THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court Of Common Pleas

Walton J. McLeod, Circuit Court Judge

Appellate Case No. 2019-000327

South Carolina Law Enforcement Division.....Respondent,

v.

Brandon Reed.....Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Circuit Court erred in finding the Family Court Order was void for lack of subject matter jurisdiction.
2. Whether the Declaratory Judgment Act is an appropriate mechanism to challenge lack of subject matter jurisdiction.
3. Whether SLED is barred by *res judicata* and collateral estoppel from challenging the Family Court Order.

STATEMENT OF THE CASE

In 1994, Brandon Reed was adjudicated delinquent at the age of twelve for committing criminal sexual conduct with a minor (1st degree). (Order (Removal from Sex Offender Registry) in Case Number: 2994-JU-02-396 and Affidavit of Dana Temple of June 28, 2018). In 1996, he had to register on the South Carolina sex offender registry (SOR) because of that adjudication. (Order (Removal from Sex Offender Registry) in Case Number: 2994-JU-02-396 and Affidavit of Dana Temple of June 28, 2018). Decades later, in 2017, and well past his twenty-first birthday, the Family Court in Aiken County had a hearing and ordered his removal from the SOR. (Order (Removal from Sex Offender Registry) in Case Number: 2994-JU-02-396).[1]

However, the Family Court's Order (Reed Order) was void for lack of subject matter jurisdiction. The Family Court's jurisdiction over a juvenile ends when that juvenile turns twenty-one years of age.

> Whenever the court has acquired the jurisdiction of any child under eighteen years of age, jurisdiction continues so long as, in the judgment of the court, it may be necessary to retain jurisdiction for the correction or education of the child, *but jurisdiction shall terminate when the child attains the age of twenty-one years.*

S.C. Code Ann. §63-3-510(B)[2] (emphasis added). Brandon Reed was 12 years old when he was adjudicated delinquent in 1994; he was well into his thirties in 2017 when the Reed Order was

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1 The Family Court's order (Reed order) is replete with errors. First, the reasoning of the Family Court focuses on equitable considerations. "[Mr. Reed] has received and completed extensive counseling and treatment, lived a productive life, and has had no other convictions." (Order (Removal from Sex Offender Registry) in Case Number: 2994-JU-02-396). Regardless of the truth of those observations, they are not grounds for relief under S.C. Code Ann. § 23-3-430(E)-(G). The statute enumerates the only avenues off the SOR—rehabilitation is not one of them.

2 Effective July 1, 2019, the legislature amended S.C. Code Ann. §63-3-510(B). The Family Court now has "jurisdiction of any child under eighteen years of age" where before the Family Court had jurisdiction of any child under seventeen years of age. That does not impact the analysis in this case as Mr. Reed was in his thirties at time the Reed order was issued.

issued. Accordingly, the Family Court no longer had subject matter jurisdiction in 2017 when the Reed Order was issued.

Finally, contrary to Appellant's assertions, SLED was never a party to the Family Court proceedings, could not have intervened in the matter, and had no ability to bring a direct appeal of the void order. Thus, the Family Court never obtained personal jurisdiction over SLED.

On March 22, 2018, SLED filed a Declaratory Judgment action in the Court of Common Pleas in Aiken, South Carolina. SLED sought a declaratory judgment from the Circuit Court that the April 22, 2017, Family Court Order was *void ab initio* for lack of subject matter jurisdiction and lack of personal jurisdiction.

STANDARD OF REVIEW

"This Court reviews all questions of law de novo." *Lollis v. Dutton*, 421 S.C. 467, 477, 807 S.E.2d 723, 728 (Ct. App. 2017) (quoting *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009); *see also Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) ("Questions of law may be decided with no particular deference to the trial court." (quoting *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008))). Whether the Court erred by granting SLED's motion for summary judgment is a question of law; therefore, the proper standard of review is *de novo*.

