STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from McCormick County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDREW JAMES HARRELSON,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err in imposing lifetime global position monitoring (GPS) pursuant to S.C. Code Section 23-3-540 in Harrelson's guilty plea to lewd act on a minor when 23-3-540 violated the constitutional prohibition against cruel and unusual punishment and disproportionate sentencing as contained in the Eighth Amendment and the South Carolina Constitution?

2. Did the mandatory imposition of permanent Global Positioning Satellite (GPS) monitoring pursuant to S.C. Code Section 23-3-54 (C) without the opportunity for a meaningful hearing on the merits if imposing GPS monitoring on appellant violated his right to procedural due process?

STATEMENT OF THE CASE

Appellant Andrew James Harrelson pled guilty to first degree criminal sexual conduct, lewd act on a minor, third degree criminal sexual conduct and assault, and battery of a high and aggravated nature during the February 2009 term of the McCormick County General Sessions Court before the Honorable William P. Keesley, Judge. Appellant was sentenced to commitment within the South Carolina Department of Corrections Youthful Offender Division for an indeterminate period not to exceed six years and placement upon electronic monitoring per South Carolina Code Ann. §23-3-540. His attorney filed a notice of appeal which was perfected by the Office of Appellate Defense. On November 8, 2010, the South Carolina Supreme Court issued an opinion remanding Harrelson's case finding that his guilty plea was conditional because his attorney objected during the guilt phase. State v. Harrelson, Op. No. 2010-MO-030 (filed November 8, 2010).

On February 22, 2011, Harrelson appeared before the Honorable R. Knox McMahon and entered a guilty plea to lewd act on a minor. Harrelson waived presentment to the grand jury. R. 55; R. 57, ll. 1 – 25; R. 58, ll. 1 – 10. Harrelson was represented by E. Tim Moore, Jr., and the state was represented by H. Franklin Young, Assistant Solicitor. Judge McMahon sentenced Harrelson to the recommended sentence pursuant to the Youthful Offender Act not to exceed six years suspended to five years probation; sex offender registration; and mandatory G.P.S. monitoring. R. 79, ll. 5 – 22. Harrelson's attorney filed a notice of appeal of the G.P.S. monitoring. R. 75, ll. 16 – 24. This appeal follows.

ARGUMENT

I.

The circuit court erred in imposing lifetime global position monitoring (GPS) pursuant to S.C. Code Section 23-3-540 in Harrelson's guilty plea to lewd act on a minor when 23-3-540 violated the constitutional prohibition against cruel and unusual punishment and disproportionate sentencing as contained in the Eighth Amendment and the South Carolina Constitution.

On August 11, 2007, Andrew Harrelson, at the age of sixteen, went on a church outing which involved swimming at a local lake. R. 71, ll. 9 – 18. During swimming, a young girl approximately eight years old did not want to touch the bottom of the lake so Harrelson carried her into the deeper water. During this time, he allegedly reached inside her bathing suit and placed his finger into her vagina. Medical exams confirmed redness in her vaginal area. During a later statement, Harrelson admitted touching the girl inappropriately but was not sure there was penetration. R. 71, ll. 19 – 25; R. 72, ll. 1 – 21.

At his guilty plea, Harrelson admitted to the inappropriate touching, but not to penetration. He pled guilty only to the lewd act charge. R. 68, ll. 16 – 21.

After the plea judge accepted the guilty plea, Harrelson's attorney offered mitigation in favor of Harrelson. R. 73, ll. 8 – 25; R. 74, ll. 1 – 25; R. 75, ll. 1 – 15. Plea counsel then raised an objection to the electronic monitoring and registration. Counsel's objection was as follows:

> As to the sentence, Your Honor, I would wish to preserve Mr. Harrelson's rights. As this Court indicated in the appellate decision, they didn't reach the merits of whether or not Section 23-3-540 violates the Constitution's prohibition against cruel and unusual punishment and disproportionate

> sentencing. As to the electronic monitoring and registration provision of the sentence, Your Honor.

