STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
AUG 14 2015
SC Court of Appeals

Appeal from the Court of Common Pleas
The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-001162

DEREK S. CARTER..APPELLANT

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES,...RESPONDENT

INITIAL 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
(803) 734-9220

ATTORNEY FOR THE RESPONDENT

TABLE OF CONTENTS

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

Statement of issues on appeal..........iii

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

Argument

1. The Appellant is currently incarcerated and not part of CSP; therefore, he lacks standing to raise an argument regarding the constitutionality of a condition of CSP..........2

2. The Appellant's sentence cannot be considered a contract; therefore, portions of the Uniform Declaratory Judgment Act does not apply..........6

3. The Appellant has not been denied any liberty interest in the application of CSP..........7

Conclusion..........8

TABLE OF AUTHORITIES

CASES

Baughman v. Southern RY. Co., 127 S.C. 493, 121 S.E.2d 356 (1924)................................6

Holden v. Cribb, 349 S.C. 132, 561 S.E.2d 634 (S.C. App. 2002)......................................4

Sea Pines Assoc. for the Protection of Wildlife v. S.C. Dept. of Natural Resources, 345 S.C. 594, 550 S.E.2d 287 (2001)..4

Thompson v. State, 409 S.C. 386, 762 S.E.2d 51 (2014)..4,5

U.S. v. Ringling, 988 F.2d 504, 506 (1993)..6

Walker v. Walker, 220 S.C. 212, 66 S.E.2d 876 (1951)...4

STATUTES

S.C. Code Ann. §15-53-40(Supp. 2014)..6
S.C. Code Ann. §24-13-100(Supp. 2014)...2
S.C. Code Ann. §24-13-150(Supp. 2014)...2
S.C. Code Ann. §24-21-560(Supp. 2014)...3,6
S.C. Code Ann. §24-21-560(C)(Supp. 2014)..7
S.C. Code Ann. §24-21-560(C)(5)(Supp. 2014)...7
S.C. Code Ann. §24-21-640(Supp. 2014)...3

STATEMENT OF ISSUE ON APPEAL

1. **Did the Circuit Court erred in granting the Respondent's motion to dismiss the Appellant's declaratory judgment motion by determining there exist no justiciable controversy exist in the question of whether the Appellant should be required to be subject to a search and seizure within a search warrant, with or without probable cause, prior to entering and participating in the community supervision program upon his release from incarceration pursuant to the amended statute S.C. Code Ann. §24-21-560(Supp. 2010)?**

STATEMENT OF THE CASE

On October 14, 2000, the Appellant committed the offense of homicide by child abuse. He later appeared before the Honorable John W. Kittredge for this offense, and was sentenced to a thirty year period of incarceration. In response to a letter written by the Appellant, the Department's General Counsel Matthew Buchanan informed him that pursuant to South Carolina law, any person being placed on the Community Supervision Program (CSP) must consent to any searches, which is a mandatory condition of the program. The Appellant was later informed that the waiver requirement is a condition of CSP, and will not be waived by the Department. The Appellant was also informed that since he is ten years from being released from incarceration, he currently does not have standing to raise an argument against the search waiver requirement.

On June 3, 2014, the Appellant filed a summons and complaint in the Fifth Judicial Circuit Court of Common Pleas. Within this complaint, the Appellant alleged that he is being unlawfully denied his Constitutional rights, having to sign a waiver allowing warrantless searches as a condition of CSP. On July 24, 2014, the Respondent filed a motion to dismiss. The Respondent argued that the Appellant is not yet a part of the program, so he currently does not have standing to raise this cause of action.

On March 5, 2015, all interested parties appeared before the Honorable J. Ernest Kinard regarding the motion to dismiss filed by the Respondent. During this hearing, the Respondent argued, that the Appellant lacked standing to raise this cause of action. This was due to the fact he is not part of CSP, and has eleven years yet to serve in prison. Upon release he would be placed on CSP then he could possibly make this argument. The Court agreed, and determined that he cannot rule on things prematurely, he decided to grant the Respondent's motion to dismiss.

Upon receiving the lower Courts order of dismissal, the Appellant decided to file a notice of appeal before the Court of Appeals. Within this appeal the Appellant argues that the lower court erred in their decision. It is his positon that he has standing to argue that the consent to search condition of CSP is unconstitutional, and he should not be subject to such requirement as part of CSP.

The lower Court was correct. The Appellant is currently not on CSP so he lacks standing to make an argument regarding their conditions. These conditions do not apply, and will not apply for another eleven years. There exist no justiciable controversy, so the court cannot grant a declaratory judgment, or make an advisory opinion. Due to the lack of standing, the Respondent respectfully request this Court affirm the decision of the lower court dismissing the Appellant cause of action.

ARGUMENTS

1. The Appellant is currently incarcerated and not a part of CSP; therefore, he lacks standing to raise an argument regarding the constitutionality of a condition of CSP.

