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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2014-001984
Court of Appeals Case No. 2010-161446

CLIFFORD THOMPSON ..... *Petitioner*,

v.

STATE OF SOUTH CAROLINA ..... *Respondent*.

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Court of Appeals erred in holding that no justiciable controversy existed and the circuit court properly dismissed Appellant's declaratory judgment action because the question of whether Appellant should be required to register as a sex offender is not ripe for adjudication.

2. Whether the Court of Appeals erred in holding that any issues related to Appellant's classification as a sex offender by the South Carolina Department of Corrections must first be addressed through administrative proceedings.[1]

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[1] The Issues on Appeal above reflect a restatement of the Questions Presented in Appellant's *pro se* Petition for Writ of Certiorari in order to more closely conform to the manner in which the Court of Appeals addressed Appellant's questions. The Questions listed below reflect the Questions Presented in Appellant's *pro se* Petition for Writ of Certiorari. These four issues are identical to those presented to the Court of Appeals.

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 kidnaping 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 a judicial determination is exclusively controlled by *Al-Shabazz v. State*, 527 S.E.2d 742?

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

Appellant Clifford Thompson pled guilty to four counts of kidnapping and six counts of armed robbery in Berkeley County before Circuit Judge James E. Lockemy in 2001 and was sentenced to twenty-five years in prison. At the time of Thompson's convictions, the South Carolina sex offender registration statute, S.C. Code § 23-3-430, required a person convicted of kidnapping to register as a sex offender if the victim was eighteen years old or older, "except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense." S.C. Code § 23-3-430(C)(15). The facts presented by the State in support of Thompson's plea to the kidnapping offenses indicate that the kidnapping charges stemmed from Thompson's restraining of armed robbery victims in order to carry out the robberies. App. 57-61. The record clearly indicates the State made no allegation that the kidnapping charges included a criminal sexual offense or attempted criminal sexual offense.[2]

Nevertheless, when the circuit court accepted Thompson's plea, the judge did not make any record finding regarding the nature of kidnapping offenses, resulting in mandatory sex offender registration under the current version of the statute. Accordingly, the South Carolina Department of Corrections classified Thompson as a person required to register as a sex offender. App. 62 (indicating "Sex Offender Yes").

On September 11, 2009, Thompson filed a *pro se* Petition for Declaratory Judgment in the Berkeley County Circuit Court, asking the court to make "a finding on [the] record that Plaintiff's four (4) criminal convictions of kidnapping are not sexual in nature and are not of the nature that requires Sex Offender Registry." App. 10. The State of South Carolina, the named defendant in

[2] The State has never contended the kidnapping offenses were sexual in nature. The State's objection to Thompson's requests for a finding that his kidnapping offenses were not sexual in nature have been on purely jurisdictional and procedural grounds.

the declaratory judgment action, filed a Motion to Dismiss, arguing the issue was not ripe because Thompson would not be required to register as a sex offender until his release from prison and the statute in effect at the time of Thompson's release, projected for August 2020, would control. App. 14-17. Circuit Judge R. Markley Dennis, Jr., following a hearing, app. 32-51, dismissed Thompson's petition finding that the issue would not be ripe until the time of Thompson's release because only then would he be required to register as a sex offender. App. 4-6. Thompson filed a *pro se* Motion to Alter and/or Amend Judgment Pursuant to Rule 59(e), app. 24-27, which was denied by the circuit court on April 13, 2010. App. 7.

Thompson timely filed a *pro se* Notice of Appeal in the Court of Appeals. App. 54. After briefing, the Court of Appeals ruled without oral argument that the circuit court properly dismissed Thompson's declaratory judgment action. *Thompson v. State*, 409 S.C. 386, 762 S.E.2d 51 (Ct. App. 2014). Thompson timely filed a *pro se* Petition for Writ of Certiorari seeking this Court's review of the Court of Appeals decision. On January 16, 2015, this Court granted certiorari and Thompson's Motion for Substitution of Pro Bono Counsel.