R. 75, ll. 16 – 24.

Plea counsel explained to the court that the appellate court ruled that the first guilty plea was a conditional plea because defense attorney objected during the guilt phase. The appellate court ruled that a guilty plea consisted of two phases: the guilt phase and the sentencing phase. Counsel said the appellate court relied on the case of Easter v. State, 355 S.C. 79, 584 S.E.2d 117 (2003) which held that the defendant's guilty plea was not conditional because Easter's attorney objected during the sentencing phase. Counsel said he was trying to follow the procedure as described in Easter v. State, id. The state agreed that counsel was following the correct procedure when there was no conditional aspect to the guilty plea itself. R. 76, ll. 14 – 25; R. 77, ll. 1 – 22.

Defense counsel stated to the court that they had no objection to the plea itself. R. 77, ll. 23 – 25.

The plea judge reiterated the procedure from Easter v. State, id., and that defense counsel had followed the correct procedure to insure that Harrelson's plea on this date was not conditional as counsel objected during the sentencing phase only. R. 78, ll. 4 – 25; R. 79, ll. 1 – 4.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment and does not allow the duration of a sentence to be grossly disproportionate to the severity of the crime. State v. Williams, 380 S.C. 336, 669 S.E.2d 6440 (2008). In Thompson v. Oklahoma, 487 U.S. 815 (1988), the United States Supreme Court held that the two principles in determining whether a punishment is cruel and unusual

are the evolving standards of decency and the proportionality between the punishment and the offense, and that in order to establish evolving standards of decency, the defendant must show that our culture and laws would reject a particular sentence. See also State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007); cert denied 128 S.Ct. 1872 (2008), and State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002).

The Thompson v. Oklahoma Court held that the "imposition of a death sentence on one who committed a crime at the age of fifteen would not serve the goals of deterrence or retribution inasmuch as a juvenile is less culpable, has more capacity for growth and is not likely to have performed a cost beneath analysis as to the consequences of his conduct.

In Graham v. Florida, 130 S. Ct. 2011 (U.S. May 17, 2010), the United States Supreme Court held that the Eighth Amendment prohibits the imposition of a life without parole sentence on the juvenile offender who did not commit homicide.

Here, the placement of an electronic monitoring device in effect indefinitely on appellant, who was a mere sixteen years old at the time of the offense, was clearly a sentence that was disproportionate to the crime and cruel and unusual punishment for a youth who had not matured fully nor proved to be hard core and worthy of such harsh punishment at this young age. Harrelson's attorney argued to the court that Harrelson had been evaluated and been found competent. However, Harrelson was found to have impulse disorders and was delayed in his emotional development at the time of the incident when he was only sixteen. R. 74, ll. 1- 24.

The nature of appellant's case must be considered as well. Appellant's case was not a drug case nor a recidivist statute case (LWOP). It has been held that LWOP sentences for drug violations do not offend evolving standards of decency so as to constitute cruel and

unusual punishment. State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991); State v. Williams, 380 S.C. 336, 669 S.E.2d 640 (2008). Also, it has been held that LWOP sentencing in and of itself has been held not to be cruel and unusual punishment. State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2000).

The Court's ruling that a thirty-year sentence for twelve-year old did not violate the Eighth Amendment was based on the fact that the defendant committed a double murder with an elaborate and sophisticated cover-up. State v. Pittman, *supra.*

A. S.C. Code § 23-3-540(C) violates the Eighth Amendment's prohibition against cruel and unusual punishment because appellant is required to pay for the imposed monitoring and faces criminal sanctions if not able to comply.

Lifetime GPS monitoring is cruel and unusual punishment because it imposes a financial burden on the person to pay a fee to the state each month to pay the costs of the monitoring. S.C. Code Section 23-3-540(I). The person is subject to criminal sanctions if he fails to pay. S.C. Code Section 23-3-540(K). Harrelson was employed at his parents' MacDonald's Restaurant. He may have difficulty obtaining other employment as he has a criminal conviction, and has to register as a sex offender. R. 74, ll. 18 – 24.

In Moore v. Moore, 376 S.C. 467, 657 S.E.2d 743 (2008), the Supreme Court held that among the implications of having an Order of Protection imposed were a reduction in financial resources and "criminal prosecution or contempt proceedings" for violating the order. Id. at 473 – 474. The Court held that the reduction in financial resources resulting from an Order of Protection issued by the Family Court infringed a constitutionally protected right to property. Id. at 746 – 747.

The Court should find that the requirement to pay a monthly fee or face criminal sanctions pursuant to an order imposing lifetime GPS monitoring constitutes cruel and unusual punishment.

