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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENWOOD COUNTY
The Honorable Frank Addy, Circuit Court Judge

S.C. Sup. Ct. Opinion No. 27408
Heard February 5, 2014 – Filed July 2, 2014

THE STATE,

RESPONDENT

v.

ANTHONY NATION,

APPELLANT

Appellant Case No. 2011-199726

RETURN OF PETITION FOR REHARING

The Respondent, the State of South Carolina by and through its attorney does hereby make this return to the Appellant's July 17, 2014 Petition for Rehearing. The State respectfully requests that Appellant's Petition for Rehearing be denied and dismissed.

Pursuant to the Appellant Court Rules a party is only entitled a rehearing if there are points that have been overlooked or misapprehended by the Court. The Respondent contends that the Court has applied the law and has not overlooked nor misapprehended any law or issue that was necessary to make a valid decision in this case.

1) The Court has not misapprehended the facts in the record when it determined that satellite monitoring is civil and non-punitive.

The Appellant argues that GPS monitoring is punitive, and asserts that what makes it punitive is the fact that the tracking device is attached to Appellant's ankle, requires charging, alerts the agency if he enters an exclusion zone, and that there are fees associated with the program.

First, the Appellant appears to confuse the matter of the inclusion/exclusion zones as a part of the GPS tracking program, when in fact those are a part of the restrictions of probation, which uses the GPS to enforce. When an offender is under supervision of the Department, he or she is under various restrictions, including those of travel. For example, a standard condition of probation is to not leave the state without prior approval. Another would be to refrain from entering a business whose sole purpose is the sale of alcohol. Such restrictions are proper, as the offender is still under the supervision and authority of the Department and has not yet completed his or her sentence.

However, when the term of probation ends, the restrictions on travel are lifted, and the former offender is free to leave the state or enter any premises he may lawfully visit. Even with the GPS monitoring pursuant to Jessie's Law, there are no restrictions on travel and no inclusion/exclusion zones he need worry about. Therefore, this Court did not misapprehend the punitive nature of the GPS tracking.

Appellant also points out the cost associated with the device. While there is a fee assessed to offset the cost of the device, the statute includes a provision to reduce or eliminate the cost in cases of indigency. S.C. Code § 23-3-540(K) (Supp. 2010).

Furthermore, this Court examined this question exhaustively in the case *In re Justin B.*, 405 S.C. 391, 747 S.E.2d 774 (2013). In the unanimous decision, this Court determined the GPS monitoring is a civil remedy, and the "practical effects of the remedy are non-punitive." *Id.* at 409, 783.

Accordingly, this matter was properly considered and rejected by the Court, and should not be reconsidered.

2) This Court has not overlooked the changes to the sex offender registry, and has continued to uphold it as a civil requirement.

As a preliminary matter, this question was not raised at the original probation violation hearing, and as such, has not been preserved for review. The original challenge was to the GPS monitoring, not to the sex offender registry itself. Furthermore, the trial court also did not rule on whether the sex offender registry had become punitive.

Regardless, the Appellant fails to acknowledge that the matter of the sex offender registry has appeared since the cases cited in Appellant's motion. The Appellant cited *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002) (holding that the registry was non-punitive and therefore was not a criminal penalty), *Hendrix v. Taylor*, 353 S.C. 542, 579 S.E.2d 320 (2003) (holding that because the registry was non-punitive, it did not implicate a liberty interest), and *In re Ronnie A.*, 355 S.C. 407, 585 S.E.2d 311 (2003) (holding that a juvenile can be placed on the registry). Then Appellant listed changes in the law that have occurred since those cases.

The most recent cases dealing with this matter – *Justin B.* and *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013) -- have again confirmed, not just the civil nature of the GPS tracking statute, but by extension the registry itself.

3) This Court has addressed and properly applied precedent from the Supreme Court of the United States.

The Appellant suggests that this Court misapplied precedent from the Supreme Court of the United States when reaching its holding. However, the U.S. Supreme Court denied certiorari in the case of *Dykes*. 134 S.Ct. 1937, 82 USLW 3630 (2014). Importantly, the *Dykes* case is factually and procedurally similar to the case at bar, something mentioned by this Court in its opinion.

What's more, the cases that Appellant lists in its Motion are examples of other states' courts finding their *sex offender registry* punitive and ex post facto. Again, the issue of the sex offender registry is not before this Court, not having been raised at the trial level. Furthermore, the sex offender registry was in existence during the time of Appellant's offense and conviction.

Upon addressing the GPS monitoring, Appellant has far fewer cases on which to rely. Appellant asks this Court to rule the same as the Massachusetts Supreme Court in *Commonwealth v. Cory*, 454 Mass. 559, 911 N.E.2d 187 (2009), which had concluded its satellite monitoring was burdensome and punitive. However, the Massachusetts law is far different from that of South Carolina's. The appellant in *Cory* was required to wear the device and be subject to exclusion zones for the duration of probation, *which was for twenty-five years*. *Id.* at n.6. In South Carolina, as discussed *supra*, the GPS exclusion zones and other restrictions on travel only last for the duration of probation – statutorily limited to a maximum of five years – after which the restrictions are lifted.

4) This Court has properly considered the grounds and reconsideration is not merited.

This Court properly relied upon its recent decisions of *Dykes* and *Justin B.* in considering the matter before it. The factual similarities between this case and *Dykes* are apparent. Both were convicted of Lewd Act upon a Minor and upon willful violations of probation were required to be monitored with a GPS tracking device pursuant to Jessie's Law.

This Court determined that GPS tracking is a non-punitive civil regulation. The primary restrictions of the GPS program, such as the travel restrictions and the imposition of exclusion and inclusion zones, end when the offender's supervision period expires.

This Court has repeatedly refused to find satellite monitoring punitive, properly applying the factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) to the two-step analysis in *United States v. Ward*, 448 U.S. 242, 100 S.Ct. 2636 (1980). Applying *Ward*, this Court has acknowledged Jessie's Law was expressly a civil remedy by being placed under the sex offender registry article. Then this Court applied the seven factors from Mendoza-Martinez to determine the statute was not so punitive in effect to overcome the legislative intent. *Justin B.* at 781-783, 405-408.

As these conclusions were proper, this Court does not need to rehear this case.

CONCLUSION

For the reasons set forth above, the Respondent submits the Appellant's Petition for Rehearing should be denied and dismissed.

Respectfully submitted,

Matthew C. Buchanan
General Counsel

South Carolina Department of Probation
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

ATTORNEY FOR THE RESPONDENT

Columbia, South Carolina
July 28, 2014

THE STATE OF SOUTH CAROLINA
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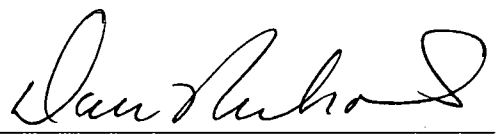
CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that this 28th day of July, 2014, I served the following documents:

1. Return to Petition for Rehearing; and
2. Certificate of Service;

by first class mail, postage prepaid as follows:

Robert Dudek, Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589



Dawn K. Nichols,
Executive Administrative Assistant
S. C. Department of Probation, Parole and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220