

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Case No.: 2018-CP-40-00254

Edward L. Green,)
)
Plaintiff,)

v.)

Mark Keel, Director, South Carolina Law)
Enforcement Division (SLED) and the)
State of South Carolina,)
)
Defendants.)

ORDER GRANTING
SUMMARY JUDGMENT

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SC Court of Appeals

This matter came before me on October 1, 2018, on the Defendants' Motion for Summary Judgment. The Defendants were represented at the hearing by Adam L. Whitsett, Esquire, General Counsel to the South Carolina Law Enforcement Division.¹ The Plaintiff was represented by Charles T. Brooks, III, Esquire, of The Brooks Law Office, LLC. Based upon the filings submitted in this matter, the arguments presented at the hearing, the applicable South Carolina law, and the following; I hereby GRANT the Defendants' Motion for Summary Judgment in this matter.

STANDARD OF REVIEW

A motion for summary judgment shall be granted "if the pleadings... show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to a judgment as a matter of law." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) (citing Rule 56(c), SCRCP) (emphasis in original).

¹ Assistant Attorney General Harley Kirkland also represents the Defendants.

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” Bankers Trust of South Carolina v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976).

DECISION

Based on the following, I find and conclude that there is no genuine issue of material fact in dispute in this matter. Further, I find that there is no factual dispute requiring the services of a fact finder. Accordingly, the Defendants are entitled to a judgment as a matter of law. *See* George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001); Rule 56(c), SCRCP.

AN EXPUNGEMENT DOES NOT AFFECT SORA REGISTRATION

The Plaintiff was convicted of Criminal Sexual Conduct 3rd Degree in 2005. This is a mandatory registry offense in accordance with the South Carolina Sex Offender Registry Act (SORA). *See* S.C. Code Ann. § 23-3-430(c)(3). All SORA registration in South Carolina is for life. *See* S.C. Code Ann. § 23-3-460 (setting forth SORA’s lifetime registration requirement in an unambiguously worded statute – to wit: “for life”). Accordingly, the Plaintiff’s expungement does not affect his SORA registration requirement and that Plaintiff is required to continue registering in accordance with SORA for life unless he meets one of the statutorily enumerated grounds for removal. *See* S.C. Code Ann. § 23-3-430(E), (F), (G). However, the Plaintiff concedes he does not meet any of these enumerated grounds. Accordingly, there is no relief available to the Plaintiff in this action.

The plain and unambiguous language of SORA sets forth avenues by which an individual’s lifetime registration requirement can be removed. *See* S.C. Code Ann. § 23-3-430(E), (F), (G). As previously noted by the South Carolina Court of Appeals, these are the only lawful avenues under which a lifetime registration requirement can be lifted. *See* Johnson v.

Lloyd, 399 S.C. 470, 476–77, 732 S.E.2d 198, 201 (Ct. App. 2012), *overruled on other grounds* by Johnson v. Lloyd, 407 S.C. 610, 757 S.E.2d 705 (2014) (“The General Assembly enacted an unambiguously worded statute that sets forth the legal remedies available to an individual on the [SORA] registry. Because the sex offender registry statute provides an adequate remedy..., it was error for the circuit court to fashion an equitable remedy in this case.”). As such, this action sets forth no claim for relief that can be granted.

As to the available avenues for removal from the SORA registry, pursuant to § 23-3-430(E), “SLED shall remove a person’s name and any other information concerning that person from the sex offender registry immediately upon notification by the Attorney General that the person’s adjudication, conviction, guilty plea, or plea of nolo contendere for an offense listed in subsection (C) was reversed, overturned, or vacated on appeal and a final judgment has been rendered.” S.C. Code Ann. § 23-3-430(E). Pursuant to § 23-3-430(F), an offender who receives a pardon “based on a finding of not guilty specifically stated in the pardon” shall be removed. S.C. Code Ann. § 23-3-430(F). And finally, pursuant to § 23-3-430(G) individuals exonerated subsequent to filing a petition for a writ of habeas corpus or a motion for a new trial are removed. S.C. Code Ann. § 23-3-430(F). However, unfortunately for the Plaintiff, none of these avenues apply to him. Simply put, an expungement is not an enumerated ground for removal of an individual’s lifetime registration requirement recognized in SORA and can therefore not be utilized for such. Therefore, summary judgment is warranted in this matter.

Had the South Carolina Legislature intended for an expungement to relieve an individual’s SORA registration requirement, the Legislature would have specifically stated such in statute. However, because the Legislature did not, the canon of statutory construction *expressio unius est exclusion alterius*, which holds that to express or include one thing implies

the exclusion of another, is determinative. See Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000); Black's Law Dictionary 602 (7th ed. 1999). Moreover, South Carolina courts have noted that this "maxim should be used to accomplish legislative intent [*i.e.* lifetime registration in South Carolina], not defeat it." S.C. Dep't of Consumer Affairs v. Rent-A-Ctr., Inc., 345 S.C. 251, 256, 547 S.E.2d 881, 884 (Ct. App. 2001).

