STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JIMMY LEE DUNCAN,

APPELLANT

APPELLATE CASE NO. 2012-207966

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in failing to direct a verdict of acquittal on the charge of failure to register, second offense because the requirement that Appellant wear a GPS monitor violated the ex post facto clauses of the Constitutions of the United States and South Carolina?

STATEMENT OF THE CASE

On October 27, 2011, a Colleton County grand jury indicted Appellant for failure to register as a sex offender, second offense. R. 91 (indictment). On January 30, 2012, Appellant and his counsel, J.D. Bryan, appeared before the Honorable Thomas A. Russo.[1] R. 1. On that date, Appellant waived his right to a jury trial. R. 3, lines 22-23; R. 4, lines 5-7; R. 9, lines 6-7; R. 13, lines 21-22. The bench trial occurred on January 31, 2012. R. 14, lines 14-17; R. 15, lines 9-10. Judge Russo found Appellant guilty and sentenced him to imprisonment for three hundred and sixty-six days. R. 93 (sentence sheet).

Appellant filed a timely notice of appeal. Upon receipt of the notice of appeal, undersigned counsel ordered the transcripts. The transcript of the jury trial waiver hearing on January 30, 2012 was produced and made available. R. 1 - 15. However, the transcript of the bench trial was not available. R. 14, lines 14-17; R. 15, lines 9-10. Therefore, undersigned counsel moved this Court to order reconstruction of the record. This Court granted the motion. R. 23, lines 1-5; R. 23, lines 15-21. On October 28, 2013, undersigned counsel represented Appellant at a reconstruction hearing before the Honorable Thomas W. Cooper, Jr., in Colleton County. Steven H. Knight, an assistant solicitor for Colleton County, represented the interests of the state. R. 21.

Concerning whether the record had been reconstructed, Judge Cooper found that the reconstruction hearing record revealed production of evidence on each of the elements of the charged offense. R. 77, line 8 – R. 78, line 4; R. 78, lines 10-18; R. 82, lines 13-18. He further found that motions for directed verdict had been made at the appropriate stage and

[1] The transcript does not identify the prosecutor by name; instead, it lists "Assistant Solicitor" only. R. 1.

were denied. R. 78, lines 5-9; R. 78, lines 22-25. However, he candidly admitted that the reconstructed record was "devoid ... of any objections that might have been made, any other meaningful motions that may have been made, and the rulings on those matters." R. 78, lines 18-21; see also R. 79, lines 1-3. Judge Cooper also noted the reconstruction was "somewhat summary." R. 79, lines 18-19. However, he explained there was no question regarding how many witnesses testified and who those witnesses were. Judge Cooper explained that there was no "highly contested factual situation in this case as far as the elements are concerned." R. 79, lines 21-24; R. 80, lines 9-15.

Judge Cooper also expressed his concern over whether he had jurisdiction to do anything other than "send this back up" because the remand order only directed the "court to reconstruct the record, with no option to conclude the record could not be reconstructed with specificity to support meaningful appellate review." R. 80, lines 16-20; R. 81, lines 15-25. Judge Cooper "proceed[ed] as if [he] had the option to decide whether or not this record could be reconstructed so as to provide meaningful appellate review." R. 82, lines 6-12. He then found that the record could be reconstructed and had been reconstructed. Specifically, he found the elements of the offense had been proven and the defenses, which were legal in nature, were fully briefed and preserved. As a result, he determined the appellate court was capable of reviewing the sufficiency of the legal arguments. R. 82, line 24 – R. 84, line 2.

Appellant now files this brief.

ARGUMENT

The trial court erred in failing to direct a verdict of acquittal on the charge of failure to register, second offense because the requirement that Appellant wear a GPS monitor violated the *ex post facto* clauses of the Constitutions of the United States and South Carolina.

Relevant facts

The trial exhibits from the Clerk of Court's file concerning Appellant's January 31, 2012 bench trial revealed that on December 6, 2000, Appellant was sentenced to fifteen years' imprisonment after pleading guilty to criminal sexual conduct with a minor in the first degree pursuant to indictment number 2000-GS-15-0726. R. 16. Additionally, the exhibits revealed that on July 15, 2008, Appellant pleaded guilty to failure to register as a sex offender, first offense and was sentenced to imprisonment for ninety days on July 15, 2008 pursuant to indictment number 2008-GS-15-0320. R. 17

