STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Berkeley County

Honorable Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LAWRENCE L. KELLEY, JR.

APPELLANT

APPELLATE CASE NO 2018-000364

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err by ordering Appellant to register as a sex offender, where Appellant pled guilty under Alford to assault and battery in the second degree, where one doctor indicated it was unnecessary to require Appellant to register, where the State's doctor who concluded that Appellant should be required to register relied on unreliable data, and where the evidence fails to support a finding of good cause?

STATEMENT OF THE CASE

Appellant was indicted for assault and battery in the second degree. R. 92 On June 2, 2017, he waived presentment before the Honorable Kristi Harrington and pleaded guilty to a negotiated plea under North Carolina v. Alford.[1] R. 5, ll. 5 – 25; R. 6, l. 23 – R. 7, l. 8. Anne Williams served as the assistant solicitor, and Aaron Mayer represented Appellant.

Judge Harrington sentenced Appellant to three years' incarceration suspended to five years of probation. R. 10, l. 20 – R. 11, l. 6. The trial court deferred a decision on whether Appellant would be placed on the sex offender registry. Id.

Following hearings on September 19, 2017 and September 29, 2017, the trial court requested written memoranda regarding placement on the registry. By way of a written Order dated February 6, 2018, Judge Harrington found that Appellant should be placed on the registry. R. 88.

This appeal follows.

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[1] 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

STANDARD OF REVIEW

"On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct.App.2001). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

ARGUMENT

The trial court err by ordering Appellant to register as a sex offender, where Appellant pled guilty under Alford to assault and battery in the second degree, where one doctor indicated it was unnecessary to require Appellant to register, where the State's doctor who concluded that Appellant should be required to register relied on unreliable data, and where the evidence fails to support a finding of good cause.

Background

The alleged facts giving rise to Appellant's decision to plead guilty under Alford do not constitute good cause such that he should be placed on the registry. As noted at the outset of his plea, part of the negotiated plea was that Appellant would be willing to have an evaluation; Appellant did not concede the facts. R. 4, ll. 19 – 24. Appellant, when asked how he pleads, answered "Guilty under Alford." R.. 6, l. 23 – R.. 7, l. 8.

Following a recitation of the allegations, the trial court asked Appellant whether he believed "the State could call witnesses to testify to those facts" and whether "[the jury] most probably would find [him] guilty beyond a reasonable doubt" if they heard those facts, Appellant answered in the affirmative. R. 9, ll. 2 – 9. He never admitted to the facts as presented by the State, nor do they, if true, support placement on the registry. The unique nature of an Alford plea, or a plea in general, allows the State a fair amount of latitude in reciting the facts as alleged. As a result, the decision whether to force Appellant to register should stem from a qualified medical opinion offered by a doctor and not from comments by counsel at the guilty plea.

In this case, two experts—Dr. Randolph Waid and Dr. Helen Clark—offered opinions regarding whether Appellant should be placed on the registry, and each reached a different conclusion. R. 35. Dr. Randolph Waid rendered an opinion that "Mr. Kelley is not in need of

placement on the Sexual Offender Registry nor is there need for him to enroll in a sexual offender treatment program." R. 49. Dr. Waid used a dozen different psychological and actuarial risk assessment instruments to evaluate Appellant. Id.

In contrast, Dr. Helen Clark listed five tests, the majority of which failed to find a high or medium risk for future "sexual acting out behaviors," with only the Abel Assessment for Sexual Interest concluding that he was at medium risk without treatment. Neither the personality assessment inventory, substance abuse subtle screening inventory, psychopathic personality inventory, nor the inventory of offender risk, needs, and strengths concluded that he was at a risk to reoffend. In fact, the inventory of offender risk found that "[t]he overall risk for further difficulty with the law appears **low**." (emphasis in original).

Discussion

"A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and ... the act involves the nonconsensual touching of the private parts of a person, either under or above clothing." S.C. Code Ann. § 16-3-600. Under S.C. Code Ann. §23-3-340, "the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor" following a guilty plea.

Good cause was not shown in this case. The trial court cited State v. Hicks, a 2008 case from this Court. 377 S.C. 322, 659 S.E.2d 499 (2008). Hicks was indicted for criminal sexual conduct and pleaded guilty to assault and battery of a high and aggravated nature, "although he admitted to having sex with" the fourteen-year-old complaining witness. Id. at 324, 659 S.E.2d

at 500. Hicks was not required to register initially, but the following a motion to reconsider by the State, Hicks was ordered to register as a sex offender. Id.

