

1 State of South Carolina)
 2 County of Aiken)
 3 South Carolina Law)
 4 Enforcement Division,)
 5 Plaintiff,)
 6 vs.)
 7 Brandon Reed,)
 8 Defendant.)

In the Court
 Of Common Pleas
 Case No.: 2018-CP-02-00670

Transcript of Record

RECEIVED

September 24, 2018

APR 15 2019

Aiken, South Carolina

SC Court of Appeals

BEFORE:

The Honorable Walton J. McLeod, IV, Judge

APPEARANCES:

Harley Littleton Kirkland, Esquire
 Attorney for the Plaintiff

Kristina Michelle Anderson, Esquire
 Attorney for the Defendant

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Motion

3

Certificate of Reporter

EXHIBITS

NO. DESCRIPTION

ID EVDS.

NONE

1 Thereupon, the following proceedings were had,

2 (Side bar off the record.)

3 THE COURT: SLED versus Brandon Reed. Okay.

4 MS. ANDERSON: All right. Judge, just to give the
5 Court a little bit of background here from the standpoint
6 of the factual scenario that we're looking at, I'm
7 representing Brandon Reed who was placed on the sex
8 offender registry in 1996 for an adjudication in Family
9 Court that occurred in 1994. There's a lot of dates in
10 this, Judge, so I apologize for any confusion but it's
11 all covered in the memoranda that have been filed with
12 the Court.

13 Brandon was 11 years old when he had inappropriate
14 contact with a three year old. He pled guilty in Family
15 Court here in Aiken County obviously and was adjudicated
16 delinquent in 1994. The SOR, the Sex Offender Registry
17 initially became effective in 1994. My understanding of
18 it and certainly they probably have a way better
19 understanding than I do because my experience is limited
20 to this case basically, my understanding is that
21 initially the SOR applied to adult defendants who were
22 convicted of criminal sexual conduct actions in General
23 Sessions Court. In 1996 that changed and the statute,
24 the SOR was modified slightly to cover defendants of any
25 age and not just criminal convictions but also

1 adjudications which cover Family Court adjudications
2 which is how Brandon got put on the SOR in '96. He was
3 12 at the time he was placed on.

4 Long story short, we fast forward 23 years. My
5 client is 35 years old at that point. He has a desire
6 obviously to be removed from the Sex Offender Registry.
7 He's complied with everything that he was supposed to do
8 and there's a lot of underlying stuff about that, Judge,
9 but to the extent the Court is going to grant a motion to
10 dismiss for the declaratory judgment action, I don't
11 really think that the specific fact finding of the Family
12 Court even comes into play here. The order is either
13 going to be void on its face or it's not and obviously a
14 year and a half down the road the time to appeal this or
15 do anything about it has long since expired but at least
16 initially in February of 2017 a motion was filed in
17 Family Court with quite frankly the cooperation of the
18 Solicitor's Office so the State was involved the entire
19 time.

20 Judge Gable as I just informed the Court at side bar
21 scheduled a motion in March of 2017 to hear both the
22 State of South Carolina and my office on behalf of
23 Brandon Reed and his removal from the SOR. He was
24 present. There were doctors' records present. There was
25 a bunch of stuff present that the Court considered. As I

1 said, the State participated the entire time. At the
2 conclusion of that hearing in March essentially the
3 motion was granted to remove him from the SOR at that
4 time and that motion was granted in April of 2017. SLED
5 was aware that this was going on because there were
6 communications between my office and SLED quite candidly
7 and we provided those to the Court and as I said SLED, I
8 mean, obviously is a part of the State of South Carolina
9 and the State of South Carolina was involved the entire
10 time throughout this whole process.