The Appellant is currently serving a sentence for a conviction of the offense of homicide by child abuse classified as a C-Felony. Pursuant to South Carolina law any person serving a sentence for a C-Felony would not become eligible for parole.[1] By this being classified as a C-Felony the Appellant must serve a mandatory eighty-five percent minimum before he can be released from incarceration.[2]

---

[1] For purposes of definition under South Carolina law a "no parole offense" means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more. S.C. Code Ann. §24-13-100 (Supp. 2014).

[2] Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, a prisoner convicted of a "no parole offense" as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, including a prisoner serving time in a local facility pursuant to a designated facility agreement authorized by Section 24-3-20 is not eligible for early release, discharge or community supervision as provided in Section 24-21-560, until the prisoner has served at least eighty-five percent of the actual term of imprisonment imposed. S.C. Code Ann. §24-13-150 (Supp. 2014).

Upon the service of eighty-five percent of his sentence, the Appellant is then released and responsible for a two year term of community supervision.[3] The Appellant argues that the current law allowing the search of any individual under CSP supervision without the benefit of a warrant is unconstitutional. The South Carolina Code of Laws specifically state:

> The period of time a prisoner is required to participate in a community supervision program and the individual terms and conditions of a prisoner's participation shall be at the discretion of the department based upon guidelines developed by the director; however, the conditions of participation must include the requirement that the offender must permit the search or seizure, without a search warrant, with or without cause, of the offender's person, any vehicle the offender owns or driving, and any of the offender's possessions by:
>
> 1. any probation agent employed by the Department of Probation, Parole and Pardon Services; or
> 2. any other law enforcement officer, but the conditions for participation for an offender who was convicted of or pled guilty or nolo contendere to a Class C misdemeanor or an unclassified misdemeanor that carries a term of imprisonment of not more than one year may not include the requirement that the offender agree to be subject to search to search or seizure, without a search warrant, with or without cause, of the offender's person, any vehicle the offender owns or is driving, or any of the offender's possessions.

S.C. Code Ann. §24-21-640(Supp. 2014).

The Appellant argues that forcing him to sign a waiver to be subject to warrantless searches is in violation of his Constitutional rights. The Appellant is yet to have standing to make this argument. He is not due to be released from incarceration until April 19, 2026, so he would not be a part of CSP for another eleven years.

[3] Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, any sentence for a "no parole offense" as defined in Section 24-13-100 must include any term of incarceration and completion of a community supervision program operated by the Department of Probation, Parole, and Pardon Services. S.C. Code Ann. §24-21-560(Supp. 2014).

The party seeking to establish standing carries the burden of demonstrating each of the three elements for standing; first, plaintiff must have suffered an injury in fact; second, there must be a causal connection between the injury and the conduct complained of; and third, it must be likely that the injury will be redressed by a favorable decision. *Sea Pines Assoc. for the Protection of Wildlife v. S.C. Dept. of Natural Resources,* 345 S.C. 594, 550 S.E.2d 287 (2001). The Appellant is not yet a part of the community supervision program, he has not suffered any damages regarding the consent to search requirement. Since there are no damages, there exist no connection to any injury, and the conduct complained of, any determination made by the lower court would not have redress any injury because none exist. The lower court would have just basically given an advisory opinion, which is not allowed for a declaratory judgment. A declaratory judgment should not deal with moot or abstract matters or constitute a merely advisory opinion, and there should be an existing controversy. *Waller v. Waller,* 220 S.C. 212, 66 S.E.2d 876 (1951).

In order for the Court to rule on a declaratory judgment there must exist a justiciable controversy. A justiciable controversy is a real and substantial controversy which is appropriate from a dispute or difference of a contingent hypothetical or abstract character. *Holden v. Cribb,* 349 S.C. 132, 561 S.E.2d 634 (S.C. App. 2002). There exist no controversy due to the fact the Appellant is yet to become a part of the program. He has not yet been required to sign a waiver of consent to search. This requirement might even not exist by the time the Appellant is released from incarceration.

The Appellant attempts to distinguish this case from *Thompson v. State,* 409 S.C. 386, 762 S.E.2d 51 (2014). In *Thompson*, the Court of Appeals ruled that an Appellant who is incarcerated cannot argue that he should not be forced to register as a sex offender, due to him being incarcerated. The Court ruled his case was not yet ripe for adjudication until a release from prison.

Thompson, at 389. The Appellant argues that the present case is distinguishable due to the fact CSP is an integral mandatory part of his sentence. That is not relevant, the relevancy is the fact the Appellant in the present case is raising issues that does not yet apply, due to his incarceration. He is not a part of the program, which makes the present case identical to *Thompson.* In *Thompson,* the court ruled:

> The offender failed to present a justiciable controversy; current statutes requiring registration did not contemplate that inmate would register until he was released from prison, and it was unknown whether inmate would be required to register, as the applicable statute for determining whether inmate had to register would be that in existence at the time of his release from prison.

Thompson, at 389.

