life, and is, thus, tantamount to imposing an additional sanction for Petitioner's crime."); State v. Letalien, 2009 M.E. 130, 985 A.2d 4 (2009) (held retroactive application of SORNA of 1999 violated *ex post facto* prohibitions by increasing registration duty of certain offenders from 15 years to

their entire lifetimes, and by imposing a quarterly in-person verification requirement without affording an opportunity for relief from those duties at discretion of sentencing court.)

Additionally, the Supreme Court of the United States is monitoring this issue. In U.S. v. Juvenile Male, 131 S.Ct. 2860 (2011), that Court declined to consider a challenge to the juvenile sex offender registry. The Eighth Circuit had found the juvenile sex offender registry was sufficiently punitive to invoke the *ex post facto* clause. The High Court, however, vacated the Eighth Circuit's opinion as moot because the juvenile male's registration requirement had expired.

Thus, Smith v. Doe does not apply to registries, like South Carolina's, that effectively place the offender on lifetime probation.

Turning to the satellite monitoring requirement at issue in the case, your Appellant reviewed the factors set forth in Kennedy v. Menoza, 372 U.S. 144 (1963) in his initial Brief, Argument I, pp. 14-23. Mr. Nation will not repeat that analysis here, but rather will respond to arguments raised by SCDPPPS in its brief.

First, SCDPPPS asserts that satellite monitoring "does not involve an affirmative disability or restraint." Brief of Respondent, p. 7 (emphasis original). SCDPPPS then claims, "Appellant is not being denied movement at any time of the day. He is free to go where he wants, when he wants." Id., pp. 7, 9. This Court reached the same conclusion in Justin B., holding, "Appellant is not subject to any physical restraint, nor does wearing an electronic monitor 'resemble imprisonment,' the archetypal affirmative disability."

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[1] When SCDPPPS filed its initial brief of respondent, this Court had not yet decided In re Justin B.

The record in Mr. Nation's case, however, refutes SCDPPPS's assertion and this Court's holding in Justin B. At the probation violation hearing, Agent Sorrow explained "somebody has to sit next to a wall, **plugged in to a wall**" for "**three hours" a day** unless the unit's battery "gets weaker," then "you have to **charge them more often.**" R. 48-52. (emphasis added). Additionally, "[i]f the device gets weak, then [SCDPPPS agents] often call them, tell them to plug in, charge it up." SCDPPPS establishes "exclusion zones" and gets alerts if the person enters into an "exclusion zone." R. 48-52. Thus, Agent Sorrow verified that Mr. Nation is not free to go where he wants, when he wants. In fact, SCDPPPS candidly describes the satellite-monitoring requirement as part of a "containment approach." Brief of Respondent, p. 9.

Apparently, Justin B. did not provide similar evidence in his record on appeal. This Court should reconsider the holding in Justin B. based on SCDPPPS's acknowledgment in Mr. Nation's case that satellite monitoring imposes daily restraints.

Second, SCDPPS contends satellite monitoring "has not historically been regarded as punishment." Brief of Respondent, p. 7 (emphasis original). The South Carolina Code of Laws does not support this assertion. Electronic monitoring is used to monitor compliance with the Home Detention Act, S.C. Code Ann. §24-13-1560, and the terms of probation, S.C. Code Ann. §24-21-85 and 430(11). SCDPPPS concedes this point. Brief of Respondent, p. 13. In Justin B., this Court observed, "Appellant failed to provide the Court with any evidence that the electronic monitoring device is immediately recognizable to the public, or would cause him to be identified as a sex offender to the exclusion of other reasonable and legitimate uses for electronic devices." The opinion,

however, did not articulate any use of satellite monitoring that the average person would not consider punitive or associate with the criminal justice system.

Third, SCDPPS claims satellite monitoring "is more like requiring an individual to provide a photograph, fingerprint, or DNA sample – a method of identification or ***tracking*** – than punishment." Brief of Respondent, pp. 7-8 (emphasis added). This contention is not logical. Photographs, fingerprints, and DNA samples are identification and not tracking. Satellite monitoring is tracking and not identification.

