

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5244 (S.C. Ct. App. filed June 30, 2014)

Clifford Thompson Petitioner,

v.

State of South Carolina Respondent.

PETITION FOR WRIT OF CERTIORARI

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S.C. Supreme Court

Clifford Thompson
BRC1/274805/Maultrie
4460 Broad River Rd.
Columbia, SC 29210
Pro Se

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 19, 2014.

QUESTIONS PRESENTED

1. Did the lower court commit an error of law in its interpretation of statute in ruling that it is not empowered by S.C. Code § 23-3-430, specifically § 23-3-430 (C)(15) to judicially determine/declare whether or not the evidence represented by the trial transcript of the prosecution's case theory attributing actions to Appellant in Appellant's kidnapping convictions are sexual in nature?
2. Did the lower court commit an error of law in its interpretation of statute in ruling that it is only at the time of the original conviction and sentencing proceedings and it is only the original sentencing judge who is empowered by S.C. Code § 23-3-430, specifically § 23-3-430 (C)(15) to judicially determine/declare whether or not the evidence represented by the trial transcript of the prosecution's case theory attributing actions to Appellant in Appellant's kidnapping convictions are sexual in nature?
3. Did the lower court commit an error of law in ruling that it lacks subject matter jurisdiction to judicially determine the issue of whether or not the trial transcript reflects Appellant's kidnapping offenses are sexual in nature because such judicial determination is exclusively controlled by Al-Shabazz v. State, 527 SE2d 742?

QUESTIONS PRESENTED (CONT'D)

4. Did the lower court commit an error of law and fact in ruling that Appellant's claims are moot and Appellant's declaratory judgment action is an action for writ of mandamus?

STATEMENT OF THE CASE

The Appellant, Clifford Thompson, was convicted on May 2, 2001 by Circuit Judge James E. Lockemy in Berkeley County on four (4) counts of Kidnapping (indictment numbers 00-GS-08-1100, 01-GS-10-3099, 99-GS-32-896 and 00-GS-40-52302) that stem from a multi-county and multi-jurisdictional negotiated plea agreement to armed robbery charges arising from Charleston County, Lexington County, Richland County and Berkeley County. The disposition of the criminal case is outlined in the case State v. Thompson, Case No. 2004-CP-08-1041.

The entire nature of the offenses that the state solicitor's office advanced and the entire evidence the state solicitor's office proffered at the guilty plea proceedings on May 2, 2001 were that the alleged actions of Appellant's use of force that constitutes the four (4) counts of Kidnapping were the force necessary to complete the offense counts of armed robbery in these criminal cases. There are no allegation nor evidence proffered that the Appellant's four (4) Kidnapping convictions are sexual in nature nor that the four (4) Kidnapping convictions have any sexual elements.

The presiding Judge James E. Lockemy did not make a finding on the record whether or not Appellant's four (4) Kidnapping convictions are sexual in nature or have sexual elements. The Judge James E. Lockemy

is no longer a circuit judge but is now a sitting Court of Appeals judge, the lower court R. Markley Dennis, Jr. took note and acknowledged this fact.

The Appellant filed a Petition for Declaratory Judgement on September 11, 2009. The Respondent State of South Carolina filed Answer and Motion to Dismiss in reply to Appellant's petition. Appellant filed Reply to Respondent's Answer and Motion to Dismiss. A hearing was held in the Berkeley County Court of Common Pleas on November 18, 2009 before Judge R. Markley Dennis, Jr. Appellant Thompson engaged Judge Dennis and respectfully put the Judge Dennis on notice that Thompson timely submitted an Answer to Respondent's Motion to Dismiss prior to the convening of the November 18, 2009 hearing. The Judge Dennis did not acknowledge actual receipt of the Answer to Respondent's Motion to Dismiss and Judge Dennis did not incorporate the Answer to Respondent's Motion to Dismiss into the record of this case under his order. Judge Dennis, Jr. dismissed the Petition for Declaratory Judgement. Appellant Thompson timely filed a Rule 59 (e) Motion to Judge Dennis, Jr. on March 23, 2010. Judge Dennis, Jr. denied the Rule 59 (e) Motion. Appellant timely filed Notice of Appeal in this case.

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The Appellant filed the final brief to the Court of Appeals on July 21, 2011. The Court of Appeals filed its Opinion No. 5244 in this case on June 30, 2014 affirming the decision of the lower court. The Appellant timely filed a Petition for Rehearing on July 14, 2014. The Court of Appeals issued an order filed August 19, 2014 denying the Petition for Rehearing. This Petition for Writ of Certiorari now timely follows.

