STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GREG J. FLOYD,

APPELLANT

APPELLATE CASE NO. 2014-000143

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the court err in finding Appellant, who was convicted of lewd act upon a child in 2004, was subject to lifetime GPS monitoring pursuant to S.C. Code Ann. § 23-3-540 where he was initially placed on GPS monitoring pending adjudication of a new lewd act charge and not as a result of a probation violation, was acquitted of the new charge by a jury, and where his probation has since expired, particularly where it would be inequitable for Appellant to remain on GPS monitoring?

STATEMENT OF THE CASE

A Clarendon County Grand Jury indicted Appellant at the November 2003 term of General Sessions for lewd act upon a child.[1] R. 64-65. On May 19, 2004, Petitioner pled guilty before the Honorable Doyet A. Early, III. R 66 He was represented by William Ceth Land. The Honorable R. Ferrell Cothran, Jr., who at the time was an assistant solicitor, represented the state. R.66. Judge Early sentenced Appellant to ten years suspended upon the service of six years imprisonment and five years probation. R. 66.

On March 30, 2007, Appellant was released from incarceration after serving his six year unsuspended sentence and placed on probation in Clarendon County. R. 41, l. 18 – 42, l. 6. On November 30, 2009, while still on probation, Appellant was again arrested for lewd act upon a child. R. 42, ll. 7-9. Consequently, the Department of Probation, Parole, and Pardon Services (DPPPS) issued an arrest warrant for Appellant on December 1, 2009 listing Appellant's recent arrest as the only alleged violation. R 1-2.

There was no probation violation hearing held in the Court of General Sessions in response to this warrant. However, on January 11, 2010, a Form 9 Order was signed by the Honorable George C. James, Jr. The order stated there were "no violations at this time," but "due to the alleged community safety issues of the allegations of November 27, 2009, the defendant is hereby placed on GPS monitoring pending adjudication of those charges." R. 43, l. 7 – 44, l. 14; R. 3.

On April 11, 2011, DPPPS issued a second arrest warrant for Appellant alleging he

[1] At the time of Appellant's indictment, S.C. Code Ann. § 16-15-140 codified the crime of "lewd act upon a child under sixteen." S.C. Code Ann. § 16-15-140 (1996). However, the General Assembly later renamed this crime criminal sexual conduct in the third degree and re-codified it in S.C. Code Ann. § 16-3-655(C) (2010).

violated the "terms of the Department's Global Positioning Satellite System (GPS) Monitoring Program." R 4-5. A hearing was held in response to these allegations on May 12, 2011 before the Honorable Howard P. King. R. 8. Jack Swerling represented Appellant at this hearing and Holly Price represented DPPPS. R. 8. Despite expressing concerns whether the GPS monitoring was a valid court ordered condition of Appellant's probation, Judge King found Appellant was in violation of the terms or conditions of his probation, revoked ninety days, continued him on probation, and adopted the GPS monitoring condition that was imposed by DPPPS. R. 20, l. 18 – 22, l. 6; R. 3.

On March 29, 2012, Appellant successfully completed his five year probationary term Despite the expiration of his probation, Appellant remained on active GPS monitoring because his November 30, 2009 charge for lewd act was still pending. In early November 2012, Appellant proceeded to trial and was acquitted by a jury. R. 46, l. 20 – 47, l. 9.

On June 21, 2013, since his November 2009 charge was now adjudicated, Appellant filed a motion to be relieved from active GPS monitoring. R. 25-37. A hearing was held before Judge James on Appellant's motion on November 20, 2013 R. 38 Tommy Evans, Jr. represented DPPPS and Jack Swerling represented Appellant R. 38. By written order dated January 9, 2014, Judge James denied Appellant's motion to be relieved from active GPS monitoring and held Appellant is subject to lifetime GPS monitoring under S.C. Code Ann. § 23-3-540 R. 60-63.

This appeal follows.

ARGUMENT

The court erred in finding Appellant, who was convicted of lewd act upon a child in 2004, was subject to lifetime GPS monitoring pursuant to S.C. Code Ann. § 23-3-540 where he was initially placed on GPS monitoring pending adjudication of a new lewd act charge and not as a result of a probation violation, was acquitted of the new charge by a jury, and where his probation has since expired, particularly where it would be inequitable for Appellant to remain on GPS monitoring.

