

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APR 16 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ANDREW JAMES HARRELSON,

APPELLANT

APPELLATE CASE NO. 2011-187406

Appeal from McCormick County

R. Knox McMahon, Circuit Court Judge

Opinion No. 2014-UP-156

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on April 2, 2014. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, Appellant submits the following:

Harrelson raised on appeal the issue that the circuit court erred in imposing lifetime global position monitoring (GPS) pursuant to S.C. Code Section 23-3-540 in Harrelson's guilty plea to

lewd act¹ on a minor when 23-3-540 violated the constitutional prohibition against cruel and unusual punishment and disproportionate sentencing as contained in the Eighth Amendment and the South Carolina Constitution.

The Court of Appeals ruled that a party must have a contemporaneous and specific objection to preserve an issue for appellate review; a defendant is required to raise the issue before the plea court and also obtain a ruling on it to preserve the issue; and Section 23-3-540 does not violate the Eighth Amendment because GPS monitoring is a non-punitive civil remedy.

The Court of Appeals misapprehended the issue as the record reflects that the issue was preserved by plea counsel.

Appellant Andrew James Harrelson pled guilty to first degree criminal sexual conduct, lewd act on a minor, third degree criminal sexual conduct and assault, and battery of a high and aggravated nature during the February 2009 term of the McCormick County General Sessions Court before the Honorable William P. Keesley, Judge. Appellant was sentenced to commitment within the South Carolina Department of Corrections Youthful Offender Division for an indeterminate period not to exceed six years and placement upon electronic monitoring per South Carolina Code Ann. §23-3-540. His attorney filed a notice of appeal which was perfected by the Office of Appellate Defense. On November 8, 2010, the South Carolina Supreme Court issued an opinion remanding Harrelson's case finding that his guilty plea was conditional because his attorney objected during the guilt phase. State v. Harrelson, Op. No. 2010-MO-030 (filed November 8, 2010).

In State v. Harrelson, Id., the Supreme Court ruled that Harrelson's guilty plea was conditional because his attorney made the constitutional objection during the guilt portion of the

¹ The 2012 Amendment to S.C. Code Section 23-3-540 substituted criminal sexual conduct with

hearing before the guilty plea was accepted. The Court wrote: “By objecting during the guilt portion of the hearing as opposed to just during the sentencing phase, Harrelson’s plea became conditional.” The Court vacated Harrelson’s first guilty plea in 2009 and remanded for further proceedings.

On February 22, 2011, Harrelson appeared before the Honorable R. Knox McMahon and entered a guilty plea to lewd act on a minor. Harrelson waived presentment to the grand jury. R. 55; R. 57, ll. 1 – 25; R. 58, ll. 1 – 10. Judge McMahon sentenced Harrelson to the recommended sentence pursuant to the Youthful Offender Act not to exceed six years suspended to five years probation; sex offender registration; and mandatory G.P.S. monitoring. R. 79, ll. 5 – 22. Harrelson appealed the GPS monitoring.

ISSUE: On August 11, 2007, Andrew Harrelson, at the age of sixteen, went on a church outing which involved swimming at a local lake. R. 71, ll. 9 – 18. During swimming, a young girl approximately eight years old did not want to touch the bottom of the lake so Harrelson carried her into the deeper water. During this time, he allegedly reached inside her bathing suit and placed his finger into her vagina. Medical exams confirmed redness in her vaginal area. During a later statement, Harrelson admitted touching the girl inappropriately but was not sure there was penetration. R. 71, ll. 19 – 25; R. 72, ll. 1 – 21.

At his guilty plea, Harrelson admitted to the inappropriate touching, but not to penetration. He pled guilty only to the lewd act charge. R. 68, ll. 16 – 21.

After the plea judge accepted the guilty plea, Harrelson’s attorney offered mitigation in favor of Harrelson. R. 73, ll. 8 – 25; R. 74, ll. 1 – 25; R. 75, ll. 1 – 15. Plea counsel then raised an objection to the electronic monitoring and registration. Counsel’s objection was as follows:

As to the sentence, Your Honor, I would wish to preserve Mr. Harrelson’s rights. As this Court indicated in the appellate decision,

a minor third degree for committing a lewd act upon a child under the age of sixteen.

they didn't reach the merits of whether or not Section 23-3-540 violates the Constitution's prohibition against cruel and unusual punishment and disproportionate sentencing. As to the electronic monitoring and registration provision of the sentence, Your Honor.

R. 75, ll. 16 – 24.

Plea counsel explained to the court that the appellate court ruled that the first guilty plea was a conditional plea because defense attorney objected during the guilt phase. The appellate court ruled that a guilty plea consisted of two phases: the guilt phase and the sentencing phase. Counsel said the appellate court relied on the case of Easter v. State, 355 S.C. 79, 584 S.E.2d 117 (2003) which held that the defendant's guilty plea was not conditional because Easter's attorney objected during the sentencing phase. Counsel said he was trying to follow the procedure as described in Easter v. State, id. The state agreed that counsel was following the correct procedure when there was no conditional aspect to the guilty plea itself. R. 76, ll. 14 – 25; R. 77, ll. 1 – 22.