11 SLED ordered the transcript from the hearing. That
12 order went in in May requesting a copy so we weren't
13 really sure if they were going to file an appeal or if
14 they were going to pursue a motion 59, a motion under
15 Rule 59 or under Rule 60 but nothing was done so
16 essentially Brandon Reed was removed from the SOR. He
17 hasn't been on it now for a year and a half after that
18 order was entered on April 21st, 2017 the order we are
19 here about today. Nothing happened until September of
20 2017 some six months or so later. SLED filed an original
21 application with the South Carolina Supreme Court
22 briefing the Reed case and several others. There were
23 three or four other orders that had been entered around
24 the state removing individuals from the SOR trying to do,
25 I guess, kind of a catch all presentation of all these

1 orders should be void.

2 So we're asking the South Carolina Supreme Court to
3 take jurisdiction of this and basically void all these
4 orders including the Reed order. It was briefed and
5 presented. We prepared a brief obviously on Mr. Reed's
6 behalf. There were other briefing documents that were
7 presented and in December of 2017 the South Carolina
8 Supreme Court denied SLED's application so the order
9 stood. The arguments before the South Carolina Supreme
10 Court were the exact same ones that are being voiced here
11 today in this declaratory judgment motion that's now been
12 filed by SLED. This was filed in March almost a full
13 year after this order had already been in effect.

14 The arguments in the declaratory judgment that's
15 been filed by SLED are, one, we're asking the Court to
16 declare this order void from the Family Court on its face
17 because you didn't have subject matter jurisdiction in
18 Family Court, you couldn't hear this, it's a civil issue
19 and it should have been brought in civil court, and, two,
20 you didn't have personal jurisdiction over SLED is what
21 they're arguing. There is some reference to the fact
22 that the factors that were used by the Family Court to
23 issue the order were improper looking at the SOR but
24 again to the extent we're here looking at a declaratory
25 judgment action on whether or not this order is void on

1 its face I don't really think the factors used in the
2 determination actually matter. I would say in response
3 to --

4 THE COURT: Is it your argument that the order that
5 they filed, the DJ action order was already affirmed by
6 the Supreme Court?

7 MS. ANDERSON: It is not but I do think that it is
8 relevant to point out that to the extent that this order
9 which we're here on now in this declaratory judgment
10 action is so appalling on its face that it should be void
11 and not enforced. The Supreme Court looked at that and
12 had a chance to exercise jurisdiction over it and
13 declined to do it. So, I mean, I think the argument
14 could be made that it obviously wasn't something that
15 upset them enough for them to do anything about it
16 frankly if it was a problem.

17 The argument with regard to SLED being a party and
18 the lack of personal jurisdiction in the Family Court
19 frankly given the fact that the State of South Carolina
20 participated in this and was involved the entire way I
21 don't see any way to actually argue that SLED was a
22 required party in that and quite candidly the case law is
23 not overwhelmingly helpful on any of this. Frankly
24 there's no path spelled out for removal from the SOR
25 clearly because the intent is it's a lifetime registry

1 and they're not spelling out a way for you to get off the
2 SOR basically.

3 THE COURT: But apparently some courts have done so
4 and the Supreme Court did not get involved. Is that what
5 you said?

6 MS. ANDERSON: Well, with regard to this particular
7 case, yes, Judge, that's correct. There were four
8 different cases that were briefed as a part of this one
9 to set aside those orders and all of them as far as I
10 know are still standing. I don't know of any of them
11 that have been individually piecemeal taken up. There's
12 a lot of case law on this. There's case law in which
13 SLED is a party regarding the SOR. There's appellate
14 case law. There's case law in which just the State of
15 South Carolina is named. And two my knowledge there is
16 no case out there that says that SLED is a required party
17 in an SOR matter.

18 THE COURT: Has there been any communication with
19 Judge Gable about the order? Has there been any motions
20 filed with Judge Gable about the order?

21 MS. ANDERSON: No, Judge. Nothing's been done. The
22 order has been the order of the Court, like I said, for a
23 year and a half now and she's now retired.

24 THE COURT: Be that as it may, prior to her
25 retirement two, three months ago, was there any motion

1 made to Judge Gable --

2 MS. KIRKLAND: Not that I'm aware of.

3 THE COURT: -- regarding this order? Okay.

4 MS. ANDERSON: She was aware that this was pending.
5 I mean, she knew that this was filed.

6 THE COURT: Yeah. I just wanted to know if the
7 State made any communications or motions to the Judge who
8 signed the order?

