STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH CHARLES TICE,

APPELLANT

APPELLATE CASE NO. 2014-001957

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

STATEMENT OF ISSUE ON APPEAL

The circuit court judge erred in revoking appellant's probation due to reported allegations that he violated a condition of probation that prohibited the use of Facebook because this social media ban violated appellant's First Amendment right to free speech to the extent that such a restriction was neither reasonably related to the nature and circumstances of his prior conviction nor sufficiently narrowly tailored to serve the state's interest.

STATEMENT OF THE CASE

Appellant Joseph Charles Tice pled guilty to two counts of second degree criminal sexual conduct with a minor during the August 2011 term of the Richland County General Sessions Court before Judge G. Thomas Cooper, Jr., and was sentenced to imprisonment for a period of two concurrent twenty-year terms, suspended upon time served and five years probation. On November 11, 2011, Judge R. Markley Dennis revoked six months of appellant's probation sentence for violating his probation. Appellant was subsequently released and placed in a community supervision program.

On July 7, 2014, a citation was issued from SCDPPP against appellant for violating the terms and conditions of his supervision by using Facebook/social media. A probation violation hearing was convened on September 5, 2014, at the Richland County Courthouse before Judge Clifton Newman. Appellant was present at the hearing and represented by John C. Shipman, and Mathew C. Buchanan appeared as counsel on behalf of SCDPPP. Judge Newman revoked 90 days of appellant's suspended sentence and ordered that his reinstatement into the community supervision program could follow thereafter.

Appellant appealed his probation revocation. This appeal follows.

ARGUMENT

The circuit court judge erred in revoking appellant's probation due to reported allegations that he violated a condition of probation that prohibited the use of Facebook because this total ban against social media violated appellant's First Amendment right to free speech to the extent that such a restriction was neither reasonably related to the nature and circumstances of his prior conviction nor sufficiently narrowly tailored to serve the state's interest.

During the probation revocation hearing, the state argued that appellant's use of Facebook/social media, which was allegedly prohibited because of his prior sex convictions, violated a condition of his probation while he participated in a community service program. Tr. 4, l. 5 - p. 5, l. 16; Tr. 12, l. 22 – p. 19, l. 1.

Defense counsel argued that the total ban on social media imposed upon appellant as a condition of probation was too restrictive because it was not narrowly tailored to achieve the state's goals and not reasonably related to his prior convictions; and as a result, violated appellant's right to free speech under the First Amendment. Tr. 6, l. 10 – p. 12, l. 14; Tr. 20, l. 12 – p. 22, l. 10.

The First Amendment free speech protections extend to Internet communications. Reno v. ACLU, 521 U.S. 844 (1997). More specifically, special conditions of conduct that follow an inmate's release from prison must be reasonably related to the nature and circumstances of the offense and narrowly tailored to serve the state's interests so as to avoid free speech impositions that would pose greater deprivations of liberty than reasonably necessary to achieve the state's interests, which are in effect to protect the public from further crimes and prevent offenders' recidivism. United States v. Dotson, 324 F.3d

256 (4th Cir. 2003); Doe v. Prosecutor, Marion County, Indiana, 705 F.3d 694 (7th Cir. 2013).

A.) The Social Media Ban Was Not Reasonably Related To Appellant's Prior Sex Offenses.

In the case at bar, appellant was convicted for sexual events with minors that occurred in 1988. The record in this case is devoid of any indication that the sexual acts which appellant perpetrated on the minors in question in 1988 were in any way connected to Facebook/social media. Social networking did not come on the scene until 2002/2003 with "My Space." Social media did not exist in 1988[1]. Therefore, the total ban on social media against appellant, which was the probation condition the state alleged he violated, had no rational relation to his prior convictions as his priors were not computer-related or computer- based. Compare United v. Smathers, 351 F. App'x 801 (4th Cir. 2009) cited to in the case of Wagner v. Hampton[2], where the Court struck down the computer ban against Smathers as unjustified because Smather's prior sex crime (sexual exploitation of minors) did not involve a computer or the Internet; and therefore, the Court held that the computer ban was not reasonably related to Smather's non-computer prior conviction and ultimately resulted in a "greater deprivation of liberty than [what was] reasonably necessary to achieve the state's interests/goals." Likewise, the social media ban against appellant in the instant case was not reasonably related to his non-computer prior sex

[1] www.digitaltrends.com/features/the-history-of-social-networking/2015.

[2] In Wagner v. Hampton, 2014 WL 3799267 (U.S. District Court, Charleston Division. July 30, 2014), the Court held that that computer and Internet restrictions on the defendant during his supervised release were not unconstitutional. Note however, that the defendant was convicted of four counts of child pornography and one count of possession of child pornography.

crimes either; and therefore, said ban also resulted in a greater deprivation of liberty than what was needed to protect the public.

B.) The Social Media Ban Was Not Narrowly Tailored To Serve The State's Goals.