ARGUMENTS

1. THE COURT OF APPEALS SHOULD NOT HAVE REVIEWED, CONSIDERED NOR MADE DETERMINATIONS OF FACTS BASED UPON EVIDENCE WHICH DO NOT APPEAR IN THE RECORD ON APPEAL.

The honorable Court of Appeals noted in footnote number 3 of its Opinion No. 5244 submitted September 1, 2013 and filed June 30, 2014 that:

- (1) it determined as a matter of fact that Appellant Thompson is not currently registered on the sex offender registry as of June 30, 2014;
- (2) it determined as a matter of fact that the S.C. Department of Corrections has recently updated its website as of June 30, 2014;
and
- (3) it determined as a matter of fact that the S.C. Department of Corrections' update no longer indicates Appellant Thompson will be required to register as of June 30, 2014.

Each and every one of the three (3) enumerated factual determinations made by the honorable Court of Appeals is based on facts which do not appear in the Record of Appeal in this appellate case. Each and every one of the three (3) enumerated factual determinations made by the honorable Court of Appeals is based on facts that are external to the official submitted Record on Appeal. These three (3) enumerated facts impacted the legal analysis and standard of review of this appeal.

The Court of Appeals is prohibited from considering any fact which does not appear in the Record on Appeal. The S. C. A. C. R. Rule 210 (h) explicitly prohibits this manner of resolving an appeal by expressly stating, "Except as provided by Rule 212 and Rule 208 (b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal." The South Carolina jurisprudence establishes that it is equivalent to court error for an appellate court to consider facts that do not appear in the Record on Appeal. (See Spreeuw v. Barker, 682 SE2d 843 (S.C. App. 2009) (appellate court considering father's challenge to child support award could not consider a fact that did not appear in record); Beverly S. v. Kayla R., 718 SE2d 224, 395 S.C. 399 (S.C. App. 2011) (same); Tobias v. Rice, 665 SE2d 216 (same); Griffin v. Rice, 57 SE2d 69 (same); and Columbia & Greenville R. Co. v. Gibbes, 24 S.C. 60 (same)).

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2. THE COURT OF APPEALS ERRED IN ITS RULING THE ISSUE IS NOT RIPE BECAUSE NO JUSTICIABLE CONTROVERSY EXISTED AT THE CIRCUIT COURT.

The honorable Court of Appeals ruled this case does not present a justiciable controversy because the substance of the statute requiring registration is unknown until an inmate is released from incarceration. (See Byrd v. Irmo High Sch., 321 S.C. 426, 430, 468 SE2d 861, 864 (1996) ("A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." Id at 430-31, 468 SE2d at 864.)).

This erroneous, in that the controversy in this case does not arise from whether or not Thompson must register as a sex offender, but rather whether he should be classified as a sex offender. Undoubtedly, Thompson will not be affected by having to register as a sex offender until he is released from prison since an inmate is not required to register until their release. However, an inmate's classification as a sex offender, which in the case of kidnapping under the current statute is the default when the circuit court fails to make a finding regarding the sexual nature of the kidnapping, could have immediate and harmful ramifications.

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The case Hazel v. State, 377 S.C. 60, 659 SE2d 137 (2008), is distinguishable from the current case because unlike Hazel, where the supreme court faced the question of the applicable statute as to sex offender registration, the instant case deals with the immediate ramifications of being labeled a sex offender. Hazel did not face such ramifications because, as the majority of the Court of Appeal judges note, the sex offender registry did not exist when Hazel pled guilty in 1979. The circuit court erred in finding Thompson failed to present a justiciable controversy and the Court of Appeals erred in affirming the lower court decision.

Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 26, 630 SE2d 474, 477 (2006).

3. THE COURT OF APPEALS ERRED IN ITS RULING THE ISSUE MUST BE ADDRESSED THROUGH ADMINISTRATIVE PROCEEDINGS.

The honorable Court of Appeal erroneously ruled any issue relating to Thompson's classification must be addressed through administrative proceedings. Generally speaking, issues regarding custodial status within the Department of Corrections are administrative in nature and therefore are properly determined before the administrative body. See Al-Shabazz v. State, 338 S.C. 354, 368-69, 527 SE2d 742, 749-50 (2000).

However, classification as a sex offender is not a custodial status; therefore, the current challenge was properly brought before the circuit court. Moreover, even if such a classification is considered a "custodial status," at least in the case of kidnapping, that status is a direct result of the circuit court's finding or failure to make any finding, that the offense was a criminal sexual offense. See S.C. Code § 23-3-430 (Supp 2013).

