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SC Court of Appeals

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SPARTANBURG COUNTY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

The STATE of South Carolina,

Prosecutor,

-vs-

Carl Ray FRALEY,

Defendant.

IN THE COURT OF GENERAL SESSIONS

ORDER

DENYING MOTION TO RECONSIDER

Indictment(s) No(s): 2013-GS-42-00567
2013-GS-42-00568 2013-GS-42-00569
2013-GS-42-00570 2015-GS-42-00614

This matter came before this Court on motion of the defendant by and through his trial counsel, Richard W. Vieth, Esq. pursuant to Rule 29, SCR CrimP seeking reconsideration of the Court's decision requiring the defendant to register as a sex offender pursuant to S. C. Code Ann. Section 23-3-430(A) and (D) after his entry of a plea of guilty to a charge of Assault and Battery in the First Degree involving allegations of criminal sexual conduct against a minor child.

The Court previously considered the matter and issued an order requiring sex offender registration by the defendant. The defendant filed this motion seeking a reversal of this Court's decision or, in the alternative, requesting a hearing to allow the presentation of additional testimony and argument on the issue. The Court granted the defendant's request for a hearing at which the defendant appeared with counsel and the State being represented by Kinli B. Abee, Assistant Attorney General for the State of South Carolina.

Factual Background

The defendant was charged with two counts of Criminal Sexual Conduct with a Minor in the First Degree and two counts of the Commission of a Lewd Act Upon a Child involving allegations of sexual conduct towards a grandchild. The evidence supporting the charge provided to the court by the State was that the child's parents noticed the three year old child exhibiting sexualized behaviors during a period of time that the defendant was spending time alone with the child. The child's father, who is a son of the defendant, reported that when the defendant came to visit with the child he "almost always" would take her to his truck alone. After he and the child's mother became uncomfortable with the situation, limitations were placed on the defendant's opportunities to be alone with the child. After limitations were placed on his contact with the child the father reported that the defendant "began to become very angry".

The child's mother reported that after she became pregnant and was having difficulties with the pregnancy, she temporarily moved with the child to her parents home Columbia, S. C. so as to have assistance from her parents for a period of about eight weeks. She reported that the child returned to her normal "happy self again". The mother further reported that upon her return to her own home and subsequent to the child's first visit with the defendant after their return to Spartanburg, the child again began exhibiting sexualized behavior which had not been occurring while she was at her parent's pending the birth of her child.

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In June of 2012 the child's mother reported to police statements made to her by the child regarding inappropriate contact by the defendant with the child of a sexual nature. Law enforcement referred her with the child to the Children's Advocacy Center for potential services. The child disclosed sex abuse by the defendant to a forensic interviewer.

The defendant denied the allegations and speculated that the mother of the child was manipulating the child to make the allegations because he had offered to assist his son in divorcing the mother and obtaining custody of the children.

The defendant was offered and consented to a polygraph examination regarding the sexual abuse allegations which was administered by an examiner with the State Law Enforcement Division. The test results in the examiner's opinion, was "deception indicated" The defendant then requested that an additional independent examination be conducted by a qualified examiner of his own choosing which resulted, in the examiner's opinion, as "inconclusive".

After extensive plea negotiations, even until the eve of the scheduled trial in this matter, the defendant appeared before this Court on February 9, 2015 and entered a plea of guilty, pursuant to North Carolina v. Alford, 400 US 25, (1970), to a charge of Assault and Battery in the First Degree. As a part of the negotiated plea and the sentence of the Court, the defendant was required to submit to a psycho-sexual evaluation to assist the Court in its decision as to whether the defendant should be required to register as a sex offender pursuant to S. C. Code Section 23-3-430. After reviewing the case and considering the psycho-sexual evaluations submitted by two separate qualified examiners, the Court issued an order requiring the defendant to register as a sex offender.

In his motion for reconsideration the defendant presents a three-pronged argument in support of his assertion that this Court should reverse its decision requiring registration. First, the defendant argues that the Court's decision is erroneous in that the Court considered the results of a Penile Plethysmograph Examination undergone by the defendant pursuant to the psycho-sexual evaluation. Secondly, the defendant argues that the Court erroneously considered evidence of the results of two polygraph examinations voluntarily submitted to by the defendant, one having been conducted by the State Law Enforcement Division and the second having been conducted by an independent examiner chosen by the defendant. Thirdly, the defendant argues that the Court erroneously considered the defendant's entry of an "Alford" plea to be an admission of guilt and that the presentation of "a one-sided version does not mean guilty".