Relevant Facts

In 2005, after Appellant's guilty plea, but prior to his release from the Department of Corrections, "the General Assembly amended South Carolina's sex offender registration requirements by enacting the Sex Offender Accountability and Protection of Minors Act of 2006." See State v. Nation, 408 S.C. 474, 477, 759 S.E.2d 428, 430 (2014); see also S.C. Code Ann. § 23-3-540 (2005). This statute reads in relevant part:

> (C) A person who is required to register [as a sex offender] pursuant to this article for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or criminal sexual conduct with a minor in the third degree, pursuant to Section 16-3-655(C), 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.
>
> (H) The person shall be monitored by the Department of Probation, Parole, and Pardon Services with an active electronic monitoring device for the duration of the time the person is required to remain on the sex offender registry pursuant to the provisions of this article, unless the person is committed to the custody of the State. Ten years from the date the person begins to be electronically monitored, the person may petition the chief administrative judge of the general sessions court for the county in which the person was ordered to be electronically monitored for an order to be released from the electronic monitoring requirements of this section . . . If the court finds that there is clear and convincing evidence that the person has complied with the terms and conditions of the electronic monitoring and that there is no longer a need to electronically

> monitor the person, then the court may order the person to be released from the electronic monitoring requirements of this section. If the court denies the petition or refuses to grant the order, then the person may refile a new petition every five years from the date the court denies the petition or refuses to grant the order A person may not petition the court if the person is required to register pursuant to this article for committing criminal sexual conduct with a minor in the first degree pursuant to Section 16-3-655(A)(1), or criminal sexual conduct with a minor in the third degree, pursuant to Section 16-3-655(C).[2]

S.C. Code Ann. § 23-3-540 (2011)

On March 30, 2007, upon his release from the Department of Corrections, Appellant began his five year probationary term. In November 2009, while still on probation, Appellant was again charged with lewd act upon a minor. Instead of making it a condition of his *bond*, DPPPS required Appellant be subject to GPS monitoring as a condition of his *probation*. On January 11, 2010, Judge James signed a "Form 9" finding no violation, but indicating that "due to the alleged community safety issues of the allegations of November 27, 2009, the defendant is hereby placed on GPS monitoring pending adjudication of those charges." R. 3. Judge James later explained at the November 20, 2013 hearing, "Typically, I would sign these after the agent, Ms Price, and the probationer would sign the bottom and then if they both signed the bottom, then I signed right above that." However, Judge James acknowledged there was no hearing on January 11, 2010 when he signed the "Form 9." R. 43, l. 7 – 44, l. 14.

Subsequently, on April 11, 2011, Appellant was charged with violating his probation for failing to comply with the terms of the GPS monitoring. Specifically, the state alleged

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[2] The last portion of this subsection which requires lifetime monitoring without judicial review of the risk of reoffending if the person is convicted of committing criminal sexual conduct in the first degree pursuant to Section 16-3-655(A)(1), or criminal sexual conduct with a minor in the third degree, pursuant to Section 16-3-655(C), was found unconstitutional by our supreme court in State v Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013).

Appellant left his home before 8:00 am on Saturday, April 9, 2011 and Sunday, April 10, 2011 without permission.[3] R 4-5. A hearing was held on May 12, 2011 before Judge King. R. 8. Judge King expressed concerns regarding whether the GPS monitoring requirement was a proper court ordered condition of Appellant's probation. He said, "I do have some issue in my mind, Mr. Swerling, I think you can appreciate this as well as to whether that is a court-ordered requirement by that written thing [the Form 9 Order]. There is some authority for the fact that even PSC imposed by the probation department is not a violation if you violate the PSC if it's not implemented by The Court." R. 20, l. 24 – 21, l. 4.

Despite his concerns, Judge King found Appellant in violation of his probation and revoked ninety days "for his leaving those 2 mornings early." R. 21, l. 5 – 20, l. 2. The court also indicated, "I am going to adopt ***the conditions that have been imposed by the department*** on this written sheet attached to - - that he has acknowledged receipt of [the Form 9 Order]. ***And those now become a part of the court order.*** The conditions imposed by the instructions by the Department of Probation, Parole, and Pardon Services now become a part of the court order. And if he violates them, then he has violated a court order and the matter can be brought back before The Court."[4] R. 21, l. 18 – 22, l. 1.