ARGUMENT

At bottom, this is a simple case. An order was issued by the Family Court to Appellant purporting to remove him from South Carolina's Sex Offender Registry. However, the Family Court, whose jurisdiction over Appellant ended when he turned twenty-one, did not have jurisdiction to issue the order to Appellant, who was over 30 years old at the time of issuance. S.C. Code Ann. §63-3-510(B). Acting without jurisdiction renders the order *void ab initio*, as the Circuit Court found below. *Turner v. Malone*, 24 S.C. 398, 403 (1886). Procedurally, as a void order, it was subject to collateral attack under South Carolina's Declaratory Judgment Act. *Yarbrough v. Collins*, 293 S.C. 290, 292, 360 S.E.2d 300, 301 (1987); S.C. Code Ann. § 15-53-60. This is to say nothing of the fact that SLED, the state agency in charge of maintaining the registry, was not a party to the Family Court action. Thus, SLED cannot be bound by this order or collaterally estopped from challenging it. In sum, the Circuit Court rightly recognized the deficiencies in the order and declared it void. Appellant's instant appeal provides no argument warranting a different result.

I. The Reed order is void for lack of subject matter jurisdiction and personal jurisdiction.[3]

i. Subject Matter Jurisdiction

Registering on the SOR is a civil requirement. *Thompson v. State*, 415 S.C. 560, 564 n. 3, 785 S.E.2d 189, 191 n. 3 (2016) ("As we have repeatedly stated, the sex offender registry is a civil requirement separate and apart from the criminal punishments associated with sexual offenses in this state."). "Subject matter jurisdiction is the power of a court to hear and determine

[3] The lower court declined to decide if the order was void for lack of personal jurisdiction, after making the dispositive finding that family court lacked subject matter jurisdiction. Nonetheless, Appellant argues in their brief that the court had personal jurisdiction, so it is addressed here as well out of an abundance of caution.

cases of the general class to which the proceedings in question belong." *Johnson v. South Carolina Dept. of Probation, Parole, and Pardon Serv.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007) (internal citation omitted). The Family Court has the exclusive power to hear and determine cases involving juveniles. *In re Shaquille O'Neal B.*, 385 S.C. 243, 247-51, 684 S.E.2d 549, 552-53 (2009). But Family Courts that acquired subject matter jurisdiction over juveniles when they were under the age of eighteen lose subject matter jurisdiction over those same juveniles when they turn twenty-one. S.C. Code Ann. §63-3-510(B). The Family Court lost subject matter jurisdiction over Mr. Reed at the latest in 2003, when he was 21 years old—but still reopened his case in 2017 and issued an order that removed Mr. Reed from the SOR. Clearly the court lacked subject matter jurisdiction over Mr. Reed, who was then in his thirties. Consequently, the Reed order is void.

Appellant argues the Family Court did have jurisdiction pursuant to §63-3-530(A)(25). *See* S.C. Code Ann. § 63-3-530(A)(25) ("The family court has exclusive jurisdiction . . . . to modify or vacate any order issued by the court"). This is an incorrect assertion. Section 63-3-530 is titled "Jurisdiction in domestic matters" and clearly only applies to domestic cases, not juvenile criminal cases. S.C. Code Ann. § 63-3-530. The Family Court clearly attains jurisdiction over juvenile matters in § 63-3-510, and that section also sets the limits of that jurisdiction when it provides that the Family Court's jurisdiction ends when the juvenile turns twenty-one. S.C. Code Ann. § 63-3-510. The Family Court attained jurisdiction over Mr. Reed when he was a juvenile, and lost it, when he turned 21. The statutes providing for the Family Court's jurisdiction over domestic matters cannot confer subject matter jurisdiction on the court in this juvenile criminal case.[4]

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4 The Appellant argues that because the Family Court can also grant expungements, this

Lastly, the lack of subject matter jurisdiction was evident on the face of the record. The 1994 juvenile case number is in the caption. (Order (Removal from Sex Offender Registry) in Case Number: 2994-JU-02-396). The fact that Mr. Reed was adjudicated delinquent in 1994 at the age of 12 is also on the face of the record. *Id.* As is the fact that the court issued its order in 2017, well past Mr. Reed's twenty-first birthday. *Id.* Because the Family Court's lack of subject matter jurisdiction was evident on the face of the record, the Reed order is subject to collateral attack. *Yarbrough v. Collins*, 293 S.C. 290, 292, 360 S.E.2d 300, 301.