After the grand jury charged Appellant with a second offense of failing to register, Appellant appeared before Judge Russo on January 30, 2012 to waive his right to a jury trial. R. 1. During the hearing, Appellant explained that while serving his time for a charge in 2000, the legislature created a new law for supervised release and conditional discharge for a sex offender. R. 5, lines 3-20; R. 6, lines 16-20. He further explained that another judge had removed him from the program requiring registration in 2008. R. 5, lines 21-23. When Appellant continued to address the matter of community supervision, Judge Russo explained his belief that the requirement to register as a sex offender had nothing to do with any subsequent charges or community supervision. R. 6, line 23 – R. 7, line 8. Appellant contested that registration was never ordered by the judge. R. 7,

lines 12-13. However, later, Appellant stated "I don't care nothing about registering. You want me to register, I'll register. It's just that two year thing. I don't even know it's relevant. I don't know. I'm not contesting the registering thing. I'm contesting that." R. 9, lines 15-19. Later, Appellant clarified that he should suffer only the sanctions under the law in 2000, not the greater sanctions developed while he was in prison, including "GPS monitoring, and all this kind of crazy stuff." R. 11, line 22 – R. 12, line 1; R. 12, line 19 – R. 13, line 16.

At the reconstruction hearing, Patricia Grant, the Clerk of Court for Colleton County testified to having a vague recollection of testifying at Appellant's trial. R. 26, lines 2-9. She "probably provided a certified copy of the record." R. 26, line 10-16. She then identified state's exhibits one and two as being certified copies of the original records of Appellant's sentences. R. 26, line 17 – R. 27, line 4; R. 16-17 Ms. Grant had no further memory of what transpired at Appellant's trial. R. 27, line 5 – R. 28, line 5.

Jay Lemacks, a retired probation and parole agent, recalled Appellant's trial in somewhat greater detail. R. 28, line 20. Lemacks recalled testifying that he had provided Appellant with oral and written notice on the requirement to register. Essentially, he testified that Appellant was instructed to register. R. 29, lines 14-22; R. 30, lines 4-21. Lemacks identified state's exhibits three and four as documents that were used during his trial testimony. Exhibit three was a form called notice of sex offender registry showing Appellant's signature dated September 1, 2011. Exhibit four was a form listing standard sex offender conditions, including the registration requirement. R. 30, line 22 – R. 32, line 2; R. 20 Although Lemacks initially recalled no questions from the trial dealing with

the GPS monitor, he did recall the fact that Appellant was on GPS monitoring at the time. R. 33, lines 16-22.

Lemacks was recalled as a witness by Appellant during the reconstruction hearing based upon the testimony of trial counsel. Lemacks admitted trial counsel asked him questions about the GPS monitoring, but did not recall the specific questions or answers. Although he believed trial counsel asked about the weight and dimensions of the GPS monitoring device, Lemacks was not sure of the answers. R. 67, lines 5-25. He did not recall Judge Russo making any specific rulings concerning the GPS monitor. R. 69, lines 3-12.

Ray Taylor, a sergeant with the Sheriff's Office, testified that he oversaw the sex offender registry for the Sheriff at the time of Appellant's trial. R. 35, lines 5-18. Taylor recalled testifying that he had received forms from Lemacks indicating that Appellant was required to register within a day of being released. In other words, Appellant, who was released on September 1, 2011, was required to register by September 2, 2011. Taylor claimed he made several attempts to contact Appellant without any success. When Appellant had not registered by September 26, 2011, Taylor obtained a warrant for Appellant's arrest. R. 36, lines 5-14; R. 39, lines 12-23.

Appellant's trial counsel, John D. Bryan, "moved for a directed verdict on the grounds that the GPS monitoring made this requirement unconstitutional, that it was a violation of the ex post facto clauses of the state and federal constitutions, the federal constitution coming in through the [Fourteenth] Amendment." R. 45, lines 3-13. Trial counsel submitted a two-page brief in support of his argument. R. 45, lines 1-4. This brief was admitted as an exhibit during the reconstruction hearing. R. 87-88 According

to trial counsel, Judge Russo denied the motion for directed verdict. Trial counsel recalled that Judge Russo acknowledged that GPS monitoring was a restraint on Appellant, but such restraint did not "arise to the level of an ex post facto violation." R. 46, lines 11-17.

Trial counsel recalled the prosecution asked Appellant if he had been convicted of the sex offense and if he had failed to register. He further recalled that Appellant "in a roundabout way, admitted it." R. 48, lines 1-6. At the conclusion of the defense case, trial counsel renewed his motion for directed verdict based upon the same legal argument. The trial judge again denied the motion. R. 48, lines 10-18.

