

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County

Honorable J. Cordell Maddox, Circuit Court Judge

**ORIGINAL
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MAR 29 2017

SC Court of Appeals

THE STATE,

RESPONDENT

V.

SHAWN ALLEN MITCHELL,

APPELLANT

APPELLATE CASE NO. 2016-000560

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court err in ordering GPS monitoring for Appellant Mitchell three years after his guilty plea to failing to register as a sex offender because it was a violation of his Fourteenth Amendment right to due process to order electronic monitoring without an individualized assessment of his risk to reoffend since the state had waited three years to request the GPS monitoring which was a waiver of the state's right to do so and there was no evidence that he had committed any other sexual offense during this three year unmonitored period?

STATEMENT OF THE CASE

On November 10, 1997, Appellant Mitchell was convicted of committing a lewd act on a child under sixteen, and was required to register as a sex offender. (November 17, 2014 Tr. 5, ll. 1 – 4.) On May 17, 2012, Mitchell was convicted of violating the Sex offender Registry second offense pursuant to Section 23-3-470 (A). He was sentenced to one year incarceration. (Nov.17, 2014 Tr. 7, ll. 12 – 14.) The plea judge did not order GPS monitoring. (Nov. 17, 2014 Tr. 3, ll. 21 – 20; Tr. 7, ll. 1

On November 17, 2014, Mitchell appeared pro se before the Honorable J. Cordell Maddox for probation violation hearing for his conviction for grand larceny. The state was represented by Probation Agent Scott Metcalf. (Nov. 17, 2014 Tr. 1; Tr. 3, ll. 1 - 11.) Octavia Wright, counsel for the Department of Probation, Pardon and Parole (DPPPS) asked the judge to issue a remedial order placing Mitchell on GPS monitoring because GPS monitoring should have been ordered at his guilty plea in 2012 for his violation of the Sex Offender Registry. (Nov. 17, 2014 Tr. 6, ll. 12 – Tr. 7, ll. 11.)

The judge continued the hearing in order for Mitchell to obtain an attorney. (Nov. 17, 2014 Tr. 9, ll. 17 – Tr. 12, ll. 3.)

However, the judge issued an order the next day requiring that Mitchell be monitored by the DPPPS with an active electronic monitoring device. (Order of November 18, 2014 by judge Maddox.)

On February 27, 2015, Mitchell appeared before the Honorable R. Lawton McIntosh for a probation violation hearing that was continued from November 17, 2014 hearing. Mitchell was represented by Brian Horrocks, and the state was represented by Scott Metcalf. (February 27, 2015 Tr. 1-Tr. 4, ll. 25.) Judge McIntosh refused to hear arguments about the order by Judge

Maddox requiring GPS monitoring. (Feb. 27, 2015, Tr. 5, ll. 4 – Tr. 8, ll. 7.) He heard the probation violations, revoked one year, and extended probation for fifteen months. (Feb. 27, 2014, Tr. 15, ll. 7 – 23.)

On July 13, 2015, Appellant Mitchell appeared before the Honorable J. Cordell Maddox again for a hearing on the GPS monitoring. Mitchell was again represented by Brian Horrocks, and the state was represented by Scott Metcalf and Octavia Wright. (July 13, 2015 Tr. 1.) On March 2, 2016, Judge Maddox issued an order requiring that Mitchell be monitored by the Department of Probation with an electronic monitoring device. (Order of March 2, 2016 by Judge Cordell Maddox.) This appeal follows.

ARGUMENT

The circuit court erred in ordering GPS monitoring for Appellant Mitchell three years after his guilty plea to failing to register as a sex offender because it was a violation of his Fourteenth Amendment right to due process to order electronic monitoring without an individualized assessment of his risk to reoffend since the state had waited three years to request the GPS monitoring which was a waiver of the state's right to do so and there was no evidence that he had committed any other sexual offense during this three year unmonitored period.

On November 17, 2014, Appellant Mitchell appeared before the Honorable Judge Cordell Maddox for a probation violation hearing. He was convicted of grand larceny less than ten thousand dollars on May 17, 2012 when he was sentenced to five years suspended to the service of 366 days and two years probation. He was charged with violating probation by testing positive for drugs and failing to report. (Indictment 2012-GS-04-1034; Sentencing Sheet for grand larceny; Feb. 27, 2015 Tr. 15, ll. 7 – 23.)

At that guilty plea in 2012, he also pled guilty to violating the Sex Offender Registry by failing to register second offense and was sentenced to one year. (Nov. 17, 2014 Tr. 4, ll. 25 – Tr. 5, ll. 20.) Counsel for the DPPPS reported that the probation agent, Agent Metcalf, while preparing for this probation hearing, discovered that Appellant Mitchell had been convicted of committing a lewd act on a child in 1997. Agent Metcalf then realized when Mitchell pled guilty to failing to register on the Sex Offender Registry, GPS monitoring was not ordered for him by that court.