Defense counsel stated to the court that they had no objection to the plea itself. R. 77, ll. 23 – 25.

The plea judge reiterated the procedure from Easter v. State, id., and that defense counsel had followed the correct procedure to insure that Harrelson's plea on this date was not conditional as counsel objected during the sentencing phase only. R. 78, ll. 4 – 25; R. 79, ll. 1 – 4.

The Court of Appeals misapprehended the issue when the Court ruled that a contemporaneous objection was needed and that the defendant was required to raise the issue before the plea court and obtain a ruling on it. The Record reflects that plea counsel objected on R. 75, lines 22 – R. 76, line 7 by saying immediately following his discussion of the violation by Section 23-3-540 of the Constitution's prohibition against cruel and unusual punishment:

As to the electronic monitoring and registration provision of the sentence, we would state our objection as to that portion of the sentence, Your Honor. I

understand there are four or five other cases similar that are before the Court of Appeals at the present time on the exact same issue.

And just to protect Mr. Harrelson's rights in the event that provision would change, we would state on the record, as far as the sentencing, it is that part of the sentencing. This isn't a conditional plea. He has pled guilty to the offense as charged.

R. 75, ll. 22 – R. 76, ll. 7.

The plea judge then sentenced Harrelson to the GPS monitoring in addition to the normal conditions of probation. R. 79, ll. 11 – 17. This was the judge's ruling on the issue—when he sentenced Harrelson to a YOA sentence, probation and GPS monitoring.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment and does not allow the duration of a sentence to be grossly disproportionate to the severity of the crime. State v. Williams, 380 S.C. 336, 669 S.E.2d 6440 (2008). In Thompson v. Oklahoma, 487 U.S. 815 (1988), the United States Supreme Court held that the two principles in determining whether a punishment is cruel and unusual are the evolving standards of decency and the proportionality between the punishment and the offense, and that in order to establish evolving standards of decency, the defendant must show that our culture and laws would reject a particular sentence. See also State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007); cert denied 128 S.Ct. 1872 (2008), and State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002).

The Thompson v. Oklahoma Court held that the “imposition of a death sentence on one who committed a crime at the age of fifteen would not serve the goals of deterrence or retribution inasmuch as a juvenile is less culpable, has more capacity for growth and is not likely to have performed a cost benefit analysis as to the consequences of his conduct.

In Graham v. Florida, 130 S. Ct. 2011 (U.S. May 17, 2010), the United States Supreme Court held that the Eighth Amendment prohibits the imposition of a life without parole sentence on the juvenile offender who did not commit homicide.

Here, the placement of an electronic monitoring device in effect indefinitely on appellant, who was a mere sixteen years old at the time of the offense, was clearly a sentence that was disproportionate to the crime and cruel and unusual punishment for a youth who had not matured fully nor proved to be hard core and worthy of such harsh punishment at this young age. Harrelson's attorney argued to the court that Harrelson had been evaluated and been found competent. However, Harrelson was found to have impulse disorders and was delayed in his emotional development at the time of the incident when he was only sixteen. R. 74, ll. 1- 24.

The nature of appellant's case must be considered as well. Appellant's case was not a drug case nor a recidivist statute case (LWOP). It has been held that LWOP sentences for drug violations do not offend evolving standards of decency so as to constitute cruel and unusual punishment. State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991); State v. Williams, 380 S.C. 336, 669 S.E.2d 640 (2008). Also, it has been held that LWOP sentencing in and of itself has been held not to be cruel and unusual punishment. State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2000).

The Court's ruling that a thirty-year sentence for twelve-year old did not violate the Eighth Amendment was based on the fact that the defendant committed a double murder with an elaborate and sophisticated cover-up. State v. Pittman, *supra*.

A. S.C. Code § 23-3-540(C) violates the Eighth Amendment's prohibition against cruel and unusual punishment because appellant is required to pay for the imposed monitoring and faces criminal sanctions if not able to comply.

Lifetime GPS monitoring is cruel and unusual punishment because it imposes a financial burden on the person to pay a fee to the state each month to pay the costs of the monitoring. S.C. Code Section 23-3-540(I). The person is subject to criminal sanctions if he fails to pay. S.C. Code Section 23-3-540(K). Harrelson was employed at his parents' MacDonald's Restaurant. He may have difficulty obtaining other employment as he has a criminal conviction, and has to register as a sex offender. R. 74, ll. 18 – 24.