Appellant's memory of the trial was somewhat more vivid than the other witnesses, as would be expected. Appellant recalled a challenge to the sufficiency of the indictment occurring during a pretrial hearing. However, the trial judge never ruled on the motion. R. 53, line 21 – R. 54, line 16. Additionally, Appellant recalled a motion to exclude any prior convictions that were older than ten years. Ultimately, the prosecution agreed to use only convictions less than ten-years old. R. 55, lines 3-22.

Also, Appellant recalled a motion concerning relieving Appellant from community supervision. R. 56, lines 4-14. According to Appellant, Lemacks testified that Appellant had served the entirety of his sentence and the Honorable Perry Buckner had determined that Appellant was no longer required to serve community supervision. This matter was relevant because Appellant was required to register as a sex offender both as a result of his conviction and as a result of community supervision. R. 58, lines 2-24; R. 59, lines 4-17. Appellant's testimony at trial included his assertion that he was not required to register as a sex offender at the time he was convicted of the sex offense.

This was a basis for his argument that requiring him to register violated the ex post facto clause. R. 60, lines 1-25. Appellant also recalled his trial counsel arguing the GPS monitor was unconstitutional. R. 61, lines 4-13. However, unlike trial counsel, Appellant recalled Judge Russo granted the motion concerning the GPS monitor. R. 61, lines 13 – 21.

Later, Appellant recalled the prosecutor asking him if he received the notice to register as testified to by Lemacks. Appellant responded that he reviewed the paperwork with Lemacks and informed Lemacks of his disagreement with the applicability of the registration requirement to him. Lemacks insisted that Appellant sign the document despite his insistence that the registration requirement was inapplicable to him.

During the sentencing proceeding, Appellant informed Judge Russo that he had been falsely imprisoned. Although Appellant admitted to having participated in "gang banging" previously, he had turned his life around. R. 62, line 15 – R. 63, line 15. According to Appellant, Judge Russo relieved him from community supervision, but sentenced him to one-year incarceration. R. 63, line 18 – R. 63, line 24.

Discussion

The United States Constitution provides "[n]o bill of attainder or ex post facto Law shall be passed." U.S. Const. Art. I, § 9. The United States Constitution limits the abilities of states to do likewise: "No state shall … pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." U.S. Const. Art. I, § 10. Similarly, the South Carolina Constitution provides "[n]o bill of attainder, ex post facto law, law impairing the obligation of contracts, nor law granting any title of nobility or hereditary emolument, shall be passed, and no conviction shall

work corruption of blood or forfeiture of estate." S.C. Const. Art. I, § 4. These clauses prohibit the enactment of any law that imposes a punishment for an act that was not punishable at the time the act was committed or imposes additional punishment to what was then prescribed. Weaver v. Graham, 450 U.S. 24, 28 (1981); Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs., 377 S.C. 489, 501, 661 S.E.2d 106, 113 (2008). "The purpose of an ex post facto clause is to prevent lawmakers from passing 'arbitrary or vindictive legislation.'" State v. Bryant, 382 S.C. 505, 510, 675 S.E.2d 816, 819 (Ct. App. 2009)(quoting Miller v. Florida, 482 U.S. 423, 429 (1987)).

The United States Supreme Court set forth four general categories of laws that violate the ex post facto clause of the United States Constitution:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Calder v. Bull, 3 U.S. 386, 390 (1798). A law violates the ex post facto clause when it applies to events that occurred prior to its enactment and the offender of the law is disadvantaged by it. State v. Walls, 348 S.C. 26, 30, 558 S.E.2d 524, 525 (2002); see also State v. Huiett, 302 S.C. 169, 171, 394 S.E.2d 486, 487 (1990). However, "[a] change in the law does not run afoul of the ex post facto clause if it only affects a mode of procedure and does not alter 'substantial personal rights.'" Bryant, 382 S.C. at 511, 675 S.E.2d at 819. To implicate the ex post facto clause, the statute at issue must be criminal or penal in purpose and nature. Id.

At the time of Appellant's conviction for criminal sexual conduct with a minor in the first degree, the Sex Offender Registry Act contained no requirement for certain individuals on the registry to be monitored with an electronic monitoring device. However, the Act was amended in 2005 to provide for such monitoring. 2005 Act No. 141, § 8. Currently, the statute requires the following:

> Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person for committing criminal sexual conduct with a minor in the first degree ..., the court must order that the person, upon release from incarceration, confinement, commitment, institutionalization, or when placed under the supervision of the Department of Probation, Parole and Pardon services shall be monitored by the Department of Probation, Parole and Pardon services with an active electronic monitoring device.