B. S.C. Code Section 23-3-540 constitutes cruel and unusual punishment because it requires mandatory GPS monitoring for someone who commits a lewd act on a minor or CSC with a minor first degree, but makes GPS discretionary for other sex offenses such as CSC with a minor second degree.

Section 23-3-540 classifies sex offenders by the offense they have committed. S.C. Code §§ 23-3-540 (A) through (G). There are two classes: (1) those that commit CSC with a Minor 1st degree or Lewd Act and (2) those that commit any other sex offense. See id. For people, such as appellant, who fit into the first class, lifetime GPS monitoring is mandatory. S.C. Code § 23-3-540(A), (C), and (E). Those people who fit into the second class are not ordered to submit to lifetime GPS monitoring unless a court, in its discretion, orders lifetime GPS monitoring. S.C. Code § 23-3-540(B), (D), and (F).

The classification of sex offenders by § 23-3-540 (C) is not reasonably related to protecting the public from those offenders who pose a high risk of re-offending. The statute bases its classification solely on the offense the person was convicted of or adjudicated for. Section 23-3-540 (C) classifies sex offenders based on their underlying offense. The result is that § 23-3-540(C) requires trial courts use different procedures and impose different requirements on sex offenders who pose the same level of risk.

C. The mandatory order imposing lifetime GPS monitoring on appellant pursuant to S.C. Code § 23-3-540 (C) is cruel and unusual punishment because it violates appellant's right to protection against unreasonable, warrantless search and seizure under the Fourth Amendment to the United States Constitution and Article I, Section 10 of the South Carolina Constitution.

Lifetime GPS monitoring of appellant pursuant to § 23-3-540 (C) violates appellant's Fourth Amendment right to be protected from unreasonable searches and seizures. The state will seize appellant in order to permanently attach the GPS device and then will retrieve his location every minute of the day for the rest of his life. Because the state does not have a particularized basis for believing that appellant will commit or has already committed a crime, the imposition of lifetime GPS monitoring is an unconstitutional use of search and seizure for general crime control.

The stated intention of § 23-3-540(C) is to assist law enforcement with the investigation of sex offenses. S.C. Code § 23-3-400 One of the clear intentions of continuous, minute-by-minute monitoring using GPS is to assist law enforcement in its investigation into future, uncommitted sex offenses. The Fourth Amendment does not allow law enforcement to use search and seizure in this way.

The U.S. Supreme Court has held that a state cannot use a program that seizes people when the primary purpose is general crime control. City of Indianapolis v. Edmond, 531 U.S. 32, 37, 121 S.Ct. 447, 451, 148 L.Ed.2d 333 (2000) ("A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."). In Edmond, the Court rejected a highway checkpoint used by the Indianapolis Police Department for the primary purpose of conducting drug interdiction.

Id. at 453 – 454. The Court noted that it has "never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." Id. at 454.

The program created by § 23-3-540(C) is aimed at general crime control. It has no specific basis for investigating a crime that is imminent; all crime is in the future—it might happen. The government cannot provide probable cause that a crime has been committed. It cannot even provide articulable facts that a crime is afoot.

Using permanent GPS monitoring amounts to seizing appellant for the purpose of investigating a future crime without probable cause or reasonable suspicion to believe that he has committed or would even commit the crime. It is like tapping a phone without probable cause or reasonable suspicion because the state "thinks" (but has no evidence) that a person might use the phone to commit a crime.

In Easter v. State, *supra*, the Supreme Court held that there was a guilt phase and a sentencing phase in a guilty plea. Easter's plea was not conditional because he entered his guilty plea, and then objected to the sentence during the sentencing phase.

Harrelson's attorney made it clear to the circuit court that they did not object to the guilty plea, but were objecting to the electronic monitoring which occurred during the sentencing phase.

ARGUMENT

II.

The mandatory imposition of permanent Global Positioning Satellite (GPS) monitoring pursuant to S.C. Code Section 23-3-540 (C) without the opportunity for a meaningful hearing on the merits if imposing GPS monitoring on appellant violated his right to procedural due process.

On August 11, 2007, Andrew Harrelson, at the age of sixteen, went on a church outing which involved swimming at a local lake. R. 71, ll. 9 – 18. During swimming, a young girl approximately eight years old did not want to touch the bottom of the lake so Harrelson carried her into the deeper water. During this time, he allegedly reached inside her bathing suit and placed his finger into her vagina. Medical exams confirmed redness in her vaginal area. During a later statement, Harrelson admitted touching the girl inappropriately but was not sure there was penetration. R. 71, ll. 19 – 25; R. 72, ll. 1 – 21.