ARGUMENT

I. THE EVOLUTION OF THE SOUTH CAROLINA SEX OFFENDER REGISTRATION STATUTE'S TREATMENT OF KIDNAPPING AND THIS COURT'S RESPONSE TO CHANGES IN THE STATUTE

The South Carolina sex offender registration law, S.C. Code § 23-3-430, has undergone significant evolution since its original enactment in 1994. As originally enacted, it required that any person convicted of one of fifteen enumerated offenses register as a sex offender. "Kidnapping," with no exceptions or qualifications, was included on the list of offenses. S.C. Code Ann. § 23-3-430(8) (1994).

The first amendment to the sex offender registration law occurred in 1996 and completely removed kidnapping from the list of offenses. *See* 1996 S.C. Acts 444 § 16. In 1998, the statute was amended again and kidnapping was re-added to the list, but with an exception for cases in which "the court makes a finding on the record that the offense did not include a criminal sexual offense." S.C. Code Ann. § 23-3-430(C)(15) (1998); 1998 S.C. Acts 384 § 1. In 1999, the statute was amended again with minor changes. It required sex offender registration when the kidnapping was of a person eighteen years old or older, except for "when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense." S.C. Code Ann. § 23-3-430(C)(15) (1999); 1999 S.C. Acts 74 § 1. The current version of the statute retains the language of the 1999 amendment. The 1999 version of the statute was in effect at the time of Thompson's guilty plea to kidnapping offenses.

In *Hazel v. State*, 377 S.C. 60, 659 S.E.2d 137 (2008), this Court addressed the inevitable result of the amendments—that some individuals convicted of kidnapping would be required to register as sex offenders solely because the sentencing judge did not make a record finding, rather than because a sexual offense was involved in the kidnapping. In *Hazel*, the Court explicitly endorsed the circuit court's "power to make the determination that a prior kidnapping offense did

not involve sexual misconduct." *Id.* at 65, 659 S.E.2d at 140. The Court held that "[t]he Court of Common Pleas had power to make this finding pursuant to the Declaratory Judgment Act." *Id.* (citing S.C. Code Ann. § 15-53-20 (2005)). Thus, the circuit court judge in Thompson's case clearly had the authority to make a record finding that Thompson's kidnapping offenses did not involve a criminal sexual offense despite the fact that the plea judge did not make such a finding at the time of Thompson's convictions and sentencing.

II. THOMPSON'S DECLARATORY JUDGMENT ACTION PRESENTED THE CIRCUIT COURT WITH A JUSTICIABLE CONTROVERSY

The Court of Appeals erred in finding that no justiciable controversy existed at the time Thompson filed his declaratory judgment action. "Before a court may render a declaratory judgment, an actual, judiciable controversy must exist." *Pee Dee Elec. Co-op., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). This Court has defined a justiciable controversy as "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." *Byrd v. Irmo High School*, 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996) (citing *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co.*, 249 S.C. 561, 155 S.E.d 618 (1967)). A justiciable controversy must be "ripe and appropriate for judicial determination." *Pee Dee Elec. Co-op*, 279 S.C. at 66, 301 S.E.2d at 762.

The appellate court's finding that the "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," *Thompson*, 409 S.C. at 388, 762 S.E.2d at 52, ignores other, current harms Thompson suffers due to the lack of a record finding that his kidnapping charges did not involve a criminal sexual offense. As Judge Thomas correctly noted in her dissenting opinion in the Court of Appeals, "the controversy in this case does not arise from whether or not

Thompson must register as a sex offender, but rather whether or not he should be classified as a sex offender" by the South Carolina Department of Corrections. *Id.* at 390-91, 762 S.E.2d at 53 (Thomas, J., dissenting). Judge Thomas further noted that "an inmate's classification as a sex offender . . . could have immediate and harmful ramifications." *Id.* at 391, 762 S.E.2d at 53. For example, classification as a sex offender by the Department of Corrections has the effect of limiting the programs available to the incarcerated individual, *id.* at 391 n.7, 762 S.E.2d at 53 n.7, limits the inmate's ability to achieve a lower custody level, limits who may visit the inmate while incarcerated, and increases the risk of being assaulted if other inmates learn of the inmate's sex offender classification. Based on the now-current version of the sex offender registration statute, the South Carolina Department of Corrections has classified Thompson as a person required to register as a sex offender because the judge who took Thompson's plea did not make a record finding that the kidnapping offenses were not sexual in nature. Thus, Thompson did not present the circuit court with a controversy that was merely hypothetical or abstract. He sought a record finding which would result in an immediate change in his inmate classification with the Department of Corrections and would remove the immediate and harmful ramifications of such a classification.[3]