9 MS. KIRKLAND: No, sir.

10 MS. ANDERSON: Not that I'm aware. As far as, I
11 mean, in the SOR as far as the statute is concerned
12 there's no requirement in the Sex Offender Registry law
13 that SLED be made a party. There is nothing there, at
14 least nothing that I'm aware of. There are people placed
15 on the SOR every day in this state that SLED is not a
16 party of those litigations or those resolutions in any
17 way.

18 As far as the argument of lack of subject matter
19 jurisdiction in Family Court which is the other argument
20 that's voiced with regard to the order being void on its
21 face, the Family Court was the court of original
22 jurisdiction. The argument that SLED wants to make now
23 all this time later that obviously could have been
24 covered in motions or an appeal or anything like that
25 prior to now is that the Family Court lacked jurisdiction

1 because Brandon Reed was no longer under age anymore.
2 The Family Court statute specifically says that they can
3 basically have control of a juvenile defendant for
4 probationary purposes through the age of 18 but Family
5 Court jurisdiction for the purposes of education and
6 correction ends at the age of 21. That's what the
7 statute says. They're wanting to use that language which
8 discusses education and correction to mean that the
9 Family Court couldn't hear this motion if it was filed
10 there, that the Family Court Judge couldn't be the one
11 who decided this on the case that she was originally
12 involved in. The law on that, there is no case law out
13 there that specifically says that.

14 There is case law out there that says that this is a
15 civil statute. The SOR is a civil statute. While the
16 Family Court is a civil court, it's also a court of
17 equity. The Family Court Judge thought she could hear
18 this motion and she did with the participation of the
19 State and like I said, it's been an order now for a year
20 and a half. My argument in the motion to dismiss is that
21 this is basically, they're using, Judge, the declaratory
22 judgment action not to resolve a judicable controversy
23 which would be required under the declaratory judgment
24 law but basically it's some kind of second quasi bite at
25 an appellate apple. They put all of their everything

1 essentially into going to the South Carolina Supreme
2 Court on these various orders that have been entered, my
3 order being one of them, saying declare these void,
4 Court, and the Court after a couple months said no. That
5 was in December of 2017. At that point the order had
6 been in place for eight months.

7 THE COURT: Is that order in the file?

8 MS. ANDERSON: Yes. It was filed, Judge. It's
9 attached as an exhibit. Now here we are long after
10 motions could have been filed or an appeal could have
11 been made and we stand here now a year and a half down
12 the road, this man has been off the SOR for a year and a
13 half under this order and we are here now wanting to set
14 the order aside claiming it's void on its face and
15 restore him to the SOR which frankly I don't even need to
16 go into the highly prejudicial impact this is going to
17 have on my client who clearly, he's living in Maryland,
18 he works in D.C., he has major issues at risk here as far
19 as this determination is concerned. He may have to move.
20 He may lose his job. This is an inappropriate use of the
21 declaratory judgment statute. The statute specifically
22 looks to providing responses and help for people who have
23 controversies between them with regard to contract
24 interpretation, statute interpretation, law
25 interpretation. Tell me what my rights are.

1 The only question here by SLED in this declaratory
2 judgment action is do I have to obey a court order?
3 That's the question. That's not a legitimate issue under
4 the declaratory judgments statute. It's just not. And
5 to the extent res judicata or collateral estoppel which
6 we have pled as affirmative defenses in our response, the
7 State of South Carolina was involved in the totality of
8 this. If there was anything to be raised or any issues
9 with regard to what was happening, the time to express
10 that has long since expired. The same parties were
11 involved in the Family Court action for all intents and
12 purposes frankly. The State of South Carolina, I mean,
13 SLED is a privy to the State of South Carolina obviously.
14 SLED doesn't exist separate and apart. Any complaint to
15 what happened there the time for complaining about that
16 is done. The time to appeal, the time to file motions,
17 all of that has expired and frankly because they were
18 active participants in all of it and basically ceded the
19 Family Court jurisdiction of the matter, participated in
20 the hearing and then now a year and a half later want to
21 ask the Court, I mean, I guess they have buyer's remorse
22 at this point so they want to set it aside. I mean, this
23 application for declaratory judgment should be dismissed
24 and the order of the Family Court should stand as it has
25 for the last year and a half.