As previously argued before the lower court, there is no way of knowing if the law will change between now and 2026 when the Appellant is released. That requirement might not exist by the time he is released from incarceration. He cannot make an inquiry about the Constitutionality due to it not applying to him until he is released from incarceration and placed on the program. This case does not present a justiciable controversy because the current requirement does not contemplate that the Appellant would not be required to consent to search until his release from prison. *See, Thompson,* at 388.

The Appellant also argues that this mandatory consent to search alters his sentence. There is no altering of his sentence, the consent does not come into play until he is released on CSP. This does not alter his sentence at all, he will continue to do his sentence yearly until it is completed or he completes CSP.

2. **The Appellant's sentence cannot be considered a contract; therefore, portions of the Uniform Declaratory Judgment Act does not apply.**

The Appellant attempts to use Section 15-53-40 of the South Carolina Code of laws to support his argument. Section 15-53-40 of the South Carolina Code of Laws specifically state, "A contract may be construed either before or after there has been a breach thereof. S.C. Code Ann. §15-53-40 (Supp. 2014). In support of his argument that a criminal plea is subject to contract principles the Appellant cites the case of *U.S. v. Ringling.* In *Ringling,* the fourth circuit U.S. Court of Appeals determined that plea bargains rest on contractual principles, because each party should receive a benefit of its bargain. *U.S. v. Ringling,* 988 F.2d 504, 506 (1993). This was not a plea bargain between the Department and the Appellant. Due to the offense he committed, when the Appellant is released from incarceration he must be placed on CSP. He has no choice, it is mandatory, and he must do two continuous years under this supervision. There is no benefit to the Appellant, if he violates he can be incarcerated for one year increments until his sentence is completed. The Appellant argues, that his guilty plea manifests a mutual assent to the mandatory terms and conditions of the actual terms of imprisonment as to the mandatory requirements of CSP, so it establishes a legal binding contract. The agreement regarding the plea bargain was between the solicitor and the Appellant. This agreement was made in order for the Appellant to receive a benefit, either a lesser offense, dismissal of charges, or a shorter period of incarceration. There has never been any agreement between the Appellant and the Department as to CSP or the conditions created by the Department. The Appellant must adhere to these conditions when he becomes a part of the program.

In order for the Appellant to recover, he has the burden of proving there exist a contract, that was breached, and there are damages due to that breach. *Baughman v. Southern RY. Co.,* 127 S.C. 493, 121 S.E.2d 356 (1924). There never exist any agreement between the Appellant and the

Department regarding his supervision on CSP. The Appellant will receive no benefit once being placed on CSP. He is obligated to serve two continuous years on the program, under the direction of the Department.[4] There exist no breach of contract because a contract never existed. The Appellant is currently incarcerated, and not yet a part of the program. Due to his current incarceration has not consent to any searches, or is currently obligated to follow any conditions of CSP. There exist no damages so he cannot bring an action for a breach of contract.

3. The Appellant has not been denied any liberty interest in the application of CSP.

The Appellant argues that he has been denied a liberty interest regarding the consent to search. The Appellant has not been denied a liberty interest due to the fact he is not yet been placed on the program. He has never been required to a consent to search. Even if he has been placed on CSP there is no denial of a liberty interest. That is due to the fact that he is to remain free until there is a possible violation. Upon any violation he is allowed to appear before the Circuit Court where he can present evidence in mitigation.[5] There can also be no violation unless the Court determines it is willful. S.C. Code Ann. §24-21-560(C)(5)(Supp. 2014). So there exist no violation of his liberty interest even after he is released on CSP. Since he remains incarcerated, and has yet to be placed on the program, there has been not any denial of his liberty interest, or constitutional rights. The Appellant does not have standing to raise this cause of action, nor is this case ripe for adjudication. The decision of the lower court should be affirmed.

---

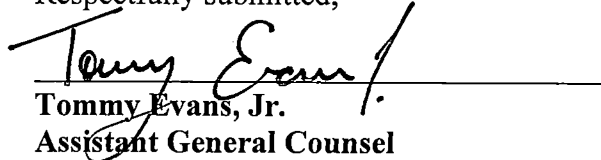
[4] A community supervision program operated by the Department of Probation, Parole and Pardon Services must last no more than two continuous years. S.C. Code Ann. §24-21-560 (Supp. 2014).

[5] If the department determines that a prisoner has violated a term of the community supervision program and the community supervision should be revoked, a probation agent must initiate a proceeding in General Sessions Court. S.C. Code Ann. §24-21-560 (C)(Supp. 2014).

CONCLUSION

Due to the above referenced defenses the Respondent respectfully requests this honorable court affirm the decision of the lower court granting the Respondent's motion to dismiss.

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

Columbia, South Carolina
August 12, 2015

RECEIVED

AUG 14 2015

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Court of Common Pleas
The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-001162

DEREK S. CARTER...APPELLANT

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES,...RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent and Designation of Matter* dated August 12, 2015, on Appellant this 12th day of August, 2015, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Derek Carter, #275938
Kershaw Correctional Institution-Unit MA-22
4848 Goldmine Highway
Kershaw, South Carolina 29067

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