[3] The Court of Appeals further erred in referring to the South Carolina Department of Corrections recently updated website, which no longer indicates Thompson will be required to register as a sex offender. *See Thompson*, 409 S.C. at 388 n.3, 762 S.E.2d at 52 n.3 (majority opinion). In addition to the website update being outside the scope of materials to be considered by the Court of Appeals because it was not included in the Record on Appeal, SCACR 210(h), the website update does nothing to prove the Department of Corrections no longer classifies Thompson as an inmate required to register as a sex offender. The website update merely demonstrates that the Department of Corrections no longer makes that inmate classification information public on its website. There is simply no indication in the record that the Department of Corrections no longer classifies Thompson as required to register as a sex offender.

The Court of Appeals' reliance on *Hazel* is misplaced. In *Hazel*, the respondent pled guilty to kidnapping in 1979, approximately fifteen years prior to the enactment of the sex offender registration statute. 377 S.C. At 62, 659 S.E.2d at 138. Not until his release in 2002 did Hazel receive any notification that he would be required to register on the sex offender registry as a result of the enactment of and amendments to the registration statute. *Id.* Upon his release, Hazel filed a petition for declaratory judgment, seeking a finding, under the 1998 amendment, that his kidnapping offense involved no sexual element. *Id.* *Hazel*, therefore, did not present this Court with the question of whether Hazel could have sought a record determination regarding the nature of his kidnapping offense prior to his release from prison. Accordingly, the *Hazel* decision does not mandate that Thompson must wait until his release to file a declaratory judgment action.[4]

Additionally, the Court of Appeals erred because Thompson's declaratory judgment action did not ask solely for a record determination that he is not required to register as a sex offender, but specifically sought a record determination that his kidnapping offenses did not involve a criminal sexual offense. *See* App. 10. While it is true that a court cannot now determine what version of the sex offender registration law will be in effect at the time of Thompson's release, a court can, with certainty, review the record of Thompson's plea hearing to determine that the kidnapping offenses did not involve a criminal sexual offense. Solely making the record finding

[4] The Court of Appeals decision also failed to address the significance of this Court's order in *Bennett v. State*, Appellate Case No. 2009-145366 (Nov. 7, 2013). In the petition for writ of certiorari asking this Court to review his conviction and death sentence, Bennett specifically asked the Court to reverse the circuit court's denial of his request for an on the record finding that his kidnapping conviction was not sexual in nature. This Court denied certiorari but specifically stated it was doing so "without prejudice to petitioner's right to file an action under the Declaratory Judgment act to determine whether his kidnapping offense requires him to register as a sex offender." Despite the fact that Bennett was under a sentence of death and would likely never be released from prison, this Court indicated that he should file a declaratory judgment action in order to determine his status as a sex offender within the Department of Corrections.

regarding the nature of the kidnapping offense would address the Department of Corrections classification issue, but would not require the court to speculate as to the registration requirements at the future time of release. This would alleviate any concerns that might be created by making a judicial finding that Thompson is not required to register before knowing what version of the statute will apply at the time of his release. *See Hazel*, 377 S.C. at 64, 659 S.E.2d at 139 ("[T]he applicable statute is the statute that existed at the time of respondent's release from prison."). The Court of Appeals, therefore, erred in finding Thompson's declaratory judgment action did not present a justiciable controversy. [5]

III. *AL-SHABAZZ* DOES NOT CONTROL THOMPSON'S DECLARATORY JUDGMENT ACTION SEEKING A RECORD FINDING THAT HIS KIDNAPPING OFFENSES DID NOT INVOLVE A CRIMINAL SEXUAL OFFENSE