This Court, in affirming the circuit court's decision to order Hicks to register, noted that Hicks knew where the complaining witness lived. Id. at 326, 659 S.E.2d at 501. The minor's father described the nature of Hick's behavior and noted Hicks had been by the house where she lived "on numerous occasions, both before and after the ABHAN." Id. "During the course of several of these occurrences, Hicks made gestures" toward the father "that could be interpreted as confrontational or predatory." Id.

The primary thrust of the Alford decision is that a defendant may voluntarily and knowingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit he participated in the acts constituting the crime. United States v. Morrow, 914 F.2d 608, 611 (4th Cir.1990). Recognizing that "there is no significant distinction between a standard guilty plea and an Alford plea," Appellant's case is distinguishable from Hicks in several ways. See State v. Herndon, 403 S.C. 84, 93, 742 S.E.2d 375, 380 (2013).

Appellant never admitted to having sex with anyone. He pleaded guilty under Alford, supra. He pleaded guilty under Alford to assault and battery, not criminal sexual conduct with a minor. Appellant never made gestures or appeared confrontational or predatory. As a result, The State failed to show "good cause" sufficient to require him to register as a sex offender. The crux of the State's case, Dr. Clark's report, is nullified by Dr. Waid's evaluation. The conflicting expert reports do not constitute good cause such that Appellant should be required to register.

Dr. Waid has been the subject of appellate litigation at least once before. In Means v. Gates, one party in a negligence action sought to introduce a videotaped deposition of Dr. Waid. 348 S.C. 161, 165, 558 S.E.2d 921, 923 (Ct. App. 2001). This Court found that the trial court

erred in refusing to admit any portion of the "videotaped deposition of the neuropsychologist who performed a series of psychological tests." Id. The opinion contained a lengthy discussion of Dr. Waid's background:

> Dr. Waid has a bachelor's degree in general psychology from Temple University, a master's degree in psychology from the University of Richmond, and a doctorate in clinical psychology from the University of North Texas following an internship at the Medical University of South Carolina in Charleston ("MUSC").
>
> Dr. Waid worked as the director of psychological services at a private psychiatric facility in Dallas, Texas before returning to Charleston in 1982 to join MUSC's faculty in the departments of psychiatry and neurology. In 1989, he became the director of MUSC's assessment center, where he ran a clinic providing assessments for conditions such as chronic pain, neurological disorders, and psychiatric disorders. In 1998, Dr. Waid became a clinical associate professor in psychiatry and neurology at MUSC and opened a private practice in Mount Pleasant.

Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001).

The trial court noted that Dr. Clark's qualifications include "her position as a Clinical Member of the Association for the Treatment of Sexual Abusers and inclusion on the list of approved psychosexual evaluators compiled by the South Carolina Department of Probation, Parole, and Pardon Services." R. 29. Dr. Waid's credentials are equally as impressive, and his report should have been given more weight.

Dr. Waid's report conclude that "[Appellant's] low risk for sexual recidivism and his [New Jersey Registrant Risk Assessment Scale] scores indicate no empirical/quantitative reason for him to be placed on the South Carolina Sex Offender Registry." As mentioned above, Dr. Waid conducted approximately twelve different procedures on Appellant, and they collectively indicated low-to-no risk of recidivism.

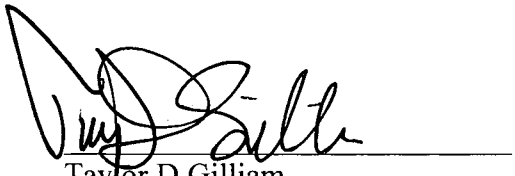
Judge Harrington's Order sought to distinguish Dr. Clark's report as including "a thorough discussion of Defendant's social and sexual relationship history" and involving two

clinical sessions. However, Dr. Waid's report contained a finding that "[Appellant] was on time for his scheduled appointments." Additionally. Dr. Waid offered extensive detail on Appellant's social life, including the claim that Appellant's ex-wife attacked him with a knife after he served with divorce papers.

Therefore, based on the thorough undertaking by Dr. Waid, including an extensive discussion of Appellant's social history and multiple testing procedures, Appellant was not at risk to reoffend; there was no good cause to order him to be placed on the sex offender registry.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Court reverse the trial court's Order and declare that good cause did not exist to make Appellant register on the sex offender registry.



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ATTORNEY FOR APPELLANT

This 23rd day of May, 2019.

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 April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 23, 2019

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