

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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S.C. SUPREME COURT

The Honorable Grace Gilchrist Knie, Circuit Court Judge

Civil Action No. 2017-CP-32-00712

Eric Ragsdale,Appellant,

v.

Mark Keel, Chief, State Law Enforcement
Division, and the State of South Carolina Respondent.

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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ARGUMENT

Having received and reviewed the Supplemental Brief of Respondents, and arguments raised therein, Appellant, Eric Ragsdale (“Ragsdale”), hereby submits this Supplemental Reply Brief of Appellant pursuant to Rule 208(a)(3) of the South Carolina Rules of Appellate Procedure, responding to those issues raised by Respondents and not previously addressed by Appellant.¹ Ragsdale submits this Brief as an addition to the Supplemental Brief of Appellant, and hereby specifically adopts and reargues those arguments presented therein. For these reasons presented herein, as well as those previously presented, the circuit court erred in granting summary judgment to Defendants and concluding the lifetime registration requirement for unenumerated offenders is Constitutional.

Much like with Respondents’ Initial Brief, the Supplemental Brief of Respondent recites how this Court has addressed earlier challenges to the Sex Offender Registration Act (“SORA”), before arguing that other States that have invalidated sex offender registration statutes as in violation of due process all rely upon dissimilar State Constitutional protections. The protections in those other States are not so dissimilar to our own, however, and provide further justification for invalidation of SORA.

As an initial matter, all South Carolinians have a Constitutionally protected right to privacy, as enumerated in Article 1, Section 10 of the South Carolina constitution. This section provides, in part that “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated,

¹ Ragsdale rests on the arguments presented in his Initial Brief of Appellant as sufficient where no Reply is included herein.

...” While this Court has not had many opportunities to interpret the “privacy right,” several cases do provide direction as to the force and effect of this right.

In Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993), this Court had occasion to interpret the “privacy right” in the context of forced medication to treat incompetence in preparation for execution. Ultimately, this Court concluded that our State’s due process was violated in such a situation, and that “Federal due process and our own South Carolina Constitution require that an inmate can only receive forced medication where the inmate is dangerous to himself or to others, and then only when it is in the inmate's best medical interest.” Singleton, 313 S.C. at 87–89, 437 S.E.2d at 60–61. In making this determination, our Court relied upon how Louisiana interpreted their State’s Constitutionally included “privacy right” which is remarkably similar to the “privacy right” contained within South Carolina’s Constitution.

In Louisiana v. Perry, 610 So.2d 746 (La.1992), which, like Singleton, concluded that forced medication for execution violates the State Constitution, the Louisiana Supreme Court discussed their State’s Constitutional “privacy right.” In so doing, they addressed how their “privacy right,” which again is remarkably similar to our own, had been construed by an earlier case as affording protection against the unreasonable compilation or disclosure of information about individuals. State v. Perry, 610 So. 2d 746, 756 (La. 1992)(citing Trahan v. Larivee, 365 So.2d 294 (La.App. 1978)). Alaska similarly recognized that privacy rights are implicated when the State disseminates on a state-sponsored website records which otherwise might be maintained in paper copy in file drawers. See Doe v. Department of Public Safety, 444 P.3d 116, 129 (Alaska 2019). Doe goes on to note that “[a] number of courts have held that a sex offender's privacy rights are implicated by internet publication of registration information, either because some of the

information is private or because the aggregation and accessibility of the information raises legitimate privacy concerns, and have therefore applied strict or at least heightened scrutiny. Id., at 129, n.101. Thus, the consistent theme in these cases, both with “privacy rights” similar and dissimilar to our own, is that privacy is implicated when the State collects and disseminates otherwise public records, and that heightened scrutiny applies. While Louisiana has not invalidated their Sex Offender Registry, which we ask of this Court, the Louisiana statute provides a tiered system similar to the Federal Act which provides for removal from the Registry. See LA RS 15:544. Thus, because of the ability in Louisiana to be removed from the Registry, Louisiana’s act is insulated from the instant type of challenge.

