STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
The Honorable George C. James, Jr., Circuit Court Judge
Appellate Case No. 2014-000143

RECEIVED
OCT 31 2014
SC Court of Appeals

GREG J. FLOYD, ...APPELLANT

v.

THE STATE, ...RESPONDENT

FINAL BRIEF OF RESPONDENT

Tommy Evans, Jr.
Assistant General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250

ATTORNEY FOR THE RESPONDENT

TABLE OF CONTENTS

Table of authorities....................ii

Statement of issue on appeal....................iii

Statement of the case....................1

Arguments

1. The Court was correct in deciding that due to his prior violation of probation, the Appellant must be placed on a lifetime period of GPS monitoring....................2

2. Since GPS monitoring is mandatory per statute, the fact the Court did not check off the GPS monitoring box in his order is irrelevant....................6

Conclusion....................10

TABLE OF AUTHORITIES

CASES

Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956)....................8

Cooper v. Moore, 351 S.C. 207, 569 S.E.2d 330 (2002)....................8

In the Interest of Justin B., 405 S.C. 391, 747 S.E.2d 774 (2013)....................7

Pachal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)....................8

Rowe v. Hyatt, 321 S.C. 366, 468 S.E.2d 649 (1996)....................8

State v. Archie, 322 S.C. 135, 470 S.E.2d 380 (1996)....................3

State v. Boggs, 388 S.C. 314, 696 S.E.2d 597 (2010)....................8

State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013)....................4,6

State v. Stevens, 373 S.C. 595, 646 S.E.2d 870 (2007)....................4

Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997)....................8

Wilder Corporation v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998)....................6

STATUTES

S.C. Code Ann. §23-3-540(Supp. 2013)....................2,7
S.C. Code Ann. §24-21-430(Supp. 2013)....................3

STATEMENT OF ISSUE ON APPEAL

1. **Did the Court err in determining that the Appellant while on probation for Lewd Act, must be subject to lifetime GPS monitoring due to a violation of probation?**

STATEMENT OF THE CASE

On May 19, 2004, the Appellant appeared before the Honorable Doyet Early, III for the offense of Lewd Act upon a minor. Upon conclusion of this appearance, Judge Early sentenced the Appellant to a ten (10) year period of incarceration, suspended upon the service of six (6) years with five (5) years probation. (R.p.64-p.66). After the Appellant completed serving his sentence he was released from the Department of Corrections, and placed on probation. On November 27, 2009, the Appellant was arrested for the offense of Lewd Act upon a minor. As a result of this arrest a citation was issued. (R.p.1-p.2). The matter was then brought to the attention of the Honorable George C. James, Jr., who decided to add Global Position Satellite (GPS) monitoring as a condition of the Appellants probation. (R.p.3).

On April 11, 2011, the Appellant was served an arrest warrant due to a violation of probation. (R.p.4-p.5). It was alleged that the Appellant was out of place on three (3) separate occasions. A violation hearing was held before the Honorable Howard P. King, present was the Appellant represented by counsel, and agent Holly Price. At the conclusion of this hearing, Judge King found the violations willful, and decided to revoke ninety (90) days, reinstate GPS monitoring, and continue probation.(R.p.24). The Appellant completed his probation in April of 2012. Due to his previous violation of probation, pursuant to the Sex Offender Accountability and Protection of Minors Act of 2006, otherwise known as Jessie's law, the Appellant was placed on GPS monitoring. On November 7, 2012, the Appellant was brought to trial for the pending lewd act on a minor offense, and was found not guilty.

As a result of this not guilty verdict, the Appellant filed a motion to be removed from the GPS monitoring program. R.p. 25-p.37). On November 20, 2013, all parties regarding this matter appeared before the Honorable George C. James, Jr. (R.p38). During this hearing, the Appellant

argued that since he was exonerated of the offense that caused him to be placed on GPS monitoring, the monitor should be removed. The Respondent argued that pursuant to South Carolina law a person being supervised for the offense of lewd act upon a minor, must be placed on a lifetime period of GPS monitoring upon the violation of probation. Since the Appellant was found in violation of probation, the placement of a GPS monitor is mandatory.