Fourth, SCDPPPS contends satellite monitoring "does not *only* come into play upon a finding of scienter." Brief of Respondent, p. 8 (underlining original, italics added). Respondent, therefore, admits that monitoring can result from a finding of scienter. In fact, the monitoring requirement can be added based on violation of the sex offender registry, S.C. Code Ann. §23-3-540(E), which would require scienter.

Fifth, SCDPPPS admits satellite monitoring "does serve as a specific and general deterrent." Respondent then suggests that satellite monitoring is acceptable because it might "provide a credible alibi if Appellant is wrongfully accused" in the future. Brief of Respondent, pp. 8, 9. While SCDPPPS's unexpected interest in protecting him form wrongful accusations is admirable, Mr. Nation prefers to rely on the traditional constitutional protections, such as the presumption of innocence, the burden of proof, a jury trial, and assistance of counsel, if he is one day wrongfully accused of a crime.

Finally, SCDPPPS argues that, "even if this Court determines GPS placement is effectively a punishment that disadvantages Appellant, the *ex post facto* [prohibition] does not apply because [S.C. Code Ann. §23-3-450] is not retrospective." Brief of Respondent, pp. 9-10. The state links the requirement to a violation of probation rather

than the original offense.[2] Mr. Nation, however, does not contest that the state could require monitoring ***while he is on probation***, as monitoring is a traditional probation condition. *See* S.C. Code Ann. §24-21-85 and 430(11). Extending a condition of "probation beyond the five years authorized by statute is an illegal sentence and must be reversed." State v. Sumpter, 334 S.C. 369, 371, 513 S.E.2d 373, 374 (Ct. App. 1999). As seen in the next section, SCDPPPS's position in this regard implicates the prohibition against double jeopardy.

In footnote 9 of Dykes III, this Court relied on Phillips v. State, 331 S.C. 482, 482, 504 S.E.2d 111, 112 (1998) as holding "[i]t is not a violation of the *ex post facto* clause for the legislature to enhance punishment for a later offense based on a prior conviction, even though the enhancement provision was not in effect at the time of the prior offense." Dykes III, 403 S.C. at 510 (FN. 9), 744 S.E.2d at 511 (fn. 9). The enhancement statue in Phillips, however, was prospective only, applying only to offenses committed after its enactment, and Phillips had the right to a jury trial before being subjected to the enhanced punishment. See State v. McGrier, 378 S.C. 320, 322, 663 S.E.2d 15, 16 (2008) (holding Community Supervision Program (CSP) "is unconstitutional given a revocation from the CSP resulted in the imposition of a greater sentence than his original sentence without the benefit of the requisite constitutional protections.").

[2] SCDPPS contends Mr. Nation's probation violation was "made worse by failing to maintain a stable residence or notifying his agent of a change in address." Brief of Respondent, p. 11. The trial court judge found that Mr. Nation "missed two of his appointments with his probation officer." These other contentions are not findings of the trial court. R. 63-63.

II
Double Jeopardy

SCDPPPS asserts:

> [W]hen an offender appears before the court on a probation violation, a judge may impose additional terms and conditions as a consequence of that violation. Section 24-21-430 states that, "[t]he court may impose by order duly entered and *may at any time modify the conditions* of probation and may include among them any of the following or any other condition not prohibited by this section." (emphasis added). Among the standard conditions of probation, the court may require the probationer "submit to intensive surveillance which may include surveillance by electronic means."

Brief of Respondent, p. 13 (emphasis original). SCDPPPS, thus, concedes satellite monitoring was added as a condition of Mr. Nation's probation.

As stated, Mr. Nation does not contest that the state could require monitoring ***while he is on probation***, as monitoring is a traditional probation condition. Continuing this probation sanction beyond the expiration of his term of probation is illegal, Sumpter, supra, and violates double jeopardy.

This Court did not address double jeopardy in footnote 9 of Dykes III.

III
Cruel and Unusual Punishment

SCDPPPS contention that satellite monitoring does not violate the Eighth Amendment hinges primarily on a finding that satellite monitoring is not punitive. As argued in Section I, infra, satellite monitoring is much different from what the Supreme Court of the United States approved in Smith v. Doe, supra. Smith v. Doe approved collecting and providing information about a conviction that is already available in public records.