S.C. Code Ann. § 23 – 3 – 540 (A). Additionally, the statute requires the following concerning electronic monitoring:

> A person who is required to register pursuant to this article for committing criminal sexual conduct with a minor in the first degree ..., and who violates a term of probation, parole, community supervision, or a community supervision program must be ordered by the court or agency with jurisdiction to be monitored by the Department of Probation, Parole and Pardon services with an active electronic monitoring device.

S.C. Code Ann. § 23 – 3 – 540 (C).

In Walls, the South Carolina Supreme Court addressed whether the Sex Offender Registry Act violated the ex post facto clause. In 1973, Walls was convicted of assault with intent to ravish. However, in 1998 he was serving a prison sentence on an unrelated conviction. When he was released, the Department of Corrections notified Walls that he would be required to register as a sex offender as a result of his 1973 conviction. Walls failed to register, was convicted of such failure, and received a sentence of ninety days' imprisonment. Walls, 348 S.C. at 28-29, 558 S.E.2d at 525. Addressing Walls' claim

that the Act violated the ex post facto clause, the Court held the Act was retroactive because it applied to events occurring prior to its enactment. Specifically, the Act applied to Walls, whose offense occurred in 1973. Id. at 30, 558 S.E.2d at 526. However, the Court determined the Act was "not so punitive in purpose or effect as to constitute a criminal penalty." Thus, the Act did not violate the ex post facto clauses of the state and federal constitutions. Id.

Using the analysis of Walls, it is clear the requirement of electronic monitoring of Appellant violates the first prong of the ex post facto analysis in that it applies retroactively. Appellant was convicted in 2000 of the triggering offense; however the requirement of electronic monitoring was not established until 2005.

The question then is whether the statute is penal or criminal in its purpose and nature so as to violate the second prong of the analysis. Our Supreme Court examined this issue in In the Interest of Justin B., 405 S.C. 391, 747 S.E.2d 774 (2013). The Court initially examined the legislative intent and determined that nothing on the face of the statute suggested "that the General Assembly sought to create anything other than a simple scheme designed to protect the public from harm, or that the electronic monitoring requirement [was] incompatible with prior judicial determinations regarding restrictions placed on sex offenders." Id. at 405, 747 S.E.2d at 781. Additionally, the Court found that the statute was not so punitive in effect as to negate the intention to deem in civil. Id. The Court explained, "[e]lectronic monitoring is not similar to those sanctions historically regarded as punishment." Id. at 405, 747 S.E.2d at 782. In comparing the lifetime registration requirement for sex offenders, which the Court had previously determined was non-punitive, the Court explained that electronic monitoring did not

provide the same broad public dissemination of the sex offender's status. The Court concluded "it does not logically follow that this Court can deem this prophylactic and non-invasive mechanism punitive." Id. at 406, 747 S.E.2d at 782. According to the Court, the electronic monitoring requirement imposed no affirmative disability or restraint on the person being monitored. Id.

Turning to the commonly accepted traditional aims of punishment, retribution and deterrence, the Court found the electronic monitoring requirement did not promote punishment to the exclusion of the provision's civil goals. The Court further found that the electronic monitoring requirement may deter sex offenders from reoffending, and therefore supported the civil purposes of protecting communities and aiding enforcement in conducting investigations. As such, deterrence served both criminal and civil goals. Id. at 407, 747 S.E.2d at 782. Next, the Court explained that the electronic monitoring scheme bore a clear and rational connection to a non-punitive purpose, which was to "'promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens,' and to 'protect communities, conduct investigations, and apprehend offenders.'" Id. Based upon this 2013 decision, Appellant's argument that the electronic monitoring requirement violated the ex post facto clause would likely fail.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of December, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County
Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JIMMY LEE DUNCAN,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jimmy Lee Duncan states:

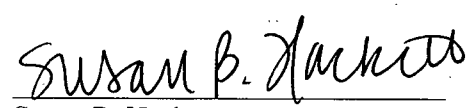
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's motion for bench trial before Judge Thomas A. Russo, which was held on January 30, 2012, and reconstruction hearing held before Judge Thomas W. Cooper, Jr., and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Jimmy Lee Duncan.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of December, 2013.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Transcript dated January 30, 2012;
(2) State's exhibits # 1, 2, 3, 4;
(3) Reconstruction hearing dated October 28, 2013;
(4) Defendant's exhibits # 1 and 2
(5) True–billed indictment(s) and sentence sheet;

I certify that this designation contains no matter which is irrelevant to this appeal.

December 17th, 2013

Susan B. Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 17th, 2013

Susan B. Hackett

Susan B. Hackett
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Jimmy Lee Duncan, at 2290 Old Hwy. # 6, Cross, SC 29436 this 17th day of December, 2013.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of December, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.