At his guilty plea, Harrelson admitted to the inappropriate touching, but not to penetration. He pled guilty only to the lewd act charge. R. 68, ll. 16 – 21.

Plea counsel then raised an objection to the electronic monitoring and registration during the sentencing phase. R. 75, ll. 16 – 24. Counsel provided mitigation to the effect that Harrelson was receiving mental health counseling; was working in his family's MacDonald's Restaurant. Counsel stated that he saw no signs that Harrelson would be involved in any further criminal activity. R. 74, ll. 1 – 25; R. 75, ll. 1 – 25.

No hearing was held on the merits of imposing lifetime GPS monitoring nor to assess his future dangerousness.

North Carolina has held GPS monitoring of sex offenders infringes liberty rights protected by the Due Process Clause. In State v. Stines, 683 S.E.2d 411 (N.C. App. 2009), the Court of Appeals of North Carolina addressed a procedural due process challenge to the application of North Carolina's Satellite-Based Monitoring program. Id. The program uses a GPS tracking system to monitor sex offenders after their release from state supervision. Id. at 412 – 414. The Stines court held that the GPS tracking system used by North Carolina "implicate[d] a protected liberty interest." Id. at 413.

In finding that GPS tracking of sex offenders infringed the subject's liberty, the Stines court reasoned the device (1) was physically attached to the person and (2) provided continuous surveillance of the person. Id. at 414 (following the reasoning in Commonwealth v. Cory, 454 Mass. 559, 911 N.E.2d. 187 (2009)).

Permanently attaching a GPS device to a person's body is 'dramatically more intrusive and burdensome' than the burden imposed [by sex offender registry]." Id. (quoting Commonwealth v. Cory, 454 Mass. at 570). The Stines court relied on the following additional reasoning from Commonwealth v. Cory:

> The intended function of the GPS device, continuous reporting of the offender's location to the probation department, also represents an affirmative burden on liberty. While GPS monitoring does not rise to the same level of intrusive regulation that having a personal guard constantly and physically present would impose, it is certainly far greater than that associated with traditional monitoring. And the impact of such intrusion is of course heightened by the physical attachment of the GPS bracelet, which serves as a continual reminder of the State's oversight.

Stines, 683 S.E.2d at 414 (quoting 454 Mass. at 570-571).

Mandatory imposition means that the trial court has no ability to ensure it is accurately imposing lifetime GPS monitoring on sex offenders who, in fact, pose a high risk of re-offending. Consequently, trial courts are being mandated by § 23-3-540(C) to impose lifetime GPS monitoring on people, like Harrelson, who do not pose a high risk of re-offending. There was no evidence that Harrelson was high risk. The judge gave him a YOA sentence and then probation.

The decision to require permanent GPS monitoring is not based upon any standard of proof (not good cause, preponderance of the evidence, or clear and convincing evidence) and because the monitoring is imposed solely on the basis of the underlying criminal offense and any violation of probation (or other supervision by the state). See S.C. Code § 23-3-540(C). As a result, monitoring is not ordered based on reliable evidence that the person indeed poses a high risk of re-offending or that such invasive monitoring is necessary.

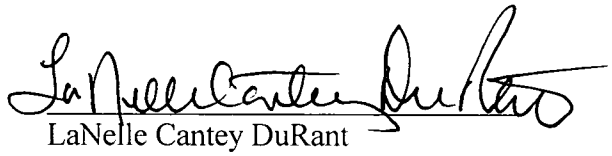
In State v. Guidry, 105 Hawai'i 222, 96 P.3d 242 (2004), the Supreme Court of Hawaii held that lifetime registration requirement for sex offenders implicated a protected liberty interest, and that the failure to provide the offender with a hearing as to future dangerousness violated due process.

Appellant should have been afforded the protections of procedural due process before being ordered to submit to the deprivation of liberty and property imposed by lifetime GPS monitoring.

CONCLUSION

Based on the above, Harrelson's case should be remanded for resentencing and the mandatory order imposing permanent Global Positioning Satellite (GPS) monitoring on appellant pursuant to S.C. Code § 23-3-540(C) should be reversed.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of October, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 22nd, 2013

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of October, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of October, 2011.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.