The DPPPS counsel then argued that pursuant to Section 23-3-54(B), the court “must” order that Mitchell be placed on electronic monitoring since it was not done when he pled guilty in 2012. (Nov. 17, 2014 Tr. 3, ll. 21 – Tr. 5, ll. 17.) DPPPS counsel asked the judge to issue a

“remedial order” placing Mitchell on GPS monitoring because that should have happened in 2012 for the registry violation. (Nov. 17, 2014 Tr. 6, ll. 12 – Tr. 7, ll. 11.) The judge asked if the statute for electronic applied retroactively since Mitchell was convicted of the lewd act in 1997. The judge said : “That’s the question that other judges have had.” Probation counsel said that the law requiring GPS monitoring passed in 2006 and did apply to convictions before then. (Nov. 17, 2014 Tr. 6, ll. 3 – 5.)

Mitchell said that when he was released from prison in 2013 after serving the year for failing to register as a sex offender, the Department of Corrections said that he did not have to wear the GPS monitoring device. (Nov. 17, 2014 Tr. 7, ll. 12 – 25.)

Mitchell did not have an attorney at the November 17, 2014 hearing. The judge then continued both the probation violation hearing and the GPS monitoring issue fifteen days in order for Mitchell to obtain a lawyer to represent him on the GPS issue. The judge told Mitchell that he needed to understand the seriousness of the GPS issue. (Nov. 17, 2014 Tr. 9, ll. 17 – Tr. 12, ll. 25.)

On February 27, 2015, Mitchell appeared before the Honorable R. Lawton McIntosh for the probation violation hearing. (February 27, 2015, Tr. 4, ll. 1 – 25.) When told about the order signed by Judge Maddox on November 18, 2014—only one day after the hearing which was continued- Judge McIntosh would not address the issue of that order or GPS monitoring. He referred that back to Judge Maddox to handle. (Feb. 27, 2015 Tr. 5, ll. 4 – Tr. 6, ll. 10.)

Judge McIntosh revoked one year and extended his probation for fifteen months. (Feb. 27, 2015, Tr. 15, ll. 7 – 23.)

On July 13, 2015, Appellant Mitchell and his attorney, Brian Horrocks, appeared before Judge Maddox for a hearing on the electronic monitoring. DPPPS counsel, Octavia Wright, and

Agent Metcalf were present. (July 13, 2015, Tr. 1.) DPPPS counsel informed the court that defense counsel had filed a motion to quash the judge's order of November 18, 2014 requiring Mitchell to be placed on electronic monitoring with the GPS. DPPPS counsel filed a memorandum in opposition to the defendant's motion to quash arguing that Mitchell waited six months after the order was signed before asserting his right. DPPPS counsel asked the judge to dismiss defense counsel's motion to quash the order of November 18, 2014 ordering GPS for Mitchell. Probation argued that GPS was mandatory under the statute and operated outside the bounds of when sentencing occurred. (July 13, 2015 Tr. 2, ll. 1 – Tr. 4, ll. 25; Tr. 5, ll. 8 – 19; Memorandum in Opposition to Defendant's Motion to Quash.)

Defense counsel had filed a memorandum in opposition to the order imposing lifetime electronic monitoring. Counsel argued that DPPPS brought this issue of GPS under a probation violation for a different offense and not under the violation of the Sex Offender Registry. Counsel also argued that the same ten day deadline in the court rules to object to the sentence or to appeal should apply to the state as well. The state wanted to add a condition to his sentence "914 days" after the sentencing. Therefore, the state "missed the opportunity to do that." (July 13, 2015 Tr. 6, ll. 9 – Tr. 7, ll. 22.)

The judge issued an order on March 2, 2016 requiring Mitchell be monitored by the Department of Probation with an electronic device. (Order of Judge Maddox March 2, 2016.)

Discussion

The Fourteenth Amendment provides that no state shall deprive any person of life, liberty, or property without due process of law. U.S. Const. amend. XIV. Rule 29 (a), SCRCrimP, provides that except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten days after the imposition of the sentence.

In State v. Warren, 392 S.C. 235, 708 S.E.2d 234 (Ct. App. 2011), the defendant had filed a timely post-trial motion to withdraw his guilty pleas. Three years later, he moved to amend that still pending motion where he abandoned his request to withdraw the guilty pleas but moved for a reconsideration of the sentence. The Court of Appeals held that the defendant's request for reconsideration of the sentence was untimely because the timely post-trial motion to withdraw the pleas was only for a hearing on that motion. The motion for reconsideration was subject to the ten day rule, and was not timely because it was filed three years later.

The Court of Appeals also held in Warren that the authority to change a sentence rests solely and exclusively within the discretion of the sentencing judge.