In addition to revoking ninety days, the written order signed by Judge King on May 12, 2011 stated "Reinstate GPS" and "Adopt ***conditions imposed by Probation.***" Notably, the box on the order for "the above named defendant is placed on active electronic monitoring pursuant to §23-3-540 (mandatory if convicted of first degree criminal sexual

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[3] Under the GPS monitoring conditions imposed by DPPPS, Appellant was allowed to leave his residence at 4:00 am Monday through Friday, but was not supposed to leave his residence until 8:00 am on Saturdays and Sundays. R. 12, ll. 19-24.

[4] Presumably, the court is referring to the GPS monitoring requirement placed on Appellant by DPPPS on January 11, 2010.

conduct with a minor or lewd act, discretionary if convicted of any other applicable sex offense against a minor)" was not checked. R. 24. Consequently, it is clear Judge King did not intend for Appellant to be subject to lifetime GPS monitoring under S.C. Code Ann. § 23-3-540 as a result of this alleged violation.

On March 29, 2012, Appellant's five year probationary term ended. However, he remained on active GPS monitoring pending adjudication of the 2009 charge. After Appellant was acquitted at trial on November 7, 2012, he filed a motion with the circuit court to be relieved from active GPS monitoring. R. 25-37.

A hearing was held before Judge James on November 20, 2013 in response to Appellant's motion. Defense counsel told the court, "[M]y argument is basically the equity of the situation since he was placed on GPS monitoring as a result of an arrest, not a violation, that the fact now that [the charge] has been adjudicated in his favor, we're asking the Court as far as the equity of the situation to go ahead and allow him to remove the GPS monitoring." R. 47, l. 20 – 48, l. 1.

Tommy Evans, general counsel for DPPPS, argued, "An individual being on supervision for a lewd act or CSC with a minor in the first degree, upon any violation of probation must be placed on GPS monitoring . . . If Mr. Floyd never violated in May [2011], the monitor would be off in April [2012] once the supervision ended. He wouldn't have to even wait until the actual exoneration of the case [the 2009 charge]." Evans continued, "And it's unfortunate that it was - - it might have been a minor violation, but the statute doesn't say minor or major. It says a violation and once that violation occurs, under statute you must be placed on GPS monitoring . . . If he had abided to the GPS order that this Court

gave him, which was a valid condition placed upon him - - that was an extra condition placed upon him by this Court and he abided to it, then he wouldn't be on GPS now, but he did not do that. He decided to violate probation. Therefore, under the statute there was no choice but [for Appellant] to be placed on [lifetime] GPS monitoring." R. 48, l. 8 – 49, l. 11.

Defense counsel argued Appellant's case "can be distinguished from what the situation Mr. Evans is talking about He [Appellant] was not placed on GPS monitoring because he violated his probation. He was placed on GPS monitoring as a condition of - - or as a result of his arrest and I think that that takes it outside the scope of what Mr. Evans is talking about." R. 50, ll. 19-24.

Lastly, defense counsel explained to the court, "I just wanted you to know that . . . in addition to his having been married March 6th, 2009, he is a truck driver He's a licensed truck driver. He does long-haul and short-haul transports with a tractor trailer for Service Transportation Freight Company out of Cheraw. His wife is an agent with Amtrak They have a five-month-old child He had three years of college for civil engineering at Central Carolina Technical College. And I would ask you to take those matters into consideration. It's a financial burden. They are having a difficult time meeting their other obligations and those of paying for the GPS monitor. That's just an additional factor I'd ask the Court to consider." R. 55, ll. 11-24.

Order

In its order denying Appellant's motion to be relieved from active GPS monitoring, the court stated, "Sections 23-3-540(B) (2005) and 23-3-540(C), whichever applies here, both plainly state that a person who is required to register as a sex offender after having been

convicted of lewd act on a minor and 'who violates a term of probation' must be placed on active electronic monitoring. The statute does not distinguish between minor or serious violations. The statute does not provide for an exception for instances where the condition violated was put in place by a court because of a new charge of which the probationer is eventually found not guilty. By its plain terms, the statute requires GPS monitoring because Mr. Floyd violated a term of probation." R. 60-63.