On January 9, 2014, Judge James issued his order denying the motion of the Appellant. He ordered that the Appellant is to remain on GPS monitoring for the remainder of his natural life. (R.p.60-p.63). Upon receiving Judge James' decision the Appellant decided to file a notice of appeal before this Court. Within this appeal the Appellant argues that the Court erred in denying his motion to be relieved of GPS monitoring. It is his position, that being found not guilty of the underlying offense should relieve him of GPS monitoring. The Respondent will argue that due to his probation violation, the Court does not have a choice but to place the Appellant on a lifetime period of GPS monitoring. The brief of the Respondent defending their position follows.

ARGUMENTS

1. The Court was correct in deciding that due to his prior violation of probation, the Appellant must be placed on a lifetime period of GPS monitoring.

The Appellant argues that the Court erred in ordering that the he must remain on GPS monitoring upon his violation of probation. The Appellant was initially placed on probation on May 19, 2004, prior to the creation of Jessie's Law. The South Carolina Code of Laws specifically state:

> An offender who violates a term of probation, parole, community supervision, or a community supervision program must be ordered by the court to be placed by the Department of Probation, Parole and Pardon Services under a system of active electronic monitoring that identifies the location of the offender and that can produce, upon request, reports or records of the offender's presence near or within a crime scene or prohibited area or the offender's departure from a

specified geographic location. S.C. Code Ann. §23-3-540(Supp. 2013)

The Appellant was arrested for the offense of Lewd Act on a minor, due to this arrest the Department issued a citation to bring to the Court attention that the Appellant could possibly be a community safety risk. The Department requested that GPS monitoring be added as a condition. The Honorable George C. James, Jr. agreed and decided to add GPS monitoring as a condition of the Appellant's current probation. It is well within the Courts authority to add this condition to his probation. The court may impose by order duly entered and may at any time modify the conditions of probation and may include among them any of the following or any other condition not prohibited in this section. S.C. Code Ann. §24-21-430 (Supp. 2013). Once this condition was ordered the Department added the condition of a curfew, and inclusion zones as part of this monitoring.

Within his brief the Appellant cites the case of *State v. Archie*, 322 S.C. 135, 470 S.E.2d 380 (1996), which the Supreme Court ruled that the Department could not impose additional conditions to probation. In *Archie*, the Court deemed that any Department added condition was a violation of the separation of powers. In 1996 the General Assembly added to the statute that, the Department can "enhance but must not diminish court imposed conditions." S.C. Code Ann. §24-21-430 (Supp. 2013). This Constitutional problem was then eliminated by this 1996 amendment. *State v. Stevens*, 373 S.C. 595, 646 S.E.2d 870 (2007).

In *Stevens*, the Supreme Court determined that the amendment of the statute did give the Department the ability to enhance only conditions that were already ordered by the Court. The Court added the condition of GPS monitoring, the added conditions of a curfew, and inclusion

zones are completely legal pursuant to *Stevens*.[1] Since the Appellant failed to abide to the order of the Court, the warrant for his arrest and his subsequent revocation of probation was perfectly legal.

In *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013), the South Carolina Supreme Court decided that,

> Statutory requirement that certain child sex offenders submit to satellite monitoring upon their release from incarceration or violation of their probation or parole does not violate due process; the requirement is rationally related to the General Assembly's stated purpose of protecting the public from sex offenders and aiding law enforcement. *Dykes,* at 508.

So it has been determined by the Supreme Court that the automatic placement on GPS monitoring is a protective measure created by the legislature and not a form of punishment. It was legal to place this measure upon the Appellant during his term of probation. The Appellant argues that this condition should have been made as a condition of his bond. Making this a bond requirement is not part of the Department responsibilities. The Department does have the authority to request the Circuit Court to add this as a condition to his probation. This request was made for community safety and not as a continuation of punishment. This requirement could have been easily rejected by Judge James; however, Judge James decided to agree with the Department and include this as an additional condition. Since this condition was rightfully added by the Court, it is the responsibility of the Appellant to abide to this condition. He failed to abide to the condition however minor, this automatically places him on GPS monitoring. He would remain on the monitor as long as he is on the sex offender registry, which will be the remainder of his natural life.

