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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Thomas W. Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ZACOATA LOPEY,

APPELLANT.

APPELLATE CASE NO. 2013-000554

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Appellant's due process rights pursuant to Fourteenth Amendment of the United States Constitution and Article I, Section three of the South Carolina Constitution were violated by the statutory requirement that he register for life as a sex offender where the statute provided no right to a hearing to determine whether Appellant was a sex offender and provided no judicial review after a term of years to determine whether Appellant should remain on the registry.

STATEMENT OF THE CASE

Appellant was fourteen-years old when the alleged crimes took place on December 14, 2010. On December 16, 2010, Investigator Joe Clarke with the Richland County Sheriff's Office filed four juvenile petitions charging Appellant with armed robbery, burglary in the first degree, kidnaping, and criminal sexual conduct in the first degree. R. 553. The Fifth Circuit Solicitor's Office moved to transfer Appellant from the Family Court to the Court of General Sessions pursuant to Section 63-19-1210(5) of the South Carolina Code. The Honorable James F. Fraley, Jr. presided over the transfer hearing on February 21-22, 2012 and March 27-29, 2012. Kathryn Luck Campbell, Joanna McDuffie, and Meghan Walker represented the state. Joanna Delaney and James May represented Appellant. S. Boyd Young served as Appellant's guardian ad Litem. R. 1; R. 194. At the conclusion of the transfer hearing, Judge Fraley ordered that the Family Court would no longer have jurisdiction over Appellant concerning the pending charges and transferred the case to the Court of General Sessions. R. 383, line 1 – R. 392, line 8.

On April 11, 2012, the Richland County Grand Jury indicted Appellant for burglary in the first degree, armed robbery, kidnaping, and criminal sexual conduct in the first degree. R. 557. On March 12, 2013, Appellant appeared before the Honorable Thomas W. Cooper, Jr. to enter a guilty plea to all charges without negotiation or recommendation. Again, Kathryn Luck Campbell, Joanna McDuffie, and Meghan Walker represented the state. Joanna Delaney and Jennifer Davis represented Appellant. R. 394. Judge Cooper sentenced Appellant to thirty years' imprisonment for armed robbery, criminal sexual conduct in the first degree, and burglary in the first degree. He ordered those sentences to be served concurrently. Concerning the kidnaping conviction, Judge Cooper sentenced

Appellant to fifteen years' imprisonment, which he suspended to probation for five years. However, he ordered the kidnaping sentence to be served consecutively to the other sentences. R. 476, line 5 – R. 477, line 11; R. 559.

STATEMENT OF FACTS

On December 14, 2010, officers with the Richland County Sheriff's Office responded to a call regarding a home invasion and purported sexual assault. R. 408, lines 20-24. The homeowner informed police that she had been robbed at gunpoint and sexually assaulted by two black males earlier in the evening. R. 409, line 17 – R. 411, line 18. Through their investigation, the officers developed Appellant, who was fourteen-years old, as a suspect and questioned him at his high school. Appellant readily accepted responsibility for his actions and admitted his conduct. Appellant further implicated a co-defendant, an older male child, in the crimes. R. 412, lines 6-21. Forensic DNA testing determined Appellant's semen was found in the homeowner's rectum and on a tissue the homeowner had used to clean herself after the encounter. R. 414, lines 4-9.

ARGUMENT

Appellant's due process rights pursuant to Fourteenth Amendment of the United States Constitution and Article I, section three of the South Carolina Constitution were violated by the statutory requirement that he register for life as a sex offender where the statute provided no right to a hearing to determine whether Appellant was a sex offender and provided no judicial review after a term of years to determine whether Appellant should remain on the registry.

Relevant facts

On March 12 2013, Appellant pled guilty to criminal sexual conduct in the first degree, kidnaping, burglary in the first degree, and armed robbery. Appellant objected to his automatic and lifetime placement on the sexual offender registry. Specifically, Appellant objected to the mandatory nature of the statute and its lifetime applicability without judicial review as a violation of Appellant's due process rights. Appellant explained that the state's psychologist, who evaluated Appellant concerning the transfer of jurisdiction, opined that Appellant was not a sex offender. She explained the stark difference in statistics about re-offending between juvenile and adult offenders. The psychologist was clear that Appellant's conduct was not motivated by sexual deviancy. R. 442, line 25 – R. 445, line 4.