DPPPS argued in her memorandum of June 4, 2015, that Appellant Mitchell's motion to quash the order imposing GPS monitoring should be dismissed because it was filed "well beyond the ten day requirement" since the last hearing on November 17, 2014. DPPPS cited rule 29(a), SCRCrimP. However, DPPPS ignored the fact that the state waited over three years to petition the court to add electronic monitoring to Appellant Mitchell's sentence for violating the Sex Offender Registry.

DPPPS also cited Moguel v. State, 184 Md.App. 465, 966 A.2d 963 (2009), for the holding that laches applies when there is an unreasonable delay in the assertion of one's rights and that delay results in prejudice to the opposing party.

DPPPS accused Mitchell with acting with "unclean hands" by waiting seven months to file a motion to quash the order. But it was the state who acted with "unclean hands" by requiring GPS monitoring for Mitchell, which DPPPS discovered accidentally three years after the fact, should have been done at the 2012 guilty plea. The holding of Moguel v. State, *id.* applies to the state as well for not asserting the statutory GPS monitoring at the time of the plea

instead of waiting three years. At the time of the plea, the state did not object to the sentence; did not request the monitoring; and did not file a post-trial motion for reconsideration of the sentence to add the GPS monitoring. The state was in violation of Rule 29(a), SCRCrimP..

Appellant Mitchell argued in his counsel's memorandum in opposition to the order imposing lifetime monitoring the case of State v. Davis, 375 S.C. 12, 649 S.E.2d 178 (Ct. App. 2007) where the Court of Appeals held that the judge at the probation revocation hearing was not authorized to order the defendant's placement on the sex offender registry as a condition of probation.

Defense counsel also argued in his Memorandum in Opposition to the Order Imposing lifetime Monitoring that Section 23-3-540 (E) (see page 5) was unconstitutional because it mandated lifetime GPS monitoring without any consideration of the defendant's likelihood of reoffending.

Counsel argued that it was a violation of the Fourteenth Amendment of the United States Constitution for the state to order this electronic monitoring without any review of the person's likelihood of reoffending because it deprived the person of life, liberty, and property without due process of law. (See Memorandum in Opposition to GPS Monitoring, page 8.)

In State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013), the South Carolina Supreme Court held that the initial mandatory imposition of satellite monitoring for certain child sex offenders did not violate due process pursuant to the Fourteenth Amendment. However, the Court determined that the statutory requirement of lifetime monitoring without judicial review of risk assessment of reoffending did violate constitutional due process.

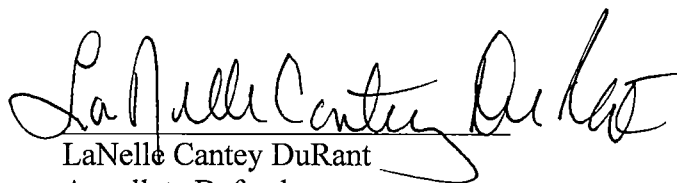
Justice Hearn wrote a dissent in Dykes and in State v. Nation, 408 S.C. 474, 759 S.E.2d 428 (2014), that she believed the initial imposition of satellite monitoring without an “individualized” determination of the likelihood of reoffending violated the person’s right to substantive due process. Justice Hearn’s dissents in both Dykes and Nation demonstrate her belief that the statute is unconstitutional where it mandates initial imposition of GPS monitoring without an “individualized determination” of the likelihood of reoffending. Although Justice Hearn refers specifically to Subsection (C), that subsection is essentially the same as Subsection (E) except (C) concerns people who violated probation and (E) concerns people who violate the Sex Offender Registry.

The United States Supreme Court ruled in Grady v. North Carolina, 135 S. Ct 1368 (2015), that GPS monitoring is a search pursuant to the Fourth Amendment. Therefore, the search must be reasonable which requires a reasonableness analysis for that particular person and not the category of persons based on the totality of the circumstances.

The circuit court in Mitchell’s case should have held a review of the likelihood of Mitchell reoffending. No evidence was presented that he had had any other sexual offenses since his release from prison on the initial conviction. He was not being monitored with a GPS during this time. The state waited too long to assert their right to ask for monitoring since they made no objection nor file any motion within the ten day period for post-trial motions.

CONCLUSION

Based on the above, the order imposing electronic monitoring on Appellant Mitchell should be dismissed.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of March, 2017.

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THE STATE,

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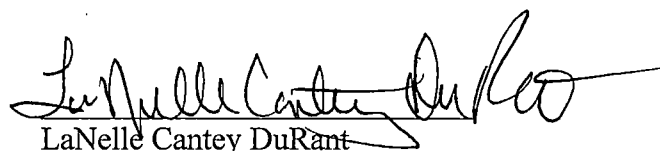
V.

SHAWN ALLEN MITCHELL,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned 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 the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Shawn Allen Mitchell, at 213 Hamlin Road, Liberty, SC 29657, this 29th day of March, 2017.



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of March, 2017.

Marie Henderson (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.