In order to make satellite tracking sound less punitive, SCDPPPS attempts to equate it to the mere collection of information. Brief of Respondent, p. 15. Tracking people and permanently storing that information is far different from publishing conviction information. The state's efforts to equate real time tracking with merely publishing court records must be rejected.

This Court did not address cruel and unusual punishment in footnote 9 of Dykes III.

IV, V, & VI
Procedural and Substantive Due Process

Responding to Mr. Nation's Arguments IV, V, and VI, SCDPPPS contends that satellite monitoring "is a legitimate legislative extension of the sex offender registry." *E.g.* Brief of Respondent, p. 19, 22. SCDPPPS's contention is based on the legislative intent set for in S.C. Code Ann. §24-21-400. Brief of Respondent, pp. 16, 20-21. Indeed, this Court reached the same conclusion in Dykes III and Justin B.

SCDPPPS's contention and the holdings in Dykes III and Justin B. ignore the statutory evolution of our state's sex offender registry. See Brief of Appellant, pp. 7-10. The General Assembly, however, did not reaffirm this legislative finding when it added the satellite monitoring requirement. 2005 Act 141. As discussed in Argument I, supra, satellite monitoring is punitive.

In addition to relying on Smith v. Doe, footnote 9 of Dykes III relied on Connecticut Dept of Public Safety v. Doe, 538 U.S. 1 (2003), which addressed procedural due process but not substantive due process. This case, however, applied only to the dissemination of conviction information and not to real time tracking of sex offenders

using satellite monitoring. Neither Smith v. Doe nor Connecticut Dept of Public Safety v. Doe applies to satellite monitoring.

VII
Right to Privacy

SCDPPPS argues that any intrusion into Mr. Nation's privacy is reasonable.[3] As pointed out in the Brief of Appellant, p. 41, the drafters of S.C. Const. Art. I, §10 "were principally concerned with the emergence of new electronic technologies that increases the government's ability to conduct searches." State v. Forrester, 343 S.C. 637, 647, 541 S.E.2d 837, 842 (2000). Satellite monitoring, therefore, is the precise intrusion our state constitution protects against.

The Court did not address our state's constitutional right to privacy in Justin B. or footnote 9 of Dykes III. Once satellite monitoring is viewed in this context, the necessity of declaring the statute unconstitutional is apparent.

VIII
Equal Protection

SCDPPPS contends this Court should apply a rational basis test and does not address the strict scrutiny test. Brief of Respondent, pp. 28-29. Mr. Nation, however, makes two arguments.

First, he contends satellite monitoring implicates fundamental rights such as the right to travel, to be free from unreasonable searches and seizures, and the right to privacy. Strict scrutiny, accordingly, applies. This Court should reconsider its

[3] SCDPPPS states, "Appellant contends that GPS monitoring violates his right to privacy, although he fails to note that the South Carolina Constitution offers protections against *unreasonable* invasions of privacy." Brief of Respondent, p. 24 (citing S.C. Const. Art. I, §10) (emphasis original). Mr. Nation, in fact, did note this provision and highlighted the word "unreasonable" with italics. Brief of Appellant, p. 40.

conclusion in footnote 9 of Dykes III that no fundamental right is implicated by satellite monitoring.

Second, he argues satellite monitoring "does not even pass the rational basis test under an equal protection analysis." Brief of Appellant, p. 47.

Conclusion

Satellite monitoring bears a striking resemblance to branding and a ball and chain, making the requirement punitive. The modern ball and chain incarcerates the person for several hours a day while the device re-charges. This Court should hold that S.C. Code Ann. §23-3-540 is punitive. Once this Court holds satellite monitoring punitive, the necessity for reversal is apparent. Thus, your Appellant respectfully urges that the Order of the lower court be reversed.

Respectfully submitted,

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This 25th day of November, 2013.

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.

November 25th, 2013

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Matthew Bachanan, Esquire, at South Carolina Department of Probation, Parole & Pardon Services, PO Box 50666, Columbia, SC 29250, this 25th of November, 2013.

Robert M. Dudek
Chief Appellate Defender

By: [signature]
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th of November, 2013.

[signature] (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.