In fact, Aalece O. Pugh-Lilly, who testified at the transfer hearing regarding her pre-adjudicatory transfer evaluation of Appellant as a witness for the prosecution, explained that the majority of adolescent sex offenders do not act out of sexual deviancy. R. 285, lines 14-25. Unsurprisingly, adolescent offenders are more amenable to treatment than adult sex offenders because their motivation for engaging in those behaviors is very different. Based upon new scientific research, it is clear that "more sexually deviant behaviors and pathology

[do not] even emerge in people until around the age of 18 or older.” R. 286, line 14 – R. 287, line 6. The rate of recidivism for juveniles is “very low.” R. 287, lines 7-16. Dr Pugh-Lilly explained that Appellant was not a sex offender because “he did not exhibit any of the characteristics” of a sex offender. Although he had committed a sex offense, he was not motivated by sexual deviancy or pathology. R. 288, lines 2-13. As a result, Appellant was more amenable to therapy than other sex offenders. R. 288, lines 14-17. The sex offense would not have occurred had the co-defendant not been present. R. 288, lines 18-21.

Although the judge had uncontested evidence that Appellant was not a sex offender and was unlikely to re-offend before him, the trial judge was forced to place Appellant on the sex offender register based upon the mandatory nature of the statute. Additionally, the trial judge was unable to order judicial review of Appellant’s placement on the registry after the passage of time because the statute did not permit such review.

Discussion

“Any person, regardless of age, residing in the State of South Carolina who in this State has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to” certain enumerated offenses, including criminal sexual conduct in the first degree, “shall be required to register” as a sex offender. S.C. Code Ann. § 23-3-430(A); § 23-3-430(C)(1). However, the statute provides for a showing of good cause to include a person on the sex offender registry when the person has been convicted of an offense other than one enumerated in the statute. S.C. Code Ann. § 23-3-430(D). The automatic provision applies based solely on the name of the offense without any consideration of the individual being placed on the registry. Appellant recognizes that the South Carolina Supreme Court has

held that registering as a sex offender is “not so punitive in purpose or effect as to constitute a criminal penalty.” State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). However, the language of the Court is clear that registration is in fact punitive, but not so punitive that it be considered a criminal penalty. In Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 352 (2003), the Court stated 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.” The Court concluded that due to the non-punitive nature of the registry, no due process violation occurred as the result of a requirement that one register. Appellant further recognizes that the South Carolina Supreme Court held that a juvenile’s due process rights were not violated by requiring him to register as a sex offender. In re Ronnie A., 355 S.C. 407, 585 S.E.2d 311 (2003). However, recent developments in the law require a re-examination of the statutory requirement that a person convicted of certain offenses register as a sex offender without a hearing to determine if the person is indeed a sex offender and that the person remain on the registry for life without subsequent judicial review of the person’s likelihood of re-offending.

No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. Amend. XIV, § 1; S.C. Const. Art. I, § 3. Substantive due process protects citizens against arbitrary or capricious action by the government regardless of the procedures used to carry out that action. In re Treatment and Care of Luckabaugh, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002). The substantive component of this right prohibits the state from arbitrarily or capriciously depriving a person of life, liberty, or property regardless of whether or not the way in which the government carries out this

deprivation is, itself, ostensibly fair. Luckabaugh, 351 S.C. at 140. Substantive due process “allows a court to examine the constitutionality of the underlying statute as opposed to merely the process by which it is applied to each individual” Id. To comport with due process, the legislation must have a rational basis for the deprivation. Hamilton v. Board of Trustees of Oconee County School District, 282 S.C. 519, 319 S.E.2d 717 (Ct. App. 1984).

Recently, the Court examined the statute requiring mandatory enrollment in satellite monitoring programs based upon certain convictions. The Court found that “lifetime imposition of satellite monitoring implicates a protected liberty interest to be free from permanent, unwarranted governmental interference.” Further, the Court found “the requirement of satellite monitoring places significant restraints on offenders that amount to a liberty interest.” State v. Dykes, 403 S.C. 499, 506, 744 S.E.2d 505, 509 (2013) Based upon this finding that electronic monitoring implicated a protected liberty interest, the Court held due process protections were invoked. Id. Therefore, the legislation must “have, at a minimum, a rational basis, and not be arbitrary” Id. at 507, 744 S.E.2d at 509 (quoting Luckabaugh, 351 S.C. at 139-140, 568 S.E.2d at 346)).