Thus, any attempt by Thompson to challenge his status as a sex offender through the inmate grievance process would be futile in that the Department of

(13)

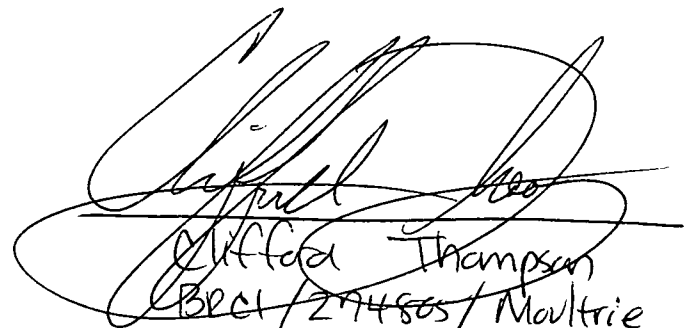
Corrections is bound by the effect of the circuit court's decision, or in this case the circuit court's failure to make any decision, regarding whether Thompson's kidnapping convictions was sexual in nature. Based on the foregoing, the decision of the Court of Appeals must be reversed and remanded because the circuit court erred in finding the instant case does not present a justiciable controversy and that Thompson must institute administrative proceedings to challenge his status as a sex offender.

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CONCLUSION

The decision of the Court of Appeals must be reversed and remanded because the circuit court erred in finding the instant case does not present a justiciable controversy and that Thompson must institute administrative proceedings to challenge his status as a sex offender. For the reasons stated, Petitioner asks the Court to grant the Petition for a Writ of Certiorari.

Date: 18 Sept 2014


Clifford Thompson
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4460 Broad River Rd.
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The South Carolina Court of Appeals

Clifford Thompson, Appellant,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-161446

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John Cannon

C.J.

A. K.

J.

Because I adhere to my dissent, I would grant the petition for rehearing.

Paul W. Thomas

J.

Columbia, South Carolina

cc: Clifford Thompson, 274805
Alan McCrory Wilson, Esquire
John W. McIntosh, Esquire

FILED
2/19/14

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Clifford Thompson, Appellant,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-161446

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5244
Submitted September 1, 2013 – Filed June 30, 2014

AFFIRMED

Clifford Thompson, pro se.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy
Attorney General David A. Spencer, Assistant Attorney
General Geoffrey Kelly Chambers, and Assistant
Attorney General Kristin M. Simons, all of Columbia, for
Respondent.

FEW, C.J.: Clifford Thompson appeals the circuit court's order dismissing his declaratory judgment action. In that action, he sought a declaration that his kidnapping convictions did not include a criminal sexual offense and would not require him to register as a sex offender. Thompson argues the circuit court erred.

in ruling (1) no justiciable controversy existed;¹ (2) it did not have subject matter jurisdiction to change Thompson's prison classification based on *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (1999); and (3) Thompson's claims were moot. We affirm.²

Thompson pled guilty to four kidnapping and six armed robbery offenses in 2001, and the court sentenced him to twenty-five years in prison. At that time, a person convicted of kidnapping was required to register as a sex offender when released from prison "except when the court makes a finding . . . the offense did not include a criminal sexual offense." S.C. Code Ann. § 23-3-430(C)(15) (Supp. 2000); *see also* S.C. Code Ann. §§ 23-3-430(A), -440(1) (Supp. 2000). The sentencing court did not determine whether any of the kidnappings included a criminal sexual offense. Thompson appealed, and this court affirmed all of his convictions except one kidnapping and one armed robbery. *State v. Thompson*, Op. No. 2003-UP-252 (S.C.Ct.App. filed Apr. 3, 2003).

In 2009, Thompson filed this action. We find the circuit court properly determined no justiciable controversy existed and dismissed the action because the question of whether Thompson should be required to register as a sex offender is not ripe for adjudication. *See Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983) ("Before a court may render a declaratory judgment, an actual, justiciable controversy must exist. A justiciable controversy is a real and substantial controversy [that] is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute."). This case does not present a justiciable controversy because the current statutes requiring registration do not contemplate that Thompson will register until he is released from prison.³ *See* S.C. Code Ann. § 23-3-430(A) (2007) ("Any

¹ Thompson presented this issue as two separate issues, but we believe combining them into one enables us to more accurately address the point he raises.

² We decide this case without oral argument pursuant to Rule 215, SCACR.