1 THE COURT: Okay. I presume you disagree?

2 MS. KIRKLAND: Yes, Your Honor, respectfully. As
3 far as -- Let us concern -- In our perspective there is
4 absolutely judicable controversy here. SLED is tasked
5 with maintaining and enforcing the Sex Offender Registry,
6 the civil statute and SLED was presented after the Judge
7 had ruled in the Family Court case with an order,
8 proposed order to go to the Judge that was in a Family
9 Court case where the individual was in his 30's and SLED
10 knew at that point, I think, that this order was not
11 right but there was no way for SLED to appeal this
12 action. SLED is not the same as the State of South
13 Carolina. It's an agency of the State of South Carolina.
14 I don't believe there's any kind of relationship between
15 the Solicitor's Office and SLED when it comes to the
16 registry.

17 So as far as whether or not there is a controversy
18 here, as far as SLED is concerned it's looking at this
19 order that's incorrectly interpreting the law where it
20 was not a party to the underlying action that's facially
21 invalid given the age of the defendant Mr. Reed at the
22 time it was entered. Your Honor, there's a copy of the
23 order that's been filed but I also have one if Your Honor
24 would like to just take a look at it.

25 THE COURT: Sure.

1 MS. KIRKLAND: (Proffering.)

2 THE COURT: This is Judge Gable's order?

3 MS. KIRKLAND: Yes, Your Honor.

4 THE COURT: Okay. All right.

5 MS. KIRKLAND: So as far as SLED is concerned there
6 is absolutely a controversy here. They have got a
7 statute on the one hand telling them this man needs to
8 register and then on the other hand this order that in
9 our opinion is facially void so the declaratory judgment
10 action we believe should stand and we believe that it's
11 additionally appropriate to attack this order
12 collaterally on lack of jurisdiction because it appears
13 on the face of the record.

14 There's a case Yarborough v. Collins that's cited in
15 our memo that allows for that. We believe that it's
16 facially invalid for two reasons. Ms. Anderson was kind
17 enough to outline them for you earlier. The first reason
18 is lack of personal jurisdiction over SLED so it's pretty
19 well established in South Carolina case law that orders
20 are only binding on you if you're a party. SLED is not a
21 party. SLED is not named as the State of South Carolina
22 or the Solicitor's Office. It's an agency of the State
23 of South Carolina. So to kind of dig into that, like the
24 Department of Transportation is also not the same as SLED
25 and the Solicitor's Office wouldn't bind the Department

1 of Transportation, it wouldn't show up at a Department of
2 Transportation case and try to bind them and that's
3 essentially what's happening here.

4 The Sex Offender Registry is a civil collateral
5 consequence of your conviction. It's never - the State
6 has argued in the past it was appropriate to handle in a
7 criminal context. We were -- The Supreme Court disagreed
8 and said that the Sex Offender Registry is civil in
9 nature. It's not proper to address it in criminal cases.
10 It has to be addressed in civil cases. In Family Court
11 where there is a juvenile it's appropriate to address it
12 in Family Court but in this case there was no juvenile.
13 I believe he was 32 or 33 years old at the time and it
14 was done in the closed criminal Family Court case so it
15 wasn't even like a separate action was filed in Family
16 Court to try to address the civil consequences of the
17 conviction. They went back into the closed criminal case
18 to issue an order in a '94 case number.

