STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Clifton Newman, Circuit Court Judge
Case No. 2014-001957

THE STATE, ... RESPONDENT

v.

JOSEPH CHARLES TICE, ...APPELLANT

FINAL BRIEF OF RESPONDENT

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ATTORNEY FOR THE RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit judge did not err in revoking Appellant's community supervision because the judge in his discretion found the conditions reasonable and that the Appellant had violated those conditions, and that the condition to refrain from social media was not a violation of Appellant's First Amendment rights to free speech.

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 the Honorable 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. (R.p.56-p.59). On November 11, 2011, the Honorable R. Markley Dennis revoked six months of Appellant's probation for violating his probation. Appellant was subsequently released from incarceration on Community Supervision pursuant to §24-21-560.

In January of 2014, agents for the Department discovered Appellant was using social media, and conducted an in-house violation to instruct him to delete his accounts. (R. p. 4-5, l. 17-2). Appellant was discovered again in July to be on social media, this time using an alias. (R. p. 5, l. 3-10). A citation was issued concerning the violation on July 7, 2014.(R.p.46-p.47).

On September 5, 2014, the community supervision violation was heard before the Honorable Clifton Newman. The court found the condition to refrain from social media to be reasonable, and that Appellant had violated that condition. The court revoked 90 days of Appellant's supervision.(R.p.55).

The Appellant appealed his revocation. This appeal follows.

ARGUMENT

The circuit judge did not err in revoking Appellant's community supervision because the judge in his discretion found the conditions reasonable and that the Appellant had violated those conditions, and that the condition to refrain from social media was not a violation of Appellant's First Amendment rights to free speech.

Community Supervision

Contrary to Appellant's insistence that he faced a "probation" violation, he in fact was under the Department's Community Supervision Program (CSP), a statutorily mandated form of supervision. Under §24-21-560, all offenders released from incarceration on a "no parole offense" must complete a period of CSP. The Department oversees the CSP and sets the conditions. Should an offender violate those conditions, the General Sessions Court must first determine whether those conditions are fair and reasonable, and then whether the offender did willfully violate those conditions.

The Department has incorporated the requirements of S.C. Code Ann. §23-3-555(D) into the CSP conditions. (R.p.52-p.53).

Section 23-3-555(D) provides that:

> If a person commits a sexual offense in which the victim is under the age of eighteen at the time of the offense or 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, adjudication of delinquency, guilty plea, or plea of nolo contendere, 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…

Even though CSP is not probation or parole, the Department has incorporated the requirement into CSP if the same conditions are met. *See* Form 1402: Computer/Internet Use Agreement for Sex Offenders.

Appellant objects to the inclusion of §23-3-555(D)'s prohibition on social media as a condition, saying that the sentencing court did not order it as a condition of probation. However, the Department is empowered to set the terms and conditions of CSP. The Department has chosen to use the guidance of the General Assembly in its direction to the courts when fashioning a probationary sentence. Furthermore, the courts in South Carolina can make individual determinations as to the conditions of supervision in relation to each offender. Far from some all-encompassing finding that social media restrictions are *per se* unconstitutional – a finding unsupported by case law – the courts are free to examine on a case by case basis the reasonableness of the restriction and the relation to the underlying offense.

"[T]he decision of whether to revoke community supervision [is] discretionary. The trial court will not be reversed unless the appellant has shown an abuse of that discretion." *State v. Garrard*, 390 S.C. 146, 151, 700 S.E.2d 269, 272, (S.C. App. 2010), citing *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006).

In this case, the trial court deemed the social media restriction fair and reasonable. R. p. 25, l. 19-21). Evidence was presented at the September 5 hearing that the Appellant was provided with instruction to no longer use social media after he was found making suggestive posts. (R. p. 4, l.17-19). He was then found six months later to be on Facebook under an alias. (R. p. 5, l. 8-10).

Clearly, the trial court was fully within its discretion to uphold the reasonableness of the condition of supervision as well as to make the finding that Appellant had violated that condition. The trial court's decision should be upheld.

First Amendment

The Appellant claims that prohibiting an offender from using social media such as Facebook violates his First Amendment rights to free speech. His claim is that the prohibition on social media is not narrowly tailored to serve the state's interest. To support this, he cites several cases in which social media bans for sex offenders have been overturned. However, these cases can be easily distinguished from the facts in this case.

In *Doe v. Nebraska*, 898 F. Supp. 2d 1086 (U.S. District Court, Neb. 2012), the court overturned a statute which prohibited registered sex offenders from accessing any social networking website that minor children can become members. All individuals on the registry, even those who were no longer under any form of supervision like probation or parole, were subject to the prohibition. In finding the statute to be overly broad and unconstitutionally vague, the court noted that it prohibited accessing any social media website, and given that major sites such as Google.com and Amazon.com have social networking links, a registered sex offender may run afoul of the law inadvertently by virtually any use of the internet.

In *Doe v. Prosecutor, Marion County Indiana*, 705 F.3d 694 (7th Cir. 2013), the social media ban, which was ultimately overturned, was again applied to all people on the sex offender registry. It is important to note that this decision was later distinguished by *Patton v. State*, 990 N.E.2d 511 (Ind.App., 2013), and upheld a social media ban as a condition of supervised release.

Consider first that the statutes overturned in the cases cited affect *all* individuals on the sex offender registry. The Appellant desires that the limited holdings be expanded so that all restrictions on social media is an unconstitutional abrogation of free speech. That sort of expansion ignores the fact that South Carolina's law, §23-3-555(D), only applies to those

offenders who have committed offenses against minors under the age of eighteen, and only then while under supervision.