In his motion for reconsideration the defendant urges the Court to reverse its ruling without further hearing or, in the alternative, to allow the defendant an additional hearing and the opportunity to present expert testimony relevant to the issue of whether he should be required to register pursuant to S. C. Code Section 23-3-430. The Court granted the defendant's request for the opportunity to present additional evidence, testimony, and argument on the issue.

Applicable Law

Rule 29, SCRCrimP, provides that "... post-trial motions shall be made within ten (10) days after the imposition of sentence."

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S. C. Code Ann. Section 23-3-430 provides that every person convicted of certain designated criminal offenses listed in subsection (C) shall be required to register pursuant to the applicable provisions of Title 23 Chapter 3 Article 7 and their name be included on the sex offender registry. Subsection (D) further provides that "upon conviction ... of an offense not listed in this article, 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."

"... [A] finding of good cause ... means only that the judge must consider the facts and circumstances of the case to make the determination of whether or not the evidence indicates a risk to reoffend sexually". In Re M.B.H., 387 SC 323 (2010)

Discussion

At a hearing held in this matter the defendant appeared with counsel and the State was represented by counsel. The State relied upon the record in this case and the psycho-sexual evaluation conducted by Leilani Lee, a medical doctor and assistant professor of psychiatry at the Medical University of South Carolina in the Sexual Behaviors Clinic and Lab Community and Public Safety Psychiatry Division already considered by the Court supporting the issuance of its Order requiring registration. The defendant presented additional evidence in the form of testimony given by Paul Gunter, who holds a Doctor of Ministry Degree in Pastoral Counseling and who is a Licensed Professional Counselor and a Certified Clinical Sexologist, and who had previously conducted an evaluation of the defendant and issued a report relevant to the issue presented, which the Court considered in its original decision for which reconsideration has been requested.

As a condition of his plea and sentence of the Court, the defendant agreed and was required to submit to a psycho-sexual examination to assist the court in its determination as to whether he should be required to register as a sex offender. The defendant was examined by the two examiners previously referenced who were accepted as experts in the field and qualified to make an examination and to evaluate the defendant's likelihood to engage in unlawful sexually deviant behavior. Each of the examiners issued a report expressing their opinions on ultimate facts for the court to consider in making its judgment. The reports of each examiner have been admitted into the record of this case without objection. The Court considered the reports, testing results, diagnoses, and opinions of the examiners in deciding the issue before the Court. The Court assumed that each of the experts employed gathered all relevant information, conducted appropriate testing and examinations, and applied their best professional judgment in fulfilling the obligations and responsibilities imposed upon them in the exercise of their duties. The Court further assumed that the examinations and evaluations were conducted according to prevailing professional norms and in accordance with the practices, procedures, and standards applicable to qualified examiners when conducting a sexual behavior evaluation for use by the court in determining sex offender registration.

Aside from an examiner's use and interpretation of the results of a penile plethysmograph examination there were no objections to the qualifications of either of the examiners to provide a sexual behavior evaluation report relating to the defendant for consideration by the Court.

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Evidence of Penile Plethysmograph Examination

The defendant argues that this Court erroneously considered the results of a Penile Plethysmograph Examination ("PPG") employed by one of the examiners in its decision to require sex offender registration based upon the fact that appellate courts have routinely excluded the results of a penile plethysmograph examination as evidence in court because such tests do not measure up to the evidentiary requirements regarding reliability and scientific validity and "there is substantial difference of opinion within the scientific community regarding the plethysmograph's reliability to measure sexual deviancy". See Gentry v. State, 443 S.E.2d 667, (Ga. Ct. App. 1994)

In the course of her sexual behaviors evaluation of the defendant, Dr. Lee utilized several professionally recognized methods and examination techniques for evaluating sexual behavior including the Abel Assessment For Sexual Interest-3 (AASI-3) test, the penile plethysmograph examination (PPG), and the Static-99R risk measurement instrument. The AASI-3 and the PPG are tests designed to measure sexual interest by the presentation of a variety of circumstances involving sexual and non-sexual activity involving various ages of persons and then evaluating the degree of sexual stimulation of the test subject. Dr. Lee opined that the examination results are not capable of utilization in determining the guilt or innocence of an examinee regarding a particular charge but are only designed to aid in treatment planning and risk assessment for a particular individual.