19 THE COURT: Let me ask you this: How do you get off
20 the registry?

21 MS. KIRKLAND: You don't.

22 THE COURT: It's just a lifetime thing?

23 MS. KIRKLAND: It is a lifetime thing. There are a
24 few avenues for removal from the registry.

25 THE COURT: What are they?

1 MS. KIRKLAND: You can have your conviction
2 overturned or vacated on appeal. You can receive a
3 habeas and that habeas results in an acquittal and a new
4 trial will allow you to come off of the registry. And
5 you can receive a pardon based on a finding of not
6 guilty. So essentially it has to be shown that you did
7 not actually receive this conviction.

8 THE COURT: What is the statute that provides that
9 there is no removal from the registry?

10 MS. KIRKLAND: It's not explicitly stated that there
11 is no other removal. There are three avenues for
12 removal.

13 THE COURT: Pardon. What were the other ones?

14 MS. KIRKLAND: I'm sorry. The three avenues,
15 overturned or vacated on appeal, you can have a habeas,
16 or a pardon.

17 THE COURT: Okay.

18 MS. KIRKLAND: So those avenues for removal preclude
19 the ability to argue equity. It's not really what we're
20 arguing today and I'll be happy to go into it but I do
21 want to make the distinction. We're not challenging the
22 underlying order. I do believe that's something that the
23 State would have needed to appeal.

24 So what we believe, and I'm happy to explain why the
25 Family Court order was incorrect, our argument today

1 really is just that it's facially invalid. But Key
2 Corporate Capital says that where there are statutory
3 avenues for removal or a statutory remedy is available,
4 the Court cannot fashion an equitable removal or an
5 equitable remedy or in this case an equitable removal.
6 There is a case Johnson v. Lloyd where in the underlying
7 Circuit Court case the plaintiff, I believe, Johnson
8 argued that he was entitled to equitable removal because
9 he didn't meet any of the statutory avenues for removal.
10 The Court of Appeals citing Key Corporate Capital says
11 that when there is a statutory remedy even if you don't
12 qualify for it, the court can't fashion an equitable
13 remedy for you. That was overturned on issue
14 preservation at the Supreme Court but I think that the
15 law and the reasoning from the Court of Appeals still
16 stands since that was issue preservation. It was
17 overturned on issue preservation not on the logic behind
18 it.

19 THE COURT: How many orders were involved on the
20 issue that went to the Supreme Court? This is one of
21 them, right?

22 MS. KIRKLAND: Yes, sir. That's one of them. There
23 were three others before the Supreme Court.

24 THE COURT: Three others. From what counties?

25 MS. KIRKLAND: One of them was in Greenville. I'm

1 not sure about the other two. We have been having
2 trouble serving --

3 THE COURT: And I haven't reviewed that. I'm just
4 curious.

5 MS. ANDERSON: I believe it's Lexington and
6 Richland.

7 MS. KIRKLAND: That is right. Thank you.

8 THE COURT: Okay.

9 MS. KIRKLAND: I think another one might have even
10 come in since that time that we're likely going to file a
11 declaratory judgment for as well. Those have, Judge
12 McKinnon in Laurens heard SLED v. Alfred Busey which was
13 another one that was before the Court.

14 THE COURT: So Judge McKinnon has one pending just
15 like this right now?

16 MS. KIRKLAND: Yes, sir. He has taken it under
17 advisement and we're submitting additional memorandum in
18 the next few weeks on that issue. But as far as the
19 Supreme Court all they did was deny cert. They didn't
20 say that these orders --

21 THE COURT: I mean, I get that they denied cert.
22 They could have said more but they didn't.

23 MS. KIRKLAND: Right. Our interpretation is that
24 was go fight it out at the Circuit Court level and bring
25 it back up to us individually on appeal.

1 THE COURT: Sure. Sure. Any other under advisement
2 issues regarding those orders?

3 MS. KIRKLAND: That's the only one. This is the
4 second one that has come up so Judge McKinnon has the
5 Busey case in Laurens, I believe, and then this one is
6 also pending.