In addition, the legislative history is instructive. Youthful Offender Act (YOA) expungements came into existence in 2003. See 2003 Act No. 1. Since that time, SORA has been amended seven (7) times, including one amendment to the statutory criteria for removal.² However, despite these numerous opportunities, not once has the Legislature ever included YOA expungements, or any expungement for that matter, in the list of statutory avenues for removal from lifetime SORA registration. See S.C. Code Ann. § 23-3-430(E), (F), (G). As such, the legislative intent that a YOA expungement does not relieve an individual's SORA registration requirement is clear and unequivocal. See Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) (acknowledging that the cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent.) Accordingly, this action fails as a matter of law.

The South Carolina Supreme Court has also held explicitly that a "court's equitable powers must yield in the face of an unambiguously worded statute." Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) *see also* Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007) (finding error in fashioning an equitable remedy in the face of an unambiguously worded statute). SORA's

² These amendments are: 2004 Act No. 208, § 14; 2005 Act No. 141, § 2; 2008 Act No. 335, § 16, eff June 16, 2008 (amending the criteria for removal set forth in S.C. Code Ann. § 23-3-430(F)); 2010 Act No. 212, § 3, eff June 7, 2010; 2010 Act No. 289, § 8, eff June 11, 2010; 2012 Act No. 255, § 5, eff June 18, 2012; 2015 Act No. 7 (S.196), § 6.D, eff April 2, 2015.

lifetime registration requirement is set forth in an unambiguously worded statute, *i.e.* “for life”. S.C. Code Ann. § 23-3-460. As such, there is simply no statutory or equitable relief available in this matter, and the Defendants are entitled to judgment as a matter of law.

Furthermore, for any court to fashion an equitable remedy in the face of an unambiguously worded statute would be a clear violation of the South Carolina Constitution’s mandate for the separation of powers. *See* S.C. Const. art. I, § 8. The South Carolina Constitution specifically provides that “the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.” S.C. Const. art. I, § 8. The duration of sex offender registration is a matter of public policy that is solely in the province of the South Carolina Legislature. As such, any attempt by any court to invade the Legislature’s exclusive province is a violation of the separation of powers and is unconstitutional. *Id.* In addition, the South Carolina Supreme Court has specifically held that

[i]f a statute’s language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (internal quotes and citation omitted). Instead, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation. *Id.* Moreover, “it is beyond this Court’s power to effect a change in the statutes enacted by the Legislature.” State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000); *see also* Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (this Court does “not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly”).

Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (2007). This entire action seeks for this Court to impermissibly and unconstitutionally act as a

“superlegislature” and to add language to an unambiguously worded constitutional statute. This is not permitted by South Carolina law. *Id.* As such, this action fails as a matter of law.

APPLICATION OF S.C. CODE ANN. § 22-5-920

In addition, any attempted reliance on S.C. Code Ann. § 22-5-920 is misplaced. An expungement pursuant to this section does not operate as a reversal, overturn, or vacation of the Plaintiff's conviction on appeal and does not affect the Plaintiff's overall SORA registration requirement. Section 22-5-920 deals only with the publication of certain arrest and conviction records - nothing more - and certainly not overall SORA registration. It is axiomatic that actual SORA in-person registration and the publication of SORA conviction information on a website are separate and distinct matters governed by separate and distinct statutes. To that end, S.C. Code Ann. § 23-3-450 mandates that offenders “register with the sheriff”, and specify that registration entails providing “information as prescribed by SLED.” This is SORA registration and is completely unaffected by S.C. Code Ann. § 22-5-920. Separately, S.C. Code Ann. § 23-3-490 speaks to the public accessibility of and the publication of SORA information. To that end, § 23-3-490 states that all “information collected for the offender registry is open to public inspection” and specifically authorizes the use of “computerized or electronic transmission of data or other electronic or similar means” *i.e.* the internet, to accomplish such publication. Accordingly, even assuming *arguendo* that § 22-5-920 could be read to limit the public's access to all of the SORA registry information related to the Plaintiff, which it does not, there is simply no possible way to read § 22-5-920 to authorize the removal the Plaintiff's separate and distinct lifetime SORA registration requirement. Rather, the only lawful avenues to remove this mandatory lifetime SORA registration requirement are set forth in SORA itself. *See* S.C Code

Ann. § 23-3-430(E), (F), (G). However, unfortunately for the Plaintiff, none of these avenues are available to him. *See supra*. Accordingly, this action must fail.