In Moore v. Moore, 376 S.C. 467, 657 S.E.2d 743 (2008), the Supreme Court held that among the implications of having an Order of Protection imposed were a reduction in financial resources and “criminal prosecution or contempt proceedings” for violating the order. Id. at 473 – 474. The Court held that the reduction in financial resources resulting from an Order of Protection issued by the Family Court infringed a constitutionally protected right to property. Id. at 746 – 747.

The Court should find that the requirement to pay a monthly fee or face criminal sanctions pursuant to an order imposing lifetime GPS monitoring constitutes cruel and unusual punishment.

B. S.C. Code Section 23-3-540 constitutes cruel and unusual punishment because it requires mandatory GPS monitoring for someone who commits a lewd act on a minor or CSC with a minor first degree, but makes GPS discretionary for other sex offenses such as CSC with a minor second degree.

Section 23-3-540 classifies sex offenders by the offense they have committed. S.C. Code §§ 23-3-540 (A) through (G). There are two classes: (1) those that commit CSC with a Minor 1st degree or Lewd Act and (2) those that commit any other sex offense. See id. For people, such as

appellant, who fit into the first class, lifetime GPS monitoring is mandatory. S.C. Code § 23-3-540(A), (C), and (E). Those people who fit into the second class are not ordered to submit to lifetime GPS monitoring unless a court, in its discretion, orders lifetime GPS monitoring. S.C. Code § 23-3-540(B), (D), and (F).

The classification of sex offenders by § 23-3-540 (C) is not reasonably related to protecting the public from those offenders who pose a high risk of re-offending. The statute bases its classification solely on the offense the person was convicted of or adjudicated for. Section 23-3-540 (C) classifies sex offenders based on their underlying offense. The result is that § 23-3-540(C) requires trial courts use different procedures and impose different requirements on sex offenders who pose the same level of risk.

C. The mandatory order imposing lifetime GPS monitoring on appellant pursuant to S.C. Code § 23-3-540 (C) is cruel and unusual punishment because it violates appellant's right to protection against unreasonable, warrantless search and seizure under the Fourth Amendment to the United States Constitution and Article I, Section 10 of the South Carolina Constitution.

Lifetime GPS monitoring of appellant pursuant to § 23-3-540 (C) violates appellant's Fourth Amendment right to be protected from unreasonable searches and seizures. The state will seize appellant in order to permanently attach the GPS device and then will retrieve his location every minute of the day for the rest of his life. Because the state does not have a particularized basis for believing that appellant will commit or has already committed a crime, the imposition of lifetime GPS monitoring is an unconstitutional use of search and seizure for general crime control.

The stated intention of § 23-3-540(C) is to assist law enforcement with the investigation of sex offenses. S.C. Code § 23-3-400 One of the clear intentions of continuous, minute-by-minute monitoring using GPS is to assist law enforcement in its investigation into future, uncommitted sex offenses. The Fourth Amendment does not allow law enforcement to use search and seizure in this way.

The U.S. Supreme Court has held that a state cannot use a program that seizes people when the primary purpose is general crime control. City of Indianapolis v. Edmond, 531 U.S. 32, 37, 121 S.Ct. 447, 451, 148 L.Ed.2d 333 (2000) (“A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”). In Edmond, the Court rejected a highway checkpoint used by the Indianapolis Police Department for the primary purpose of conducting drug interdiction. Id. at 453 – 454. The Court noted that it has “never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.” Id. at 454.

The program created by § 23-3-540(C) is aimed at general crime control. It has no specific basis for investigating a crime that is imminent; all crime is in the future—it might happen. The government cannot provide probable cause that a crime has been committed. It cannot even provide articulable facts that a crime is afoot.

Using permanent GPS monitoring amounts to seizing appellant for the purpose of investigating a future crime without probable cause or reasonable suspicion to believe that he has committed or would even commit the crime. It is like tapping a phone without probable cause or reasonable suspicion because the state “thinks” (but has no evidence) that a person might use the phone to commit a crime.

In Easter v. State, *supra*, the Supreme Court held that there was a guilt phase and a sentencing phase in a guilty plea. Easter's plea was not conditional because he entered his guilty plea, and then objected to the sentence during the sentencing phase.

Harrelson's attorney made it clear to the circuit court that they did not object to the guilty plea, but were objecting to the electronic monitoring which occurred during the sentencing phase which was the correct procedure as described by the South Carolina Supreme Court in State v. Harrelson, Op. No. 2010-MO-030 (filed November 8, 2010). Plea counsel made a clear objection, and the judge ruled against Harrelson when he sentenced Harrelson to GPS monitoring.

WHEREFORE, Appellant respectfully requests this Court to grant his petition for rehearing and reconsider its affirmance of Appellant's conviction and sentence.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

This 16th day of April, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Andrew Harrelson, 441 Sorrell Red Court, Warrenton, SC 29851, this 16th day of April, 2014.

LaNelle Cantey DuRant
LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 16th day of April, 2014.

Janis Hudson (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.