According to Dr. Lee's report, the "Visual Reaction Time portion of the AASI-3 collects sexual interest data beyond the awareness of the person completing the assessment" as well as information obtained from the examinee from self-reporting of "his or her sexual arousal to the images. The "sexual recidivism risk for males by VRT (Visual Reaction Time) to children is used to aid in prediction of recidivism using a comparison group and placing the examinee into one of three risk groups: lower-medium-higher risk. The higher the percentile, the more likely the examinee is to offend. A ratio of VRT to children versus VRT to adults and adolescents is calculated. Mr. Fraley's percentage is 70%."

Dr. Gunter elected to employ the AASI-3 over the PPG for evaluating the defendant's sexual behaviors and risk of offending or reoffending as the AASI-3 is less intrusive and sufficiently reliable. He also reviewed the report provided by Dr. Lee. Based upon his examination and evaluation he opined that the defendant "does appear to be a 'low risk' to offend or re-offend".

While the defendant argues that the court erroneously considered the results of a PPG in its decision because it "does not measure up to the evidentiary requirements of reliability and scientific validity", each of the qualified experts employed in this case, including the defendant's own retained expert, Dr. Paul Gunter, are in agreement that the PPG test is an appropriate tool in evaluating sexual behaviors. The defendant's expert testified that "... there's no shortage of critics of the PPG and the Abel Assessment", but, "there are numerous studies that compare the two and find that both of them measure sexual interests effectively. The validity and reliability of both is impressive, not perfect, but impressive."

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Dr. Lee further reported that the technician administering the PPG reported that, contrary to instructions to avoid movement during the "scenario trials", Mr. Fraley engaged in excessive movement. According to Dr. Lee's report, "the examination results revealed occasions of movement and respiratory irregularities during more trials than not. Such movements and irregularities can be intentional attempts to manipulate the PPG examination equipment, examination protocol, or physiological responses during the examination. Mr. Fraley does not have a reported or identified medical disorder with associated movement and respiratory symptoms. Therefore, dissimulation is the likely explanation."

The penile plethysmograph examination "measures physiological response to stimuli material, including measurement of penile circumference, galvanic skin response, respirations, and body movement." According to Dr. Lee the examination met the minimum requirements for interpretation which requires arousal ... of at least a 5-mm increase". "Mr. Fraley's maximum arousal ... was to a coercion of a prepubescent female scenario."

The Static-99R is an actuarial measure of risk for sexual offense recidivism as compared with members of a particular group but does not measure the actual risk specific to the individual. This test was also employed by Dr. Lee and her opinion based upon her analysis of the Static-99R is that the defendant is "in the Low Risk category for being charged or convicted of another sexual offense."

Evidence of Polygraph Examination Results

The defendant argues that this Court erroneously considered results of the defendant's polygraph examinations in its decision to require sex offender registration. This belief by the defendant is apparently based upon the examinations being referenced in the Court's Order. The defendant argues that the results of polygraph examinations are not admissible as evidence in the courts of this State and therefore should not have been considered by the Court.

This Court is aware that until its decision in State v. Council, 335 SC 1, (1999) the State Supreme Court has consistently held that whether or not a defendant took or refused a polygraph examination as well as the results whether, "pass" or "fail", is inadmissible as evidence. State v. Johnson, 334 SC 78, (1999). After Council, the "per se" rule against admissibility was abrogated to allow for the admission of such evidence if the trial court finds such evidence to be relevant and reliable after conducting an analysis pursuant to SCRE 702, Council, and State v. Jones, 273 SC 723, (1979) for the admission of scientific evidence. No such analysis was conducted in this case and therefore this court did not consider such evidence in its decision. The submission to polygraph examinations by the defendant was merely recited in the Order in the "Factual Background" of the case but not in its "Conclusion" where the Court stated that its decision was "based on the results of the Defendant's psycho-sexual evaluation and the fact that he entered a plea before this court ..."

Entry of an Alford plea

The defendant entered an *Alford* plea of guilty to a charge of Assault and Battery in the First Degree involving unlawful conduct of a sexual nature towards his three year old grandchild.