Moreover, the proper application of § 22-5-920, which speaks only to the publication of certain arrest and conviction records, requires only that SLED seal from the public view the actual charge of conviction on the Plaintiff's publically accessible SORA website entry. SLED has done such. Accordingly, SLED is in full compliance with both § 22-5-920 and with SORA. However, there is simply no reading of § 22-5-920, a statute dealing only with the publication of records, that can evidence a Legislative intent to remove an individual's overall SORA registration requirement. *See Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) (acknowledging that the cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent.) Accordingly, the Plaintiff's argument must fail.

It is also noteworthy that the most recent amendment to § 22-5-920, Act 254 (H.B. 3209) which is not yet in effect, specifically prohibits the expungement of "an offense for which the individual is required to register in accordance with the South Carolina Sex Offender Registry Act." Accordingly, while not determinative in this case, this pronouncement is clear evidence of a legislative intent that expungements should not affect SORA registration. *See Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) (acknowledging that the cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent.) Accordingly, this action fails as a matter of law.

SOUTH CAROLINA EXPUNGEMENT LAW

Similarly, a review of the recent expungement law changes in South Carolina is instructive on this issue. In 2014, the South Carolina Legislature amended the expungement

laws to require law enforcement entities to maintain expunged records and authorized such records for use in all ongoing and future law enforcement investigations. Act 276 (H.B. 4560), which became effective law on June 9, 2014, states:

Section 17-1-40. (A) For purposes of this section, ‘under seal’ means not subject to disclosure other than to a law enforcement or prosecution agency, and attorneys representing a law enforcement or prosecution agency, unless disclosure is allowed by court order.

(B)(1) If a person’s record is expunged pursuant to Article 9, Title 17, Chapter 22, because the person was charged with a criminal offense, or was issued a courtesy summons pursuant to Section 22-3-330 or another provision of law, and the charge was discharged, proceedings against the person were dismissed, or the person was found not guilty of the charge, then the arrest and booking record, associated bench warrants, mug shots, and fingerprints of the person must be destroyed and no evidence of the record pertaining to the charge or associated bench warrants may be retained by any municipal, county, or state agency. Provided, however, that:

(a) Law enforcement and prosecution agencies shall retain the arrest and booking record, associated bench warrants, mug shots, and fingerprints of the person under seal for three years and one hundred twenty days. A law enforcement or prosecution agency may retain the information indefinitely for purposes of ongoing or future investigations and prosecution of the offense, and to defend the agency and the agency’s employees during litigation proceedings. The information must remain under seal. The information is not a public document and is exempt from disclosure, except by court order....

SC LEGIS 276 (2014), 2014 South Carolina Laws Act 276 (H.B. 4560).

In 2016, the Legislature expanded the use of expunged records even further and authorized the use of expunged records for “administrative hearings” as well. Act 132 (S.255), which became effective on February 16, 2016, states:

Section 17-1-40. (A) For purposes of this section, “under seal” means not subject to disclosure other than to a law enforcement or prosecution agency, and attorneys representing a law enforcement or prosecution agency, unless disclosure is allowed by court order.

(B)(1) If a person’s record is expunged pursuant to Article 9, Title 17, Chapter 22, because the person was charged with a criminal offense, or was issued a courtesy summons pursuant to Section 22-3-330 or another provision of law, and the

charge was discharged, proceedings against the person were dismissed, or the person was found not guilty of the charge, then the arrest and booking record, associated bench warrants, mug shots, and fingerprints of the person must be destroyed and no evidence of the record pertaining to the charge or associated bench warrants may be retained by any municipal, county, or state agency. Provided, however, that:

(a) Law enforcement and prosecution agencies shall retain the arrest and booking record, associated bench warrants, mug shots, and fingerprints of the person under seal for three years and one hundred twenty days. A law enforcement or prosecution agency may retain the information indefinitely for purposes of ongoing or future investigations and prosecution of the offense, administrative hearings, and to defend the agency and the agency's employees during litigation proceedings. The information must remain under seal. The information is not a public document and is exempt from disclosure, except by court order.

SC LEGIS 132 (2016), 2016 South Carolina Laws Act 132 (S.255).

The stated purpose of the SORA registry is “to promote the state’s fundamental right to provide for the public health, welfare, and safety of its citizens....” In addition, the South Carolina Legislature specifically pronounced,

The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement’s efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency’s jurisdiction.

S.C. Code Ann. § 23-3-400. Accordingly, it is inarguable that the South Carolina Legislature intended for law enforcement to utilize expunged SORA mandated offenses and for those offenders to remain listed on the SORA registry. Therefore, the Defendants are entitled to summary judgment in this matter.