The Court of Appeals further erred in holding that "any issue relating to Thompson's classification as a sex offender by the Department of Corrections must first be addressed through administrative proceedings." *Thompson*, 409 S.C. at 390, 762 S.E.2d at 53 (majority opinion) (citing *Al-Shabazz v. State*, 338 S.C. 354, 357-78, 527 S.E.2d 742, 753-55 (1999)). In *Al-Shabazz*, this Court stated that issues of solitary confinement, downgrading custody status, credit-related issues, and other conditions of imprisonment are administrative issues to be addressed through the administrative procedures of the Department of Corrections and appealed under the Administrative Procedures Act. *Al-Shabazz*, 338 S.C. at 368-69, 527 S.E.2d at 749-50. As Judge Thomas

[5] It is important to note that the relief Thompson seeks will not place a significant additional burden on the circuit courts. In Thompson's case, all that will be required is to review approximately six pages of transcript and issue an order making the required finding. In other cases, this issue could be handled without reviewing an entire trial record by obtaining the consent of the State and the inmate, who in most cases could simply agree there were no allegations of a sexual offense involved in the kidnapping at issue. Further, the current version of the statute has been in effect since 1999. It is likely that most courts are now making the required finding at the time of sentencing. The remaining cases that did not have a finding made on the record will likely have to eventually be considered either while the inmate is incarcerated or upon the inmates release from prison. Thus, granting Thompson relief will not overburden the circuit courts.

correctly noted in her dissent, "classification as a sex offender is not a custodial status." *Thompson*, at 391, 762 S.E.2d at 54 (Thomas, J., dissenting). While classification as a sex offender may have an effect on an inmate's custody status, the classification itself is not a custody level as contemplated by *Al-Shabazz*. Unlike a custody status, which is determined based on the Department of Corrections' own administrative procedures and criteria, the classification as a sex offender is determined by statute. Thus, the classification as a sex offender by the Department of Corrections is not a "non-collateral or administrative" matter controlled by *Al-Shabazz*.

Further, as Judge Thomas also correctly noted, "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 decision." *Id.* at 392, 762 S.E.2d at 54. This is so because the classification by the Department of Corrections as a sex offender is controlled by the current sex offender registration statute. Under the statute, the registration requirement turns on whether or not the court made a finding on the record that the "offense did not include a criminal sexual offense or an attempted criminal sexual offense." S.C. Code § 23-3-430(C)(15). Because the statute turns on a finding by the court, not simply whether the kidnapping offense involved a criminal sexual offense, there is no way for Thompson to challenge his classification administratively within the Department of Corrections. Any grievance filed by Thompson would result in a determination by the Department of Corrections that it could not change his classification because there is no record finding from the circuit court. As a result, a determination by this Court that Thompson cannot pursue a declaratory judgment action to obtain the required record finding would leave Thompson completely without an avenue for relief.

CONCLUSION

The nature of Thompson's convictions of armed robbery and kidnapping do not require him to register as a sex offender. Nevertheless, due to the failure of the circuit court to make a record finding that his kidnapping offenses did not include a criminal sexual offense, Thompson is classified as a sex offender with the South Carolina Department of Corrections and is subject to the ramifications of the classification. The Court of Appeals erred in finding Thompson did not present a justiciable controversy in his Petition for Declaratory Judgment, in which he asked the circuit court to make a record finding that his kidnapping offenses did not involve a sexual offense, and in finding that he should seek relief administratively under *Al-Shabazz*. The Court of Appeals decision leaves Thompson completely without a remedy for his current classification as a sex offender. This Court should reverse the Court of Appeals decision and remand to the circuit court for appropriate proceedings.

Respectfully submitted,

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March 9, 2015

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Court of Appeals Opinion No. 5524

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CERTIFICATE OF SERVICE

I, Jill Rider, hereby certify that I have served upon the attorney for the Respondent one (1) copy of the Brief of Petitioner and Appendix in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

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This the 9th day of March, 2015, in Columbia, South Carolina

Jill A. Rider

Jill A. Rider