³ Thompson's projected release date is August 5, 2020, and he is not currently registered on the sex offender registry. Offender Search, S.C. Law Enforcement Div., <http://www.icrimewatch.net/index.php?AgencyID=54575&disc=> (agree to terms and conditions; then follow "Continue" hyperlink; then follow "Name" hyperlink; then search Clifford Thompson's name) (last visited Jun. 30, 2014). Although the record contains a printout from the Department of Corrections'

person . . . who . . . has been convicted of . . . an offense described below . . . shall be required to register pursuant to the provisions of this article."); S.C. Code Ann. § 23-3-430(C)(15) (Supp. 2013) (listing "kidnapping" as an offense requiring registration "except when the court makes a finding . . . the offense did not include a criminal sexual offense"); S.C. Code Ann. § 23-3-440 (1) (2007) ("The Department of Corrections . . . shall provide verbal and written notification to the offender that he must register with the sheriff of the county in which he intends to reside within one business day of his release."). Moreover, "the applicable statute [for determining whether a person must register] is the statute that exist[s] at the time of [that person's] release from prison," and thus it is unknown whether Thompson will be required to register. *Hazel v. State*, 377 S.C. 60, 64, 659 S.E.2d 137, 139 (2008).⁴ Because the law does not require Thompson to register as a sex offender until he is released from prison, and because the sex offender registry statute may be amended between now and Thompson's release, we find the circuit court properly dismissed Thompson's action. Therefore, we do not reach the merits of Thompson's claim.

Thompson's claim will become ripe for adjudication when he is released from prison, if he is then required by law to register. The plaintiff in *Hazel* was convicted of kidnapping in 1979 and released from prison on parole in 2002. 377 S.C. at 62, 659 S.E.2d at 138. "Upon release, he was informed that he would be

website indicating Thompson is to be included in the sex offender registry, the Department of Corrections recently updated its website, and the website no longer indicates Thompson will be required to register. Inmate Search Detail Report, S.C. Dep't of Corr. Incarcerated Inmate Search, <http://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=00274805> (last visited Jun. 30, 2014).

⁴ The sex offender registry statutes have been amended many times since their enactment. See § 23-3-430(C) (enacted by Act No. 497, § 112A, 1994 S.C. Acts 5794-98; amended by Act No. 444, § 16, 1996 S.C. Acts 2684-90; Act No. 384, § 1, 1998 S.C. Acts 2302-2311; Act No. 74, § 1, 1999 S.C. Acts 244-45; Act No. 363, § 2, 2000 S.C. Acts 2444; Act No. 208, § 14, 2004 S.C. Acts 1930-31; Act No. 141, § 2, 2005 S.C. Acts 1608-11; Act No. 212, § 3, 2010 S.C. Acts 1517-19; Act No. 289, § 8, 2010 S.C. Acts 2112-13; and Act No. 255, § 5, 2012 S.C. Acts 2043-45). Many of the amendments have related to the status of kidnapping as a registration-triggering offense. See *Hazel*, 377 S.C. at 63-64, 659 S.E.2d at 139 (analyzing amendments to the sex offender registry statutes and noting kidnapping has been deleted from and added to the list of offenses that require registration).

required to register on the Sex Offender Registry." *Id.* He later filed an action in circuit court claiming he should not be required to register. *Id.* "The court granted [Hazel]'s motion for declaratory judgment and found that [he] is not required to register as a sex offender." 377 S.C. at 63, 659 S.E.2d at 138. The supreme court held the circuit court had jurisdiction to hear the dispute and affirmed. 377 S.C. at 65, 659 S.E.2d at 140. Under *Hazel*, therefore, if Thompson is required upon release from prison to register as a sex offender, he may file a declaratory judgment action at that time to litigate the propriety of the requirement.⁵

As to Thompson's other issues on appeal, the circuit court properly determined any issue relating to Thompson's classification as a sex offender by the Department of Corrections must first be addressed through administrative proceedings. *See Al-Shabazz*, 338 S.C. at 375-78, 527 S.E.2d at 753-55 (noting an inmate must initiate a grievance within the Department of Corrections to challenge his custody status, and holding an inmate can seek judicial review only after the administrative law court has issued a final decision). Thompson also argues the circuit court erred in finding his claims were moot. We do not address this issue because the circuit court did not make such a finding in its order.

AFFIRMED.

KONDUROS, J., concurs.