The Dykes Court explained the express purpose of the state’s sex offender registration and electronic monitor provisions “is to promote the state’s fundamental right to provide for the public health, welfare, and safety of its citizens” by giving law enforcement tools for investigating criminal conduct. The General Assembly also referred to “[s]tatistics show[ing] that sex offenders often pose a high risk of reoffending.” The Court held “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.” Id. at 507, 744 S.E.2d at 510 (quoting Walls, 348 S.C. at 31, 558 S.E.2d at 526). Thus, the Court concluded, “a likelihood of re-offending lies at the core of South Carolina’s civil statutory scheme.” Id.

The Court found that the statute’s initial mandatory imposition of satellite monitoring for certain child-sex crimes to have a rational relationship to the state’s policy. However, the Court held the statute requiring lifetime monitoring with no opportunity for judicial review was unconstitutional because it was arbitrary and not rationally related to the legislature’s stated purpose of protecting the public from those with a high risk of re-offending. Id. at 508-509, 744 S.E.2d at 510. Therefore, persons required to comply with the electronic monitoring statute were entitled to judicial review. Id. at 510, 744 S.E.2d at 511.

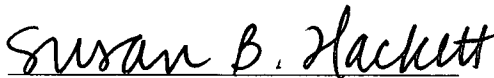
Just as the imposition of electronic monitoring implicates a protected liberty interest, the lifetime inclusion and public dissemination of a person’s name on the sex offender registry implicates a protected liberty interest – to be free from permanent, unwarranted governmental interference. The automatic and mandatory inclusion of individuals on the registry based solely on the nature of the offense fails to serve the General Assembly’s stated purpose of providing for the public health, welfare, and safety of its citizens through police investigatory tools and guarding against the likelihood of re-offending. Id. The statute requires all individuals convicted of certain crimes to be placed on the registry without a determination that the individuals are indeed sex offenders, which would include only those who display the pathology of acting out based on sexual deviancy. As such, the mandatory provision does not guard against sex offenders or those individuals likely to re-offend. Further, the lifetime requirement also

fails to guard against re-offenders because it does not permit a judicial body to determine a person is or is not likely to re-offend. The list is merely a collection of individuals who have been convicted of certain crimes and labeled as sex offenders based upon those convictions without any consideration of the individuals' pathologies, mental health, and likelihood of re-offending.

CONCLUSION

Appellant respectfully requests this Court order that Appellant not be placed on the sex offender registry based on the undisputed evidence that he is not a sex offender, or in the alternative, this Court should order that Appellant's placement on the registry be reviewed after a term of years.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of May, 2014.

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APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Zacoata Lopey states:

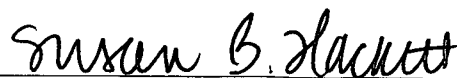
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Thomas W. Cooper, Jr., which was held on March 12, 2013, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial

WHEREFORE, she asks the Court to relieve her as counsel for Zacoata Lopey.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of May, 2014.

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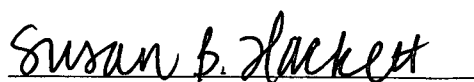
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Transfer Hearing Transcript dated February 21-22, 2012;
- (2) Transfer Hearing Transcript dated March 27-29, 2012;
- (3) Guilty Plea Transcript dated March 12, 2013;
- (4) Court's Exhibit #1 from March 12, 2013 guilty plea hearing;
- (5) State's Exhibit #13 from the March 27-29, 2012 hearing;
- (6) State's Exhibit #14 from the March 27-29, 2012 hearing
- (7) Juvenile Petitions;
- (8) True-billed indictments,
- (9) Sentence sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.

May 5, 2014




Susan B. Hackett
Appellate Defender

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Data Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 5, 2014


Susan B. Hackett
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Zacoata Lopey, #354734 at Lee Correctional Institution, 990 Wisacky Hwy, Bishopville, SC 29010, this 5th day of May, 2014.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of May, 2014.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022 .