The state may regulate speech if the regulation is narrowly tailored to serve a significant government interest and leaves open ample alternative channels for communication of information. Ward v. Rock Against Racism, 491 U.S. 781 (1989); Doe v. Nebraska, 898 F. Supp. 2d 1086 (U.S. District Court, Nebraska 2012). Moreover, a statute is narrowly tailored if it targets and eliminates no more than the exact "evil" it targets to remedy, i.e the protection of minors from sex crimes. Doe v. Nebraska, supra. In the case at bar, counsel for SCDPPP admitted that there was no proof that appellant had been on social media with a minor, but rather, SCDPPP officials assumed that appellant was in contact with a minor on Facebook. Tr. 23, l. 9 – p. 24, l. 3. Furthermore, the transcript is devoid of any indication that appellant was on Facebook with a minor. The state's assumption that appellant was using facebook to communicate with minors about sex was specious and speculative. Appellant had a right to engage in social media with adults. Clearly, the instant social media ban imposed upon appellant denied him of the right to communicate with adults on the computer, which in turn meant that this ban was not narrowly tailored to achieve the goal of deterring appellant from communicating with minors, i.e. the key targeted group the state sought to protect. This narrowly tailored issue was addressed in Doe v. Prosecutor, Marion County Indiana, supra, and Doe v. Nebraska, supra.

In Doe v. Prosecutor, Marion County, Indiana, the Court held that the ban prohibiting Doe's use of networking websites, instant messaging, and chat programs was

not narrowly tailored to serve the state's interests because Doe's prior conviction of child exploitation was not computer based, so the restrictions went far beyond protecting the targeted "evil," i.e., the protection of minors from sex crimes, which meant that this left open no open alternative channels for his computer communication with non-targets, i.e., adults. The Court went on to hold further that the ban there was over-inclusive and prohibited harmless speech; and that since there was nothing dangerous about "Doe's use of social media as long as he [did] not improperly communicate with minors," the speech restrictions went further that "the necessary targets" to be protected from harm.

Additionally, in Doe v. Nebraska, supra, the Court held that the sex offenders who were denied the use of computer social networking were rightly limited communications with the protected targets, i.e, minors; but nonetheless, this was too restrictive in that there was a limitation in the exchange of communications between adults, which meant that said prohibitions were not sufficiently narrowly tailored to meet the state's interests. The Doe Court cited to the holding in Doe v. Jindal, 853 F. Supp. 2d 596 (M.D. La 2012), where a similar scenario existed involving sex offenders' computer restrictions in the attempt to restrict their computer access to children, and where the Court ruled that "the[se] sweeping restrictions on the use of the Internet for the purposes completely unrelated to the activities sought to be banned by the [prohibition] impose[d] unwarranted restraints on constitutionally protected speech."

C.) Total Social Media Ban Was Not A Judicially Imposed Condition Of Probation.

SCDPPP issued a citation dated July 7, 2014, stating that appellant violated probation conditions number 9 and 10 and that he "failed to follow the advice and

instructions of his supervising agent via his engagement of Facebook/social media. See citation at Tr. ____.

At the outset, appellant noted that probation conditions 9 and 10 did not ban social media and the additional conditions of probation signed after previous revocations contained no social media ban prohibition. See Tr. 6, lines 10-19. Also, note that appellant's 1988 sentencing sheets do not contain a ban from social media. Tr. _____. Additionally, the consent orders signed after appellant's probation was revoked ordered only that he be placed on GPS monitoring for six months. See Tr. ---- Furthermore, the "fail[ure] to refrain from using social media" at the behest of his agent's instruction was not a judicially imposed condition of probation. Compare State v. Stevens, 373 S.C. 595, 646 S.E.2d 870 (2007), where the Court reversed the revocation of the defendant's probation for violating an agreement to participate in GPS monitoring and to avoid certain exclusive zones because these were not judicially imposed conditions, but rather additional unauthorized conditions imposed by the probation department. See also State v. Hicks #2, 382 S.C. 370; 675 S.E. 2d 796 (2009). The instant "no social media ban" apparently instituted by an instruction from a SCDPPP agent was an independent added condition of probation that was prohibited from being enforced.

D.) Attempt To Incorporate Social Media Ban As a Condition of Probation Under S.C. Code Ann. 23-3-555

Also, the state's attempt to incorporate S.C. Code 23-3-555(D) by reference and pretend appellant's paperwork referenced this code section is untenable. Section 23-3-555 reads as follows:

> If a person commits a sexual offense in which the victim is under the age of eighteen at the time of the offense of the person reasonably believes is under the age of eighteen at the

> time of the offense, and the offender is required to register with the sex offender registry for the offense, then, upon conviction..., the judge must order as a condition of probation or parole that the person is prohibited from using the Internet to access social networking websites, communicating with other persons or groups for the purpose of promoting sexual relations with persons under the age of eighteen, and communicating with a person under the age of eighteen when the person is over the age of eighteen.

The problem here was that there was no incorporation of the above statute by reference to appellant's case and there was no automatic trigger of the statute to make it applicable to appellant's conditions of probation. Compare Wiesart v. Stewart, 379 S.C. 300, 665 S.E.2d 187 (2009), where Wiesart's indecent exposure conviction required him to register annually as a sex offender automatically as triggered by statute (23-3-430) until said statute was amended and no such automatic trigger applied in such cases. S.C. Code Ann 23-3-555 did not automatically trigger or incorporate by reference a total social media ban to apply in appellant's case. Plain and simple, the total social media ban SCDPPP sought to apply to appellant as a probation condition was unordered and unconstitutional as the same violated free speech rights under the First Amendment in that such a prohibition was too restrictive, not narrowly tailored to meet the state's goal of protecting minors, and clearly not reasonably related to appellant's prior sex offense, and his history and his character.

CONCLUSION

Based on the foregoing argument, appellant requests that his probation revocation be vacated.

Respectfully submitted,

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of February, 2015.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Matthew Buchanan, Esquire, at PO Box 50666, Columbia, SC 29250, and Mr. Joseph Charles Tice, at 2510 Laurel Street. Columbia, SC 29204, this 9th day of February, 2015.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 9th day of February, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.