THOMAS, J., dissenting: The majority maintains the circuit court correctly dismissed this action because no justiciable controversy existed and any issue relating to Thompson's classification as a sex offender by the Department of Corrections must be addressed through administrative proceedings. I respectfully dissent.

⁵ We recognize the sex offender registry, specifically section 23-3-430(C)(15), did not exist when Hazel pled guilty in 1979. Therefore, the sentencing court in *Hazel*, unlike here, did not have the opportunity to determine whether the kidnapping included a criminal sexual offense. The difference is not significant, however, because in both cases the only version of the statute applicable to the requirement for registration is the one in effect on the date of release. *See Hazel*, 377 S.C. at 64, 659 S.E.2d at 139 (holding "[s]ection 23-3-430[(C)(15)] had no effect . . . until [the person] was released from prison").

Initially, I disagree with the majority's position that Thompson failed to present a ripe issue because no justiciable controversy existed at the circuit court. "Before any action can be maintained, there must exist a justiciable controversy." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Id.* at 430-31, 468 S.E.2d at 864. Specifically, the majority maintains this case does not present a justiciable controversy because the substance of the statute requiring registration is unknown until an inmate is released from incarceration. In my view, the controversy in this case does not arise from whether or not Thompson must register as a sex offender, but rather whether he should be classified as a sex offender.⁶ Undoubtedly, Thompson will not be affected by having to register as a sex offender until he is released from prison, since an inmate is not required to register until their release. *See Hazel*, 377 S.C. at 64, 659 S.E.2d at 139 (noting a defendant is not required to register as a sex offender pursuant to section 23-3-430 until the defendant is released from prison). However, an inmate's classification as a sex offender, which in the case of kidnapping under the current statute is the default when the circuit court fails to make a finding regarding the sexual nature of the kidnapping, could have immediate and harmful ramifications.⁷ *See* S.C. Code Ann. § 23-3-430 (Supp. 2013). Accordingly, I respectfully disagree with the majority and would hold the circuit court erred in finding Thompson failed to present a justiciable controversy.

I would also hold the circuit court erred in finding any issue relating to Thompson's classification must be addressed through administrative proceedings. Generally,

⁶ I distinguish *Hazel v. State*, 377 S.C. 60, 659 S.E.2d 137 (2008), from the current case because unlike *Hazel*, where the supreme court faced the question of the applicable statute as to sex offender registration, the instant case deals with the immediate ramifications of being labeled a sex offender. *Hazel* did not face such ramifications because, as the majority notes, the sex offender registry did not exist when *Hazel* pled guilty in 1979.

⁷ While not in the record on appeal, a simple review of the South Carolina Department of Corrections's website reveals an individual with a "current or past sex crime[] conviction" is ineligible for substance abuse services and the "90 Day Pre-Release Program." *See Division of Behavioral Health & Substance Abuse Services*, S.C. Dep't of Corr., <http://www.doc.sc.gov/pubweb/programs/substance.jsp> (last visited June 20, 2014).

issues regarding custodial status within the Department of Corrections are administrative in nature and therefore are properly determined before the administrative body. *See Al-Shabazz v. State*, 338 S.C. 354, 368-69, 527 S.E.2d 742, 749-50 (2000). However, in my view, classification as a sex offender is not a custodial status; therefore, the current challenge was properly brought before the circuit court. Moreover, even if such a classification is considered a "custodial status," at least in the case of kidnapping, that status is a direct result of the circuit court's finding or failure to make any finding, that the offense was a criminal sexual offense. *See* S.C. Code Ann. § 23-3-430 (Supp. 2013). Thus, any attempt by Thompson to challenge his status as a sex offender through the inmate grievance process would be futile in that the Department of Corrections is bound by the effect of the circuit court's decision⁸ regarding whether his kidnapping conviction was sexual in nature. Based on the foregoing, I would reverse and remand because the circuit court erred in finding the instant case does not present a justiciable controversy and Thompson must institute administrative proceedings to challenge his status as a sex offender. Accordingly, I respectfully dissent.⁹

⁸ I use the term "decision" loosely because, as previously noted, pursuant to section 23-3-430(C)(15), the circuit court's failure to make a sex offender determination in the kidnapping context results in the defendant's designation as a sex offender.

⁹ While the majority does not reach the mootness issue, based on the record, I would hold this case is not moot. The majority cites a recent update to the Department of Corrections's website; however, this update is not evidence in the record on appeal. Rather, there is no evidence in the record indicating Thompson is no longer considered a sex offender, and therefore that "a judgment rendered by the court [would] have no practical legal effect upon an existing controversy." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006).