---

[1] We agree with DPPPS that the statutory change authorizes it to create policies and procedures which implement and support "**conditions of supervision** on probationers" *Stevens*, at 598 (emphasis in original)

Within his brief the Appellant argues that the Department unlawfully enhanced the conditions of his probation. They interjected the statement of Judge King expressing concerns regarding whether the GPS monitoring a proper court ordered condition. It is the opinion of the Appellant that the Department imposed on its own GPS monitoring. That condition was added through an order of the court. The Form 9 is an order signed by a Circuit Court Judge adding the condition of GPS monitoring. The extra conditions added is allowed pursuant to the *Stevens* decision. The fact that Judge King made statements as to his not being sure that the condition was allowed, is a mistake made by the Court. This was a perfectly allowable addition to his current conditions due to the pending charges making him a community safety risk.

At the conclusion of the revocation hearing Judge King determined the Appellant willfully violated this condition, being out of his home at 4:52 am when he had a curfew of 8:00 am. The Court found this violation willful; therefore, he revoked ninety (90) days and continued him on probation, with a reinstatement of GPS. The determination that his violation of probation was willful, triggered the lifetime GPS monitoring pursuant to Jessie's law.

The Appellant attempts to argue that pursuant to *Archie* the addition of GPS monitoring was unlawful, being a violation of the separation of powers. This addition of GPS was made by Judge James and not the Department. That is the reason the Department decided to bring the possible community safety risk to the attention of the Court. The Department realizes it is against the separation of powers to add conditions unless it is done upon an order of a Circuit Court Judge. Once GPS was ordered by Judge James, other conditions could be added to assure this condition would be honored, and the Appellant would not be a risk to the community. If the Appellant did not violate, once his probation expired he would no longer be on GPS monitoring. Once he was

found in willful violation, he automatically he had to be placed on a lifetime period of GPS monitoring.

Even though GPS monitoring is required, the Appellant has the ability to petition the Court for removal upon being on the monitor for a period of ten (10) years. The availability to petition the Court was not always available to an individual convicted of Lewd Act. This was changed pursuant to the *Dykes* decision. In *Dykes,* the South Carolina Supreme Court ruled:

> Statue mandating lifetime satellite monitoring of certain child sex offenders without judicial review related to an assessment of an individual's risk of reoffending is arbitrary and fails the rational relationship test, such that it violates due process; lack of risk assessment is not rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending. *Dykes,* at 510.

The Appellant does have an avenue for the GPS monitor to be removed from his person. The lower Court was correct in denying the Appellant's motion to have an order removing the monitor. Due to the Appellant's failure to abide to the conditions lawfully applied by the Circuit Court, this Court should affirm the denial of the Appellant's motion.

2. Since GPS monitoring is mandatory per statute, the fact the Court did not check off the GPS monitoring box is irrelevant.

The Appellant argues that Judge King failed to check the box ordering mandatory lifetime GPS monitoring, so he should be allowed to be released from the GPS requirement. This argument was never raised before the lower court so it is not preserved for appellate review. It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellant review. *Wilder Corporation v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998).

Even if the Court decides to review this issue, GPS monitoring is mandatory and must be applied to the Appellant. The South Carolina Code of Laws specifically state: "An offender who

violates a term of probation, parole, community supervision, or a community supervision program, *must be ordered by the court* to be placed by the Department of Probation, Parole and Pardon Services under a system of active electronic monitoring" S.C. Code Ann. §23-3-540 (B)(Supp. 2013)(emphasis added). The use of the word "must" in the above sentence indicates that the monitoring via an active electronic monitoring device or GPS by the Department is mandatory for the Appellant's crimes.

