RECEIVED

FEB 19 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from York County
S. Jackson Kimball, Special Circuit Court Judge

Appellate Case № 2016-001700
Opinion № 2018-UP-461
Heard November 1, 2018 - Filed December 12, 2018

Mark Anderko ..... Petitioner,

v.

South Carolina Law Enforcement Division ..... Respondent.

PETITION FOR WRIT OF CERTIORARI

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
((864) 229-5010
S.C. Bar No. 06188

Christopher A. Wellborn
142 Oakland Avenue
Rock Hill, SC 29730
(803) 366-1065
cawlaw@comporium.net

Attorneys for Petitioner

ADAM L. WHITSETT
General Counsel
SC Law Enforcement Division
P.O. Box 21398
Columbia, SC 29221-1398
(803) 896-0647
S.C. Bar No. 74888

Attorney for Respondent

INDEX

TABLE OF AUTHORITIES

Cases: **Page:**

Statutes:

Constitutional Provisions:

CERTIFICATE OF COUNSEL

I hereby certify that a Petition for Rehearing was filed with the South Carolina Court of Appeals on December 27, 2018. This Petition was denied on January 17, 2019.

STATEMENT OF ISSUES PRESENTED

Question I: Did the Court of Appeals err as a matter of law in finding that Mark Anderko was required to continue to have his name on the out of state Sex Offender Registry when he was not a resident of the State of South Carolina?

Question II: Did the Court of Appeals err as a matter of law in failing to require the State Law Enforcement Division (SLED) to remove the name of Mark Anderko from the out of state Sex Offender Registry when the State of Washington, after a hearing, had removed him from having to register as a sex offender in the State of Washington?

STATEMENT OF THE CASE

Procedural History

Mark Anderko filed his action on December 18, 2015 in the Court of Common Pleas for the County of York seeking to have his name removed from the South Carolina Sex Offender Registry. The matter came for a hearing before the Honorable S. Jackson Kimball, Special Circuit Judge for York County. By his Order dated July 12, 2016, and filed July 28, 2016, Judge Kimball denied his request to remove his name from the Sex Offender Registry.

Mr. Anderko filed his Notice of Appeal on August 19, 2016. The South Carolina Court of Appeals, in an Unpublished Opinion, affirmed the lower court. The Petition for Rehearing was denied on January 17, 2019.

Factual History

On April 19, 2004 Mark Anderko was convicted in the State of Washington for a violation of the offense of communicating with a minor for immoral purposes. (RCW 9.68A.090). As part of his conviction, Mr. Anderko was required to register as a sex offender in the State of Washington. Rec. on App. at 60. In November of 2004, Mr. Anderko moved to the State of South Carolina. As the crime to which he pled guilty in the State of Washington required that he register as a sex offender, he was required to register as a sex offender in the State of South Carolina. S. C. Code § 23-3-430 A. He registered on a regular basis in South Carolina from November of 2004 until January of 2012, when he changed his residence back to the State of Washington. He then stopped registering in South Carolina as he was no longer a residence of the State of South Carolina. As a result of his not being a resident, he was not required to register. His status on the Sex Offender Register in South Carolina was changed to

reflect the fact he was residing out of state. His name, however, still remained on the South Carolina Sex Offender Registry in keeping with a SLED policy, but arguably not in keeping with the plain wording of the Statute. Rec. on App. at 61.

On January 9, 2014, as permitted by Washington law, the Court for the State of Washington issued an Order terminating the requirement that Mr. Anderko register as a sex offender. The State Law Enforcement Division (SLED) did not accept this Order as a basis for removing Mr. Anderko from the out of state Sex Offender Registry list maintained by SLED. The Statute has no provision that permits SLED to maintain such a list. As a result, Mr. Anderko filed the present action seeking to have his name removed from the out of state Sex Offender Registry maintained by SLED.

Argument

Question I

Did the Court of Appeals err as a matter of law in finding that Mark Anderko was required to continue to have his name on the out of state Sex Offender Registry when he was not a resident of the State of South Carolina?