ii. Personal Jurisdiction

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in litigation in which he is not designated a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). SLED is the only entity with the authority to remove an individual from the SOR. S.C. Code Ann. § 23-3-410(A) ("The registry is under the direction of the Chief of the South Carolina Law Enforcement Division . . . SLED shall develop and operate the registry . . . ."); *see also* S.C. Code Ann. §23-3-420 ("[SLED] shall promulgate regulations to implement the provisions of this article."). SLED, however, was not involved in the 2017 Family Court hearing; it was not a party. In spite of SLED's absence, the Reed order commands SLED to remove Mr. Reed from the SOR. (Order (Removal from Sex Offender Registry) in Case Number: 2994-JU-02-396). Because SLED was not designated a party or made a party by service of process, the order is void for lack of personal jurisdiction, at least so far as the order

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clearly shows that the Family Court's jurisdiction continues beyond a juvenile's twenty-first birthday. However, S.C. Code Ann. §63-19-2050 grants the Family Court the authority to grant expungements. There is no similar statute that grants the Family Court the authority to go back into a closed juvenile criminal file when the juvenile is in his thirties and issue a legally incorrect order removing him from the sex offender registry.

concerns SLED.

Finally, the lack of personal jurisdiction was evident on the face of the record. SLED is not in the caption of the Reed order (nor was it made a party through service of process), yet the order directs SLED to remove Mr. Reed from the SOR. Consequently, the order is subject to collateral attack. *Yarbrough v. Collins*, 293 S.C. 290, 292, 360 S.E.2d 300, 301.

II. The South Carolina Supreme Court authorizes collateral attacks on orders that are void for lack of subject matter jurisdiction or personal jurisdiction.

"A judgment may be collaterally attacked if the court lacked jurisdiction and the lack of jurisdiction appears on the face of the record." *Yarbrough v. Collins*, 293 S.C. 290, 292, 360 S.E.2d 300, 301 (1987) (citing *Turner v. Malone*, 24 S.C. 398, 403 (1886) ("It has often been said that a judgment is void whenever the court which pronounced it had not jurisdiction of the parties to the judgment or of the subject matter in controversy."). The Court does not limit the means by which a void order may be collaterally attacked. In this collateral attack, SLED legitimately asserts its claim under the Uniform Declaratory Judgment Act ("the Act"). SLED asked the circuit court to declare the Reed order void, thereby restoring SLED's ability to require Mr. Reed to register and ending the conflict between them.

i. An action for declaratory judgment is the appropriate means of attacking the Reed order.

"Courts of record within their respective jurisdictions shall have the power to declare rights, status and other legal relations . . . ." S.C. Code Ann. § 15-53-20. The legal relation between Mr. Reed (a person who by law must register on the SOR) and SLED (the sole entity with authority to enforce the registry) is unilaterally broken and inhibited by the void Reed order. Although this specific legal relationship is not specifically enumerated in the Act, this is no limitation on the court's ability to resolve the controversy:

> The enumeration in Sections 15-53-30 to 15-53-50 does not limit or restrict the exercise of the general powers conferred in Section 15-53-20 in any proceeding when declaratory relief is sought in which a judgment or decree will terminate the controversy or remove the uncertainty.

S.C. Code Ann. § 15-53-60. Declaring the Reed order void will end the uncertainty regarding SLED's authority to enforce Mr. Reed's SOR requirements, as well as end the controversy between them. In addition, the purpose of the Act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." S.C. Code Ann. §15-53-130. The statute commands courts to construe and administer the Act liberally. *Id.*

III. SLED is not barred by *Res Judicata* or Collateral Estoppel

Res judicata or collateral estoppel cannot be invoked to protect or sustain a void order, especially one issued by a Court lacking subject matter jurisdiction. "Subject matter jurisdiction may not be waived even with consent of the parties." *Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002); *see also Hunter v. Boyd*, 203 S.C. 518, 525, 28 S.E.2d 412, 416 (1943).

> It is axiomatic that an order entered by a court without subject matter jurisdiction is utterly void. *Coon v. Coon*, 356 S.C. 342, 347, 588 S.E.2d 624, 627 (Ct. App. 2003), aff'd as modified, 364 S.C. 563, 614 S.E.2d 616 (2005). Moreover, a lack of subject matter jurisdiction may be raised at any time. *Hallums v. Bowens*, 318 S.C. 1, 3, 428 S.E.2d 894, 895 (Ct. App. 1993). Additionally, a court lacking subject-matter jurisdiction cannot enforce its own decrees. *Id.*

Simmons v. Simmons, 370 S.C. 109, 116, 634 S.E.2d 1, 4 (Ct. App. 2006). It is clear that the Reed Order is utterly void and unenforceable because the Family Court lacked subject matter jurisdiction. Avoid order cannot provide the foundation for a *res judicata* or collateral estoppel argument.