When one examines the entire scope of §23-3-540, it is clear that the legislature intended for offenders who are found guilty of lewd act against minors be required to register on the sex offender registry, and be monitored via an active electronic device. Section 23-3-540(H) states:" 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." (emphasis added) The South Carolina Supreme Court noted the requirements of electronic monitoring for individuals convicted of sex-related offenses such as those committed by the Defendant pursuant to Section 23-3-540. See, *In the Interest of Justin B.* 405 S.C. 391, 747 S.E.2d 774 (2013) where "the Court held that ... other similarly situated sex offenders [like the Defendant], must comply with the monitoring requirement *mandated* by §23-3-540(C)," *Id.*, at 783 (emphasis added)

The mandatory statute outweighs whether any box is checked on the sentencing sheet. It is the opinion of the Appellant that because Judge King did not check the box he did not wish the Appellant to be placed on GPS monitoring, we disagree. If Judge King did not wish the Appellant to be placed on GPS monitoring, he would not have found the violation willful, and continued him on probation. It could have been easily an oversight by the Court as to why the box remained

unchecked. Even if the Appellant is correct and Judge King did not wish for the Appellant not to be placed on GPS monitoring, the requirement is mandatory. In *State v. Boggs*, 388 S.C. 314, 696 S.E.2d 597 (2010), this Court reversed a plea judge's decision not to check a box on a sentencing sheet that would not have given an Appellant credit for time served. In doing this, this Court noted that the Judge's decision was an error of law as the statute mandated that the Appellant receive credit for time served. *Id.*, at 599. In the same vein, the mandatory language of the statue was correctly applied in this case to ensure that no error of law occurred.

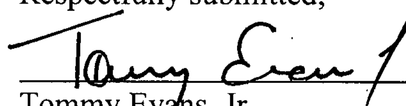
It is obvious, the intent of the Legislature is for a person currently on supervision for lewd act, upon a determination of a willful violation, be placed on GPS monitoring. The Court has no authority to evade this order, it is mandatory. If the terms of a statute is obvious, as this is, it must be followed and another meaning cannot be interpreted by the Courts. South Carolina Courts have numerously held that it must follow the intent of the legislature. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. *Rowe v. Hyatt*, 321 S.C. 366, 468 S.E.2d 649 (1996). Court should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). A law must be interpreted reasonably and practically, consistent with the purpose and policy of the General Assembly. *Abell v. Bell*, 229 S.C. 1, 91 S.E.2d 548 (1956). If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rule of statutory interpretation, and the court has no right to look for, or impose another meaning. *Pachal v. State Election Comm'n,* 317 S.C. 434, 454 S.E.2d 890 (1995). When the terms of a statute are clear, the court must apply those terms according to their literal meaning. *Cooper v. Moore,* 351 S.C. 207, 569 S.E.2d 330 (2002).

It should be obvious the General Assembly intended the Appellant to be placed on GPS monitoring. Regardless of how minor the violation, the lower Court deemed the Appellant willfully violated probation which automatically placed him on GPS monitoring. The decision of the lower court denying the Appellant's motion was lawful and should be affirmed by this Court.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the final decision of the Circuit Court denying the Appellant's motion be affirmed.

Respectfully submitted,



Tommy Evans, Jr.
Assistant 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
October 29, 2014

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
The Honorable George C. James, Jr., Circuit Court Judge
Appellate Case No. 2014-000143

RECEIVED
OCT 31 2014
SC Court of Appeals

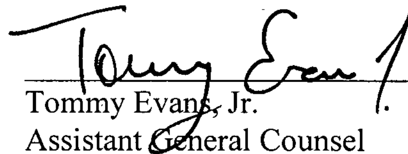
GREG J. FLOYD, ...APPELLANT

v.

THE STATE, ...RESPONDENT

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.



Tommy Evans, Jr.
Assistant General Counsel

October 29, 2014

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
The Honorable George C. James, Jr., Circuit Court Judge
Appellate Case No. 2014-000143

RECEIVED
OCT 31 2014
SC Court of Appeals

GREG J. FLOYD, ...APPELLANT

v.

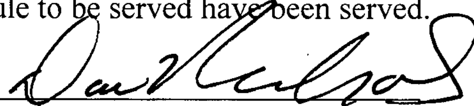
THE STATE, ...RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated October 29, 2014, on Appellant this 29th day of October, 2014, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Appellate Defender
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.



Dawn K. Nichols
Executive Administrative Assistant

South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250