In affirming the decision of the lower court, the South Carolina Court of Appeals has affirmed the practice and procedure by SLED of maintaining an out of state registration list. Such a list that is not authorized by the statute. By the plain wording of the Statute, the Statute only applies to a person residing in the State of South Carolina. The list maintained by SLED must, therefore, be of current residents of the State of South Carolina. The requirement to register in South Carolina is first contingent upon a person who was convicted of a specific sex crime being a resident of this State. S. C. Code § 23- 3-430 provides "Any person, regardless of age, *residing* in the State of South Carolina . . . ." (emphasis added). The law further defines what is required to be "residing" in South Carolina as "For purposes of this article, a person who remains in this State for a total of thirty days during a twelve-month period *is* a resident of this State." (emphasis added). Thus, a person with a conviction for certain sex crimes who vacations, works, is hospitalized, or incarcerated in South Carolina for a total of 30 days in a twelve month period is required to register as a sex offender. The Statute has no provisions for maintaining a registry list of those who formerly resided in South Carolina, although SLED is permitted to establish regulations. S. C. Code § 23-3-420. ("The State Law Enforcement Division shall promulgate regulations to implement the provisions of this article.") A regulation cannot be used to establish a list of former residents. A regulation may clarify a provision of the Statute, but it

may not created something the Statute does not require. As this Court has said, "Although a regulation has the force of law, it must fall when it alters or adds to a Statute." *Soc'y of Prof'l Journalists v. Sexton*, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984). Here the SLED regulations add a list not authorized by the Statute. It requires a non-resident to be on a list when non-residents are not required to register under the plain wording of the Statute. Mr. Anderko assumes, without conceding such, that the legislature may require a list of individuals who were required to register when they lived in South Carolina but are no longer residents. The current Statute does not so authorize. This is a proper decision for the legislature and not the regulatory personnel in SLED.

The only proper reading of S.C. Code § 23-3-430 is that it applies only to present residents of the State of South Carolina. The Statute as to residency is written in the present tense. The Statute by its plain language does not apply to those who have in the past been residents of and registered in South Carolina as a sex offender. Nor, obviously, does it apply to those not residing in South Carolina who are sex offenders in other states. Under the SLED policy, a person with a conviction for certain sex crimes who only once vacations, works, is hospitalized or incarcerated for 30 days a year in South Carolina will forever be listed in the "out of state" sex registry. No language in the Statute supports that permanent listing of a person who has left the State and establishes or has a permanent residence in another state or country.

If one searches the SLED Sex Offender Registry site, a search of the site by name will show the name of the Appellant with his residence being in the State of Washington. No local information, such as former addresses, is contained there. SLED regulation 73-250 provides "A sheriff, when notified that a registered offender is moving to another state, will update the

offender's record in the Registry to inactive status." A check of the listing for Mr. Anderko does not show that he is listed as "inactive." *See*, http://scor.sled.sc.gov/OffenderDetails.aspx?Display=Main&Id=552250 (visited February 15, 2017).

As noted by *Ahrens v. State*, 392 S.C. 340, 348–49, 709 S.E.2d 54, 58 (S.C.) "While '[t]he Legislature has the right to vest in the administrative officers and bodies of the State a large measure of discretionary authority ... to make rules and regulations,' an agency may not make rules that 'conflict with, or ... change in any way the statute conferring such authority.'" (internal citations omitted). Thus, SLED cannot make a list or procedure not authorized by the Statute.[1] A reading of the regulations does not even grant SLED the power to maintain an "out of state" list of sex offenders. The SLED regulations grants permission to the local sheriff, where the registration occurred, to destroy the records. The regulations provides:

> 73-270 Retention of Information Collected.
> A. Information collected by sheriffs office.
> (1) Information collected by a sheriffs office on a convicted sex offender may be destroyed:
> (a) Once an offender is placed on an inactive status and a sheriff confirms that the offender has been included in the South Carolina Registry by another sheriffs office, or *the offender transfers to another state* . . . . (emphasis added)

---

[1] While not relevant to this appeal, a conflict exists between the statute and the regulations as to how long a person must live in South Carolina before they are required to register. The code in § 23-3-430 says 30 days during a twelve month period. The SLED regulations say "J. 'Resident' means any person remaining in South Carolina for a period of twenty-eight (28) consecutive days. This will include any person having either permanent or temporary lodging, engaged in any activity, including, but not limited to, earning a salary, attending school or college, recreation, visitation and the like." Thus under the SLED regulations a person can leave the state every 25 days and then return and never have to register.

