

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Hon. Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2018-000364

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APR 25 2019
SC Court of Appeals

THE STATE,

Respondent,

v.

LAWRENCE L. KELLEY, JR.,

Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

Following criminal conviction, a trial court may require a defendant to register as a sex offender upon "good cause shown." Kelley pleaded guilty to second degree assault and battery and was evaluated by a psychologist specializing in treatment of sexual offenders. His evaluation caused "significant clinical concern," and the evaluator found placement on the sex offender registry "clinically appropriate." Did the trial court abuse its discretion by ordering Kelley to register as a sex offender?

STATEMENT OF THE CASE

Lawrence Kelley was charged with criminal sexual conduct with a minor in the third degree following an allegation that he fondled the breasts of his 13-year-old neighbor. (June 2 Tr. 8). On June 2, 2017, Kelley pleaded guilty before the Honorable Kristi L. Harrington to assault and battery in the second degree pursuant to North Carolina v. Alford.¹ Judge Harrington accepted a negotiated sentence of three years of imprisonment suspended to five years of probation. (June 2 Tr. 10). The State requested that Kelley be required to register as a sex offender. The court postponed the decision whether to require Kelley to register pursuant to the parties' agreement that Kelley would submit to a psychological evaluation to be performed by Dr. Helen Clark or Dr. William Burke. (June 2 Tr. 11). Kelley was evaluated by Dr. Helen Clark in June and July of 2017. Dr. Clark found sex offender registry and treatment appropriate. (State's Exhibit 5). Judge Harrington allowed Kelley to seek a second opinion, and Kelley procured an evaluation by Dr. Randolph Waid. (Sept. 19 Tr. 7). Dr. Waid opined that sex offender registry was not needed. (State's Exhibit 8). Judge Harrington requested written memoranda from both parties. In a written order dated February 6, 2018, Judge Harrington ordered Kelley to register. (Order). Kelley appeals this ruling.

¹ North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970).

STANDARD OF REVIEW

The decision whether to require a defendant to register as a sex offender is reviewed under an abuse of discretion standard. In re M.B.H., 387 S.C. 323, 692 S.E.2d 541 (2010). A trial judge has broad discretion in sentencing within statutory limits. A judge must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant. A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support. Id. at 326, 692 S.E.2d at 542 (internal citations omitted).

ARGUMENT

Evidence supports the trial court's ruling requiring Kelley to register as a sex offender.

Section 23-3-340 of the South Carolina Code provides that a person shall be placed on the sex offender registry if he is convicted of any of several enumerated sex-related offenses. S.C. Code Ann. § 23-3-430 (2007 & Supp. 2018). Section 23-3-430(D) provides that a judge may order a defendant to register upon conviction or guilty plea of a crime not enumerated in the statute "if good cause is shown by the solicitor." S.C. Code Ann. § 23-3-430(D) (2007). Good cause in this context means that the judge must consider the facts and circumstances of the case to make the determination whether the evidence indicates a risk to reoffend sexually. In re M.B.H., 387 S.C. 323, 327, 692 S.E.2d 541, 542 (2010).

Kelley claims that the trial court did not have good cause to order him to register as a sex offender. Kelley points to the evaluation performed by Dr. Waid opining that Kelley need not be placed on the registry. Dr. Waid's evaluation was essentially a second opinion Kelley procured after his first evaluator, Dr. Clark, recommended he be placed on the registry. (State's Exhibit 8). Kelley does not dispute Dr. Clark's findings, but essentially argues that Dr. Waid's evaluation was as good, if not better.

The State does not dispute Dr. Waid's qualifications, or attack the validity of his evaluation. To do so would be an invitation for this court to perform the functions of a trial court and weigh the evidence. An appellate court is not concerned with the weight of the evidence, or whether it would have come to a different decision than the trial court. Instead, the appellate court is only concerned with the existence of evidence reasonably supporting the trial court's ruling. State v.

Mitchell, 382 S.C. 1, 4, 675 S.E.2d 435, 437 (2009). As long as the trial court's ruling is supported by evidence, this Court must affirm.

The trial court's ruling is supported by evidence. The court relied heavily on the evaluation performed by Dr. Helen Clark. Dr. Clark is an experienced psychologist who has practiced since 1989. (State's Exhibit 11). Her credentials include several licensures from the State of South Carolina and national psychological organizations, and she is a former board member for the South Carolina chapter of the Association for the Treatment of Sexual Offenders. (State's Exhibit 11).

Dr. Clark performed an evaluation consisting of six clinical tests, and documented her findings in a written report. Kelley's evaluation caused "significant clinical concern." (State's Exhibit 5). Dr. Clark found the probability that Kelley engaged in child sexual abuse behaviors to be high, and his risk for future "sexual acting out behaviors" to be medium. (State's Exhibit 5). Dr. Clark found further treatment and placement on the sex offender registry "clinically appropriate." (State's Exhibit 5). Dr. Clark also had an opportunity to review Dr. Waid's evaluation, and noted that it did not include a "psychophysiological measure of sexual arousal" test, such as an Abel Screen or penile plethysmograph. In a letter to the solicitor, Dr. Clark reiterated her opinion that Kelley needed further evaluation and treatment. (State's Exhibit 7).

The trial court found Dr. Clark's evaluation to be more comprehensive than Dr. Waid's, and gave weight to Dr. Clark's qualifications. The court also viewed the police incident report and victim statement. (State's Exhibit 6 & 7). The court further noted that Kelley had been accused of sexually abusing his daughter in Virginia, and the Virginia Department of Social Services found a high risk of future harm to Kelley's child. (Order p. 3). Based on her findings, the court ordered Kelley to register.

Kelley's argument on appeal is a straightforward, yet improper, request for this Court to reweigh the evidence that was before the trial court. Kelley argues Dr. Waid's report "should have been given more weight." (Brief of Appellant at 7). However, this is precisely the type of review that this Court refuses to engage in. State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014) ("[T]he abuse of discretion standard of review does not allow this court to reweigh the evidence...."). Once the appellate court identifies evidence supporting the trial court's ruling, the analysis ends. See State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008).

Dr. Clark's evaluation, the DSS reports from Virginia, and the underlying facts of the case all support the trial court's finding that Kelley posed a risk of reoffending. Because the trial court's ruling is supported by evidence, this Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Appellant's conviction and sentence from the lower court be affirmed.

Respectfully submitted,


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ATTORNEYS FOR RESPONDENT

April 25, 2019

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The Honorable Kristi Lea Harrington, Circuit Court Judge

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THE STATE,

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LAWRENCE L. KELLEY, JR.,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his counsel of record, Taylor D. Gilliam, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.
This 25th day of April, 2019.


Anne Mueller
Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

April 25, 2019

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RE: State v. Lawrence L. Kelley, Jr.
Appellate Case No. 2018-000364

Dear Mr. Gilliam:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Joshua A. Edwards
Assistant Attorney General
Bar # 101188

JAE/aam
Enclosures

~~cc: Honorable Jenny A. Kitchings (w/original and one enclosed)~~
Victim Services