"An *Alford* plea is not distinguishable from the standard guilty plea ..." "An *Alford* plea – a guilty plea accompanied by an assertion of innocence – was held to be a constitutional admission of guilt in North Carolina v. Alford ..." Zurcher v. Bilton, 379 SC 132 (2008) "A plea of guilty is a confession of guilt, made in a formal manner and has the same effect in law as a verdict of guilty ..." Sanders v. Leeke, 254 SC 444 (1970) "For this reason, so long as a defendant has entered a guilty plea freely and voluntarily, an admission of guilt fully and fairly litigates the matter in the same manner as a contested trial in which a defendant is adjudicated guilty." Zurcher.

"Courts are generally required to confirm that a factual basis exists for the *Alford* plea" United States v. Morrow, 914 F.2d 608 (4th Cir. 1990) and required to determine the voluntariness of a defendant's decision to plead guilty whether or not under the authority of *Alford* and following the guidance and factors to consider provided trial courts in the United States Supreme Court's decision in Boykin v. Alabama, 395 US 238 (1969).

"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." State v. Herndon, 403 SC 84 (2013), State v. Baxley, 225 SC 283 (1971)(approving the validity of an *Alford* plea).

In this case the defendant voluntarily and knowingly waived his right to contest his guilt when he made an intelligent and fully informed decision to enter an *Alford* plea of guilty to one charge of Assault and Battery in the First Degree and the State agreed to dismiss the more serious charges, including two counts of Criminal Sexual Conduct with a Minor in the First Degree and two counts of the Commission of a Lewd Act Upon a Child, in return. The decision to enter an *Alford* plea offered advantages to both the defendant and the State. The defendant was permitted to plead guilty to fewer and a reduced charge, which alleviated the potential of a much more severe punishment in the event of a conviction, and the State avoided the necessity of preparation for a trial involving the testimony of a very young child witness necessary for proving the case.

The defendant was made fully aware that for all practical purposes the entry of an *Alford* plea was the same as the entry of a guilty plea with an admission of guilt or a verdict of "guilty" made by a jury, even where the defendant may have protested his innocence. The defendant was fully informed that an *Alford* plea to a criminal charge exposed him to the same potential punishment and any potential collateral consequences as a conviction obtained by admission or jury verdict. "... [T]he *Alford* plea does not create a special category of defendant exempt from punishment applicable to [his] conviction". Herndon. Nor should it permit a defendant who enters an *Alford* plea to avoid potential collateral consequences that may result from the plea simply because the defendant has denied actual guilt.

The defendant apparently believed that there was a reasonable probability that a jury would find the child witness credible and he be found guilty of Criminal Sexual Conduct and/or Commission of a Lewd Act on A Child and thus his decision to enter an *Alford* plea to the reduced charge with a full understanding of the consequences of that decision. The court accepted the guilty plea of the defendant after determining that it was freely and voluntarily made with an understanding of the consequences of that decision. The court found that there was a substantial

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factual basis presented for the acceptance of the plea based upon the proffer made by the State during the acceptance of the plea. The defendant was made aware that he could be required to register as a sex offender and entered his plea notwithstanding that fact. His denial of guilt during the entry of his plea is not an impediment to the requirement of sex offender registration any more than it would have been if the defendant had gone to trial, protested his innocence, and been found guilty by a jury.

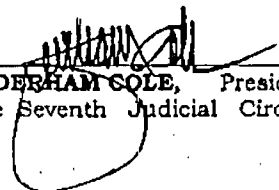
Conclusion

The defendant's motion is timely made. This Court has carefully considered the matter and all material presented by the parties relevant to the issue of registration. The Court found that there was a substantial factual basis for the entry of a guilty plea pursuant to Alford v. North Carolina and that the defendant understood the direct and collateral consequences of that decision that are relevant here.

Based upon the entry of his plea of guilty to Assault and Battery in the First Degree and after consideration of the psycho-sexual evaluation reports submitted to the Court and the testimony provided at the hearing, this Court finds that "good cause" has been shown for requiring sex offender registration by the defendant. No compelling reason has been presented or is readily apparent that convinces this Court that its original decision to require registration is erroneous.

The defendant's Rule 29 **MOTION** should be and **IS** therefore **DENIED**.

July 24, 2019



J. DERHAM SOLE, Presiding Judge
The Seventh Judicial Circuit Court

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