Notwithstanding the lack of any authority to maintain such a list by Statute, the lower court stated, "Further, as determined by the legislature, maintaining a list of out-of-state registrants assists law enforcement in continuing enforcement of this State's laws should a registrant return to reside in South Carolina." Rec. on App. at 64. The Court failed to cite to any portion of the code where the legislature made such a finding. The reason is, there is none. The Court then stated, "I conclude that South Carolina has a legitimate public policy interest and concern in maintaining the registration of all persons having a history of conviction of criminal sexual offense that would require registration in this State." Rec. on App. at 64. The basis for such a holding was "The requirement is consonant with the legitimate public policy of South Carolina of continuing provision of notice to South Carolina residents than an individual who would otherwise be registering is not, and should not be residing in this State for any extended period of time. As such, this knowledge remains as protection for the public, and also aids law enforcement in monitoring the potential risk to communities." Rec. on App. at 64. Permitting the destruction of the records on the local level and placing the offender on an "inactive list" would seem to be contrary to the purposes of maintaining an "out of state" registry found by the lower court. Certainly permitting the destruction of the records by local authorities is inconsistent with this purpose.

As Mark Anderko is not residing in South Carolina as required and defined by S.C. Code §23-3-430(B) the Statute does not apply to him. This Court should grant this Petition for Writ of Certiorari and reverse the decision of the Court of Appeals and require the State Law Enforcement Division to remove the name of Mark Anderko from the Sex Offender Registry maintained by them.

Question II

Did the Court of Appeals err as a matter of law in failing to require the State Law Enforcement Division (SLED) to remove the name of Mark Anderko from the out of state Sex Offender Registry when the State of Washington, after a hearing, had removed him from having to register as a sex offender in the State of Washington?

A person who was convicted of an out of state sexual offense can be required to register in South Carolina under two conditions. First, if the person has been convicted in "any comparable court in the United States, or a foreign country" to an offense for which a person would be required to register in South Carolina. Second, if the offenses are not comparable, then the out of state person can be required to register for "an offense for which the person was required to register in the state where the conviction or plea occurred . . ." S.C. Code §23-3-430. The issue in this case involved the second provision.[2] At the time Mr. Anderko moved to South Carolina in November of 2004, he was required under the law of the State of Washington to register as a sex offender. Therefore, even though the statute in Washington is not comparable

---

[2] The closest Statute in South Carolina is S.C. Code § 16-15-342. Criminal Solicitation of a Minor. It is defined as:

"(A) A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) . . . ." The Washington Statute is broader as virtually any sexual communication would be sufficient to violate the Washington Statute.

to a South Carolina Statute, Mr. Anderko was required to registry for the sole reason he was required to register in the State of Washington.

The Statute under which he was convicted is RCW.9.68A.090 "Communication with minor for immoral purposes." It is a misdemeanor. The lower court rested its decision on the fact that as Mr. Anderko was at one time required to register as a sex offender in the State of Washington, he is always required to register as a sex offender in South Carolina. Rec. on App. at 61. The lower court placed special emphasis on the provision of the South Carolina law that requires a person to register if they were required to register in the State where the conviction occurred.

The Washington Order dated December 22, 2014 does more than eliminate any requirement that Mr. Anderko not be required to register as a sex offender. His civil rights were fully restored except for his right to own a firearm. Even the "no contact" provision of his sentence was lifted. Rec. on App. at 67.

The lifting of the requirement to register in this case was not the result of the simple passage of a certain number of years. The Washington code requires more. The trial court is required to consider and find a number of facts. RCW 9A.44.142 provides:

> (4)(a) The court may relieve a petitioner of the duty to register only if the petitioner shows by clear and convincing evidence that the petitioner is sufficiently rehabilitated to warrant removal from the central registry of sex offenders and kidnapping offenders.
> (b) In determining whether the petitioner is sufficiently rehabilitated to warrant removal from the registry, the following factors are provided as guidance to assist the court in making its determination:
> (i) The nature of the registrable offense committed including the number of victims and the length of the offense history;
> (ii) Any subsequent criminal history;