Furthermore, this statute does not apply to Appellant because he is not on probation or parole. Instead, this is a condition of Appellant's Community Supervision Program. Restrictions on a sex offender's use of computers while under supervised release have been upheld in numerous courts, including recently the District Court for South Carolina in *Wagner v. Hampton*, 2014 WL 3799267 (D.S.C., 2014).

In *Wagner*, the plaintiff brought an action pursuant to 42 U.S.C. §1983 alleging his free speech rights were violated because of restrictions on his use of social media while on federal probation for child pornography. Per the order of the court, Wagner was not allowed to access the internet during his three years of probation, although probation agents were allowed to restore some computer rights if appropriate. *Id.* During his supervision, the agents did allow him to use the internet, but restricted him from social media and required monitoring software to be installed on his computer.

In rejecting his claim, the District Court held that restrictions could be imposed as long as the restrictions were reasonable in light of the offense, and that the "right of a convicted sex offender to use social media and be free from computer monitoring while on supervised release is anything but clearly established." The court in Wagner lists numerous examples where computer use is restricted for those under supervision. *Id.*

> Limitations on a convicted sex offender's access to the internet or social media are valid provided that they are reasonably related to the individual's offense and his history and characteristics and are no more restrictive than necessary to serve the purposes of sentencing. See 18 U.S.C. § 3583(d). Numerous courts, including the Fourth Circuit, have upheld various restrictions on the use of computers, the internet, and social media by convicted sex offenders on supervised release. *United States v. Miller*, 665 F.3d 114, 132 (5th Cir.2011)

(upholding a 25–year restriction on a defendant's use of the internet); *United States v. Loflin*, 318 F. App'x 212, 213 (4th Cir.2009) (upholding a special condition of super-vised release restricting a sex offender's use of a computer at work); *United States v. Granger*, 117 F. App'x 247, 248 (4th Cir.2004) (upholding the requirement that "[t]he defendant shall not possess or use any computer which is connected or has the capacity to be connected to any network" as a condition of supervised release for a defendant "convicted of transporting and shipping images of child pornography."); *United States v. Rearden*, 349 F.3d 608, 619 (9th Cir.2003) (upholding restrictions on use of the internet and possession of sexually explicit materials and noting that "a defendant's right to free speech may be abridged to effectively address [his] sexual deviance problem." (citations and quotation marks omitted)); see also *Doe v. Prosecutor, Marion Cnty. ., Indiana*, 705 F.3d 694, 703 (7th Cir.2013) ("[A] court could conceivably limit a defendant's Internet access if full access posed too high a risk of recidivism. The alternative to limited Internet access may be additional time in prison, which is surely more restrictive of speech than a limitation on electronics." (Citation omitted)).

Id.

Wagner and the cases it sites show the cases cited by Appellant are distinguishable in that the unconstitutional law targeted all registered sex offenders, along with being overly vague in its prohibition against accessing social media sites.

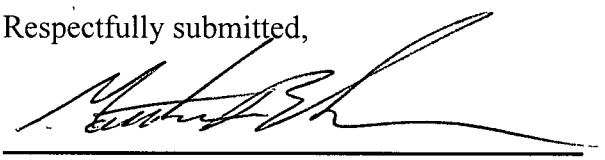
CONCLUSION

Appellant was convicted of Criminal Sexual Conduct with a Minor in the Second Degree. The Department's standard conditions for sex offenders prohibit the use of the internet for accessing social networking sites if the victim of the offense was under eighteen. Pursuant to a computer search, agents discovered that Mr. Tice had joined Facebook, a popular social networking website and was communicating lewdly to females via the networking site. (R.p. 23, l. 18-25). The information recovered by the agents is evidence of a less than innocent use of social media, something that the General Assembly recognized when it drafted §23-3-555(D).

In the instant case, Appellant is being supervised on CSP – not on Probation – for an offense involving a minor child victim, so consequently the restriction is rationally related to the underlying offense and permissible pursuant to the Department's authority to set CSP conditions.

Furthermore, the trial court made a determination that the conditions of supervision was fair and reasonable. §24-21-560(C)(1). The Appellant has made no argument that the trial court decision was an abuse of discretion. The decision of the trial court to revoke Appellant's Community Supervision should therefore be affirmed.

Respectfully submitted,



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July 1, 2015

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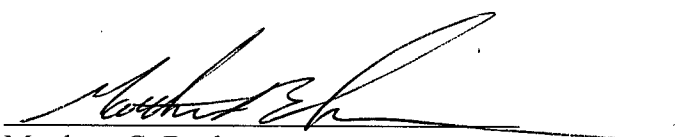
CERTIFICATE OF COUNSEL

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.



Matthew C. Buchanan
General Counsel

July 1, 2015

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated July 1, 2015, on Appellant this 1st day of July, 2015, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Wanda Carter, Deputy Chief Appellate Defense
Division of Appellate Defense
PO Box 11589
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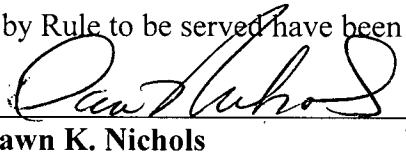
I further certify that all parties required by Rule to be served have been served.



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July 1, 2105

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street- 5th Floor
Columbia, South Carolina 29201

RE: Joseph Tice v. SCDPPPS

Dear Ms. Kitchings:

Enclosed please find the original and nine (9) copies of the *Final Brief of Respondent*, along with proof of service in the above-referenced case.

Thank you for your assistance in this matter.

Sincerely,

Matthew C. Buchanan
General Counsel

MCB:dn
Enclosures

cc: Joseph Tice

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