Nonetheless, even if a void order could provide such support, *res judicata* and collateral estoppel do not apply to this case.

i. *Res Judicata* is Inapplicable

Mr. Reed also argues that SLED should be barred by *res judicata* and collateral estoppel from bringing this action. These arguments are unavailing. "*Res judicata* bars subsequent actions by the *same parties* when the claims arise out of the same transaction or occurrence that was the subject of a prior action *between those parties*." *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (emphasis added). Notably, SLED and the Solicitor's Office acting on behalf of the State of South Carolina are not the "same parties." *Cf.* S.C. Code Ann. § 15-78-70(c) (drawing a distinction between the State and its entities in the context of litigation under the tort claims act). In South Carolina, each of the various branches of government, political subdivisions, agencies, departments, and institutions is its own entity.

The question then becomes can the Solicitor's Office bind SLED through its representation of the State of South Carolina generally. *See* S.C. Code Ann § 1-7-320 ("Solicitors shall perform the duty of the Attorney General and give their counsel and advice to the Governor and other State officers, in matters of public concern, whenever they shall be, by them, required to do so; and they shall assist the Attorney General, or each other, in all suits of prosecution in behalf of this State when directed so to do by the Governor or called upon by the Attorney General.") This statute empowers Solicitors to do a variety of things. It does not, however, allow Solicitors to bind SLED, or any other State agency for that matter, by virtue of its role prosecuting on behalf of the State. Indeed, the Solicitor's Office can no more bind SLED than it can bind the Department of Transportation, or the Department of Health and Environmental Control, or a County Sheriff. They are entities distinct from the State of South Carolina proper. Therefore, SLED is not barred by *res judicata* from bringing the instant action given it was not a party to the prior litigation.

Furthermore, even if the Solicitor's office could bind SLED, it would be inappropriate for SLED to comply with an order that is contrary to law. It is well established that two people cannot contract to perform an illegal act. *See, e.g., Bank of U.S. v. Owens*, 27 U.S. 527, 539 (1829) ("'This action is apparently founded on a contract to disobey the law.' 'The defence set up proves the principle of the contract.' 'Then how shall an action be maintained in that which is a direct violation of a public law. The contract is bottomed in *malum prohibitum* of a very serious nature in the opinion of the legislature; how then can we enforce a contract to do that very thing which is so much reprobated by the act?"). Similarly, the Solicitor's Office cannot bind SLED to act in a manner that is contrary to the law. Stated differently, SLED cannot comply with the Order and remove Mr. Reed from the registry without violating the law (enumerating only three avenues of removal) and undermining the public policy goals of the registry (maintaining an informative database of sex offenders to aid in public safety and welfare).

Additionally, as a third-party to the litigation giving rise to the void order, SLED did not have the ability to intervene in the criminal prosecution or to appeal the void order directly. *Cf. United States v. Sikes*, No. 4:15CR3128, 2016 WL 6495500, at *1 (D. Neb. Nov. 2, 2016) (recognizing the Federal Rules of Criminal Procedure "provide no path to intervention in a criminal matter by a third-party."); *State v. Miller*, 289 S.C. 316, 317, 345 S.E.2d 489, 490 (1986) (looking to the Federal Rules of Criminal Procedure to interpret South Carolina's Rules of Criminal Procedure); *State v. Wills*, 409 S.C. 183, 202, 762 S.E.2d 3, 13 (2014) (Beatty, J., dissenting) ("Given the absence of definitive case law in our state and federal jurisdiction, I have looked to other federal jurisdictions for guidance."). Whether SLED requested a transcript of the proceeding is immaterial to whether it had standing to intervene and pursue an appeal. It clearly

did not. While the Solicitor's Office might have been heard at the hearing, SLED—as the entity responsible for overseeing and maintaining the registry, S.C. Code Ann. § 23-3-410(A)—was not. In fact, SLED was not made aware of this case until after the Judge ruled at the hearing and a proposed order was being prepared. Notwithstanding SLED's inability to intervene or appeal, it has consistently attempted to challenge this incorrect and void order—even petitioning the South Carolina Supreme Court for a writ of *certiorari*.

ii. Collateral Estoppel is Inapplicable

Mr. Reed's collateral estoppel argument similarly fails. The law on collateral estoppel in South Carolina was succinctly stated in *Carolina Renewal, Inc. v. S.C. Dep't of Transp*:

> Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *Beall v. Doe*, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct. App. 1984). "While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues." *Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct. App. 2008). The doctrine of collateral estoppel should not be rigidly or mechanically applied. *Carrigg v. Cannon*, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001). Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it. *State v. Bacote*, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998).

Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554–55, 684 S.E.2d 779, 782 (Ct. App. 2009). Mr. Reed cannot show that the issue of whether Mr. Reed is required to register was necessary to support the prior judgment regarding his juvenile adjudication. Indeed, it was not necessary or even possible for the Court to find that Mr. Reed does not have to register in order for him to be adjudicated delinquent.

Mr. Reed also cannot show that SLED had a full and fair opportunity to previously litigate the issues. As mentioned above, SLED had no opportunity to be heard on this issue and SLED never would have consented to an order that required it to do something in violation of the sex offender registry act. Had SLED been given an opportunity to be heard the court would have heard the correct legal arguments for why Mr. Reed does, in fact, have to register. As discussed above, SLED was not a party to the criminal action and had no ability as a non-party to appeal. Furthermore, SLED did quickly attempt to challenge the finding by petitioning the Supreme Court, and thereafter filing the civil declaratory judgment action.

Additionally, the doctrine of collateral estoppel should not be rigidly applied when, as would be the case here, unfairness or injustice results and the public policy does not support it. Even if a finding regarding the sex offender registry was necessary to support his juvenile conviction, and even if SLED, as a separate government agency, had a full and fair opportunity to litigate this issue in the criminal case, it would be unfair to allow Mr. Reed to benefit from this error of law when all other convicted sex offenders are required to register. Indeed, it would defeat the policy of the SOR, which is to provide notice to society at large of the presence of a sex offender.

Lastly, and perhaps most importantly, applying collateral estoppel to this order is very much against public policy. *See* S.C. Code Ann. § 23-3-400; *In re Ronnie A.*, 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) ("The intent of the legislature in enacting the sex offender registry law is to protect the public from those offenders who may re-offend."); *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) ("From this language, 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."); *Hendrix v.*

Taylor, 353 S.C. 542, 551, 579 S.E.2d 320, 324 (2003) ("In our opinion, the state's action is reasonable because the purpose of the law is to protect the public welfare and to assist law enforcement in accomplishing that goal."). Clearly public policy would not support applying the doctrine of collateral estoppel to this case, which would result in allowing Mr. Reed not to register in clear violation of both the provisions of the sex offender registry act and the public policy behind its enactment.

Appellant's attempt to blur the lines between the Solicitor's Office, the State of South Carolina, and SLED, which are entirely distinct and separate governmental entities, to benefit from a legal error, as Appellant does here, all in an attempt to uphold a clearly improper order from a court with no jurisdiction is patently improper and clearly impermissible.

IV. Conclusion

Because of his conviction for criminal sexual conduct with a minor in the first degree, Mr. Reed is required by South Carolina law to registry as a sex offender. The order giving rise to this collateral litigation, issued to Appellant by the Family Court nearly two decades after his juvenile conviction, wrongfully and illegally inhibits his compliance with this statutory requirement. Simply stated, that order was issued by a court that did not have either subject matter or personal jurisdiction. These jurisdictional defects are evident on the face of the record. Thus, the Reed order is void and unenforceable in its entirety. Further, this collateral attack is proper given the procedural posture of Appellant's Family Court case, SLED's lack of representation in the hearing, and the relief sought by SLED. Lastly, SLED is not barred by collateral estoppel or *res judicata*. It is completely illogical that a void order could provide a basis for a collateral estoppel or *res judicata* argument. Even if it could, those doctrines would not apply in this case. Accordingly, the court should uphold the lower court's order declaring the

Reed order void *ab initio* for lack of subject matter jurisdiction.

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CERTIFICATE OF SERVICE

I certify that I served the Appellant, Mr. Reed, with a copy of the Respondent's Initial Brief and Designation of Matter by depositing a copy of in the United States Mail, postage prepaid. The document was sent to the following address:

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