Furthermore, the court stated, "While the factual and procedural history in this case is certainly unusual, the fact remains that Mr. Floyd fits within the category of those offenders contemplated by 23-3-540. The court concludes that the legislature's intent is upheld by this ruling." R. 60-63.

Discussion

The Court erred in finding Appellant is subject to lifetime GPS monitoring pursuant to S.C. Code Ann. § 23-3-540 due to the alleged violation of his probation as found by Judge King on May 12, 2011.

First, the GPS monitoring requirement imposed by DPPPS on January 11, 2010, subsequent to Appellant's original sentence, was not a valid condition of Appellant's probation. In State v. Archie, 322 S.C. 135, 470 S.E.2d 380 (1996), this Court held DPPPS has no authority to impose additional conditions on an individual's probation regardless of whether DPPPS and the probationer agree on the added conditions because it would be a violation of the doctrine of the separation of powers. Under Archie, the added GPS monitoring condition imposed by DPPPS in this case was an unconstitutional enhancement of Appellant's original sentence regardless of whether Appellant may have agreed to the added condition. Id. at 138, 470 S.E.2d at 382.

Because the GPS monitoring condition imposed by DPPPS was invalid and was the only basis for the alleged violation at Appellant's hearing on May 12, 2011, Appellant should not have been found to be in violation of his probation on that date. Notably, Judge King expressed concerns about whether the active GPS monitoring requirement was a valid condition of Appellant's probation and, due to his concerns, indicated that he was adopting the conditions imposed by DPPPS at the end of the hearing so "if he [Appellant] violates them, then he has violated a court order and the matter can be brought back before The Court." See R. 20, l. 24 – 22, l. 1.

Additionally, it is clear Judge King only intended for Appellant to be subject to GPS monitoring pending adjudication of his 2009 charge because he indicated he was "adopt[ing] the conditions that have been imposed by the department," and the condition imposed by DPPPS on January 11, 2010 was "the defendant is hereby placed on GPS monitoring pending adjudication of [the 2009 charge]." Judge King did not intend for Appellant to be subject to lifetime GPS monitoring. Notably, the box on the order signed by Judge King on May 12, 2011, indicating "the above named defendant is placed on active electronic monitoring pursuant to §23-3-540 (mandatory if convicted of first degree criminal sexual conduct with a minor or lewd act, discretionary if convicted of any other applicable sex offense against a minor)" was not checked. R. 8-9.

If anything, the added requirement Appellant be subject to active GPS monitoring should have been made a condition of Appellant's bond for the new lewd act charge in 2009. It should never have been made a condition of his probation by DPPPS. As argued above, this was an unconstitutional enhancement of Appellant's original sentence for his 2004 lewd act conviction. Archie, 322 S.C. at 138, 470 S.E.2d at 382.

Appellant should have been removed from active GPS monitoring when he was acquitted of the 2009 lewd act charge in early November 2012 since the condition properly adopted by Judge King on May 12, 2011 indicated Appellant was only subject to GPS monitoring "pending adjudication of the" new charge. It did not indicate Appellant was subject to lifetime GPS monitoring. R. 8-9.

Furthermore, this Court should take into consideration the hardship lifetime GPS monitoring causes Appellant. As defense counsel stressed below, it is a financial burden on Appellant, who has a wife and child, to pay for the GPS monitor and meet his other financial obligations. R. 55, ll. 11-24. Additionally, it places significant liberty restraints on Appellant who "does long-haul and short-haul transports with a tractor trailer for Service Transportation Freight Company out of Cheraw." R. 55, ll. 11-24; See Dykes, 403 S C. at 506-507, 744 S.C. at 509 (internal citations omitted).

Due to the fundamental unfairness of these circumstances, this Court should vacate the order of the lower court and find Appellant is not subject to lifetime GPS monitoring pursuant to S.C. Code Ann. § 23-3-540.

CONCLUSION

Based on the foregoing argument, this Court should vacate the order of the lower court and find Appellant is no longer subject to active electronic monitoring.

Respectfully submitted,

Lara M. Caudy

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Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of November, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings"

November 7, 2014

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Tommy Evans, Jr, Esquire, at South Carolina Department of Probation, Parole & Pardon Services, P.O. Box 50666, Columbia, SC 29250, this 7th day of November, 2014.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of November, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires. July 24, 2022 .