(iii) The petitioner's compliance with supervision requirements;
(iv) The length of time since the charged incident(s) occurred;
(v) Any input from community corrections officers, law enforcement, or treatment providers;
(vi) Participation in sex offender treatment;
(vii) Participation in other treatment and rehabilitative programs;
(viii) The offender's stability in employment and housing;
(ix) The offender's community and personal support system;
(x) Any risk assessments or evaluations prepared by a qualified professional;
(xi) Any updated polygraph examination;
(xii) Any input of the victim;
(xiii) Any other factors the court may consider relevant.
RCW 9A.44.142. Relief from duty to register

Under the factors to be considered, the Order from the State of Washington has determined that the reasons for having Mr. Anderko register as a sex offender no longer exist. The section does not apply to all sex offenders. Many in Washington will be required to register for a lifetime. The Washington Code provides:

(2)(a) A person may not petition for relief from registration if the person has been:
(i) Determined to be a sexually violent predator pursuant to chapter 71.09 RCW; or
(ii) Convicted as an adult of a sex offense or kidnapping offense that is a class A felony and that was committed with forcible compulsion on or after June 8, 2000.
RCW 9A.44.142. Relief from duty to register

Mr. Anderko requested that the lower court honor under the Full Faith and Credit Clause of Article IV, § 1 of the United States Constitution of the United States of America. As the basis for registering in South Carolina was the fact that Mr. Anderko was required to register in the State of Washington, once that obligation is removed by judicial order, then the State of South Carolina is required to honor that ruling. To hold otherwise is to ignore the judicial proceedings of the State of Washington. As the South

Carolina Supreme Court has said concerning the full faith and credit clause, "In accordance with this mandate, the courts of one state must give such force and effect to a foreign judgment as the judgment would receive in the state where rendered." *Minorplanet Systems USA Ltd. v. American Aire, Inc.*, 368 S.C. 146, 149 , 628 S.E.2d 43, 45 (2006).

The theory of Mr. Anderko is simple. If he had first moved to South Carolina after the December of 2014 Order was signed, he would not have been required to register as he was not required to register in the State of Washington. The rule should be no different simply because he now brings this action instead of moving back to South Carolina today. As found by the lower court, the only reason he was required to register in South Carolina in 2004 was that he was required to register in Washington. Today the basis for that finding does not exist as Washington by court order specifically determined he was not require to register.

The South Carolina Court of Appeals in rejecting this position of Mr. Anderko said, "The Full Faith and Credit clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject" *Sun Oil CO. v. Wortman*, 486 U.S. 717, 722 (1988). Mr. Anderko is not asking South Carolina to substitute the Statute for the State of Washington for the South Carolina Statute. Mr. Anderko was simply asking the Court of Appeals to apply the South Carolina as written with giving due credit to what the State of Washington has ruled. As noted above, the South Carolina Statute says Mr. Anderko is required to register if another state requires him to register. The State of Washington no longer requires him to register. Mr. Anderko simply is asking that this

Court honor a finding of the State of Washington as it applies to the law in South Carolina. Had Mr. Anderko moved to South Carolina after he had his requirement to register in Washington removed, South Carolina could not have determined they disagreed with the finding in Washington and made him register here. To do so would not be giving full faith and credit to the ruling in Washington. The basis for the original South Carolina registration no longer exists. Therefore, Mr. Anderko should have his name removed from the "out of state" registry list, which arguably should also not even exist.

CONCLUSION

For the foregoing reason, this Court should reverse the decision of the lower court and remand the matter to the lower court for a ruling that Mark Anderko be removed from the Sex Offender Registry for the State of South Carolina.

February 13, 2019

C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S. C. Bar № 06188

Christopher A. Wellborn
142 Oakland Avenue
Rock Hill, SC 29730
(803) 366-1065
cawlaw@comporium.net

Attorneys of Mark Anderko

RECEIVED

FEB 19 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas
S. Jackson Kimball, III, Special Circuit Court Judge

Case № 2016-001700

Unpublished Opinion No. 2018-UP-461
Submitted November 1, 2018-Filed December 12, 2018

Mark Anderko, ... Appellant,

vs.

South Carolina Law Enforcement Division ..... Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on February 13, 2019, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Writ of Certiorari and Appendix in the above case addressed to Adam Whitsett, South Carolina Law Enforcement Division, P.O. Box 21398, Columbia, SC 29221.

Sandy Traynham

Sworn to and Subscribed
before me this 13th day
of February, 2019

Notary Public for South Carolina
My Commission Expires: 12/7/2019