7 THE COURT: Okay. I think, Ms. Anderson, I think I
8 understand your argument. You're welcome to reply.

9 MS. ANDERSON: Well, I was just going to point out
10 from the standpoint of the subject matter jurisdiction
11 issue as far as the order being void facially because,
12 this gentleman is over the age of 21 under the correction
13 or education portion of the Family Court statutes, you
14 know, this court, the Family Court here on a weekly basis
15 I'm sure processes and receives orders of expungement and
16 processes them on Family Court cases where juveniles have
17 been adjudicated delinquent that are now 25, 30 years
18 old, whatever age they are because that's the only court
19 that can process an order of expungement frankly because
20 that's the originating court. So there is no ban that
21 says Family Court cannot touch anything once somebody
22 turns 21 as far as making this facially invalid. Also,
23 just from a standpoint of arguing about it, if Brandon
24 Reed had gone back and contacted the victim in this case
25 when he was 22 or 23 years old in violation of that

1 Family Court order that was originally existing when he
2 was a juvenile, where would they take him? Because he
3 can't go into General Sessions. If he's going to be in
4 violation of that court order, he's going back to Family
5 Court. He has to in order to be held in contempt.

6 THE COURT: As a practical matter Family Court cases
7 even when they're closed if something comes up in a
8 divorce ten years after the divorce is finalized, it gets
9 the same caption. That's my understanding. I may be
10 wrong but... Okay. So I have heard the motion to
11 dismiss. Have you got your own motion?

12 MS. KIRKLAND: Yes, sir.

13 THE COURT: We need to figure this one out first,
14 okay?

15 MS. KIRKLAND: Oh.

16 THE COURT: Well, I mean, were you --

17 MR. KIRKLAND: Well, our motion for summary judgment
18 is that factually according to - there's no material
19 factual dispute here. Just simply based on the law we're
20 entitled to summary judgment because facially this order
21 is void because there's no subject matter jurisdiction
22 for the Family Court to be entering this in the first
23 place, this 32 year old. This should have been brought
24 in a civil declaratory judgment action in Circuit Court
25 and it's not binding on SLED. SLED was not a party, is

1 not the same thing as the State. When the Solicitor
2 speaks on behalf of the State in a criminal context, that
3 is just a complete 180 from the Sex Offender Registry
4 civil statute which specifically tasks SLED whose leader
5 is the Director, Chief Keel appointed by the Governor,
6 confirmed by the Senate as opposed to the Solicitor who
7 is elected. I mean, the two have no -- It's all the
8 State but it's not - they're not --

9 THE COURT: Kind of what you just said earlier.

10 MS. KIRKLAND: Yes, sir.

11 THE COURT: So we all agree.

12 MS. KIRKLAND: My response to her motion to dismiss
13 is essentially the same as our motion for summary
14 judgment.

15 THE COURT: Okay. All right. Anything you want to
16 say along the same grounds?

17 MS. ANDERSON: I think I have said everything,
18 Judge, that I can.

19 THE COURT: All right. Well, thank you for this
20 motion. We'll get an answer to you at some point.

21 MS. KIRKLAND: Thank you, Your Honor.

22 MS. ANDERSON: Thank you, Judge.

23 THE COURT: All right.

24 WHEREUPON, THE HEARING WAS CONCLUDED.

25

1 CERTIFICATE OF REPORTER

2 (STATE OF SOUTH CAROLINA)

3 (COUNTY OF LEXINGTON)

4

5 I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R.,
6 and Official Circuit Court Reporter for the Eleventh Judicial
7 Circuit in and for the State of South Carolina, do hereby
8 certify that I reported the proceedings in the before
9 captioned case in the Court of Common Pleas in and for the
10 State of South Carolina on the 24th day of September, 2018.

11 I FURTHER CERTIFY that the forgoing 21 pages
12 constitute a true and accurate record of said proceedings.

13 I FURTHER CERTIFY that I am neither related, counsel
14 to, nor of interest to any party hereto.

15 IN WITNESS WHEREOF, I have hereunto set my hand at
16 Lexington County, this 7th day of April, 2019.

17

18

19 By:s/ Steven E. LeBlanc

20

21 Steven E. LeBlanc, Sr., R.P.R.
22 Eleventh Circuit Court Reporter
23 State of South Carolina.

24

25