SORA REGISTRATION IN SOUTH CAROLINA IS NOT PUNISHMENT

In South Carolina, Courts have also consistently and unequivocally held that registration pursuant to SORA is not punishment. See State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003) (finding that “the

length of time one must be listed on the sex offender registry is non-punitive, and it cannot constitute a deprivation of a constitutionally protected liberty interest.”); In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) (finding that “sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated.”); In the Interest of Justin B., a Juvenile under the Age of Seventeen, 419 S.C. 575, 799 S.E.2d 675 (2017) (reaffirming the constitutionality of SORA and reaffirming unequivocally that SORA is not punishment).

Rather, the South Carolina Legislature has evidenced a clear intent that SORA is “to promote the state’s fundamental right to provide for the public health, welfare, and safety of its citizens” and to “provide law enforcement with the tools needed in investigating criminal offenses.” S.C. Code Ann. § 23-3-400. In State v. Walls, the South Carolina Supreme Court noted the following:

it is clear the General Assembly did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes. Hence, the language indicates the General Assembly’s intention to create a non-punitive act. We find the Act is not so punitive in purpose or effect as to constitute a criminal penalty. Accordingly, the Act does not violate the *ex post facto* clauses of the state or federal constitutions.

348 S.C. 26, 30-31, 558 S.E.2d 524, 525-26 (2002).

The most recent South Carolina Supreme Court opinion in this area, In the Interest of Justin B., a Juvenile under the Age of Seventeen, 419 S.C. 575, 799 S.E.2d 675 (2017), is instructive and determinative. This case involved a challenge by a juvenile offender to mandatory lifetime public registration. *Id.* In denying every challenge to SORA brought before it, the Court, not only provided a comprehensive review of the history of SORA jurisprudence, but also stated the following:

The requirement that adults and juveniles who commit criminal sexual conduct must register as a sex offender and wear an electronic monitor is not a punitive measure, and the requirement bears a rational relationship to the Legislature's purpose in the Sex Offender Registry Act to protect our citizens—including children—from repeat sex offenders. The requirement, therefore, is not unconstitutional. If the requirement that juvenile sex offenders must register and must wear an electronic monitor is in need of change, that decision is to be made by the Legislature—not the courts. The decision of the family court to follow the mandatory, statutory requirement to impose lifetime sex offender registration and electronic monitoring on Justin B. is AFFIRMED.

Id. at 586–87, 681.

Similarly, should South Carolina's SORA laws be in need of amendment to include expungement as an available route for removal from the SORA registry, that is a decision that can only be made by the South Carolina Legislature. *Id.*; S.C. Const. art. I, § 8; Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 379 S.E.2d 119 (1989); Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007). However, in the absence of such legislative change, there is simply no lawful relief on which the Plaintiff's claim can be granted. Accordingly, the Plaintiff's claim fails as a matter of law and the Defendants are entitled to summary judgment.

RES JUDICATA

The Plaintiff is also barred from arguing the sole cause of action alleged in this Complaint, to wit: that he is entitled to equitable relief, in accordance with the doctrine of res judicata. South Carolina Courts have consistently and unequivocally held that “[u]nder the doctrine of res judicata, ‘[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.’” Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (quoting Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n of South Carolina, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). This Plaintiff has argued that he is entitled to equitable relief in a

previous action and his argument was completely and authoritatively rejected by the South Carolina courts. In conjunction with this motion, the Defendants provided the Court with a copy of the previous Circuit Court Order in which this Plaintiff sought equitable relief and was denied, an Appellate Decision affirming the Circuit Court Order, and the South Carolina Supreme Court's denial of a petition for a writ of certiorari in the same matter. These orders conclusively bar this present action seeking only equitable relief. I note that even after receiving copies of the above orders, which were filed as an attachment to the Answer in this matter, the Plaintiff has not sought to amend his complaint to articulate any relief beyond that which he has already been denied by the South Carolina courts. Accordingly, this entire action is barred by the doctrine of res judicata and the Defendants are entitled to judgment as a matter of law.

CONCLUSION

Therefore, based on the foregoing, it is hereby ORDERED, DECREED, and ADJUDGED that the Defendants' Motion for Summary Judgment is GRANTED.

AND IT IS SO ORDERED.

DeAndrea G. Benjamin
Presiding Judge
Court of Common Pleas
5th Judicial Circuit

, South Carolina
, 2018



Richland Common Pleas

Case Caption: Edward L Green vs Mark Keel , defendant, et al

Case Number: 2018CP4000254

Type: Order/Summary Judgment

So Ordered

s/DeAndrea Gist Benjamin, #2161

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