While Louisiana and South Carolina have very similar “privacy rights,” it is true that South Carolina’s Constitution does not have the same language used by other States which have invalidated their Registry. Such a distinction does not render their decisions moot to our inquiry, however, as the linchpin for invalidation of those other States’ registration statutes was the privacy rights of the individual, something that is clearly within the protections of our Constitution. Other States that have “privacy rights” imbedded in their Constitution similar to South Carolina’s include Louisiana (see above, La. Const. art. I, § 5), Arizona (Ariz. Const. art. II, § 8), Hawaii (Hawaii Const. art. I, § 6), Illinois (Ill. Const. art. I, § 6), and Washington (Wash. Const. art. I, § 7)². See State v. Forrester, 343 S.C. 637, 644 n.3,4, 541 S.E.2d 837, 841 n.3,4 (2001). For each of these States, their Sex Offender Registries all afford certain registrants the opportunity for removal from

² Other States’ Constitutions identified by Forrester as having “privacy rights” include Alaska (Alaska Const. art. I, § 22); California (Cal. Const. art. I, § 1); Florida (Fla. Const. art. I, § 23); and Montana (Mont. Const. art. II, § 10). See State v. Forrester, 343 S.C. 637, 644 n.3,4, 541 S.E.2d 837, 841 n.3,4 (2001).

the Registry. See Arizona (ARS 13-3821); Hawaii (HRS § 846E-10); Illinois (730 ILCS 150/7); Louisiana (LA RS 15:544); and Washington (RCW 9A.44.140).

Interestingly, Respondent cites to New Jersey's determination that their sex offender registry was unconstitutional on due process grounds as distinguishable because the Court relied upon a "rights of privacy and reputation" in the State Constitution. See Supplemental Brief at 15 citing Doe v. Portiz, 662 A.2d 367, 419 (N.J. 1995). The Constitutional provision cited in support, however, fails to provide the specific protection to privacy noted in the South Carolina Constitution. See N.J. Const. Art I, § 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."). Similarly, Doe v. Attorney General, 686 N.E.2d 1007, 1013 (Mass. 1997), also cited by the Respondent, relies upon Article 12 of the Massachusetts Constitution to provide a privacy interest that invalidates their Registry. Article 12, however, fails to provide a specific privacy right; certainly nothing as specific as that which is guaranteed in South Carolina.³ See Doe v. Attorney General, 686 N.E.2d at 1012. Thus, these two cases cited by Respondent as

³ Reliance is placed upon Article XII which provides:

ART. XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

distinguishable rely upon Constitutional provisions that fail to provide as much protection as South Carolina's "privacy rights," in determining their respective statutes as violating due process.

New Mexico and Texas, cited by Respondent as States upholding their Sex Offender Registrations under similar challenges, fail to have "privacy rights" incorporated in their State Constitutions, and are therefore clearly distinguishable from the present situation. See Supplemental Brief of Respondent, p. 20-22 (citing State v. Druktenis, 86 P.3d. 1050, 1077 (N.M. 2004); Ex Parte Chamberlain, 352 S.W.3d 121, 122 (Tex.App. 2011); Ex Parte Chamberlain, 335 S.W.3d 198, 200 (Tex.Crim.App. 2011)(vacating Ex Parte Chamberlain, 306 S.W.3d 328, 334 (Tex.App. 2009)). While Illinois, also cited by Respondent, does have a similar "privacy right," their Sex Offender Registration provides for termination of the registration requirement after 10 years in many circumstances, which is in stark contrast to the mandatory, lifetime, "one size fits all" registration requirement in South Carolina. As noted in the Supplemental Brief of Appellant, it is the inability to demonstrate that one no longer presents a risk that violates substantive due process.

Finally, contrary to the suggestion of Respondent, strict scrutiny applies. Appellant does not seek to create a new fundamental right. The fundamental right which is outlined in our Constitution is the "privacy right" of our citizens. Too narrowly defining this fundamental right as a "right of a convicted sex offender to privacy" or the "right of a convicted sex offender to protection of public records associated with a conviction" would be error. Those other circumstances of conviction, and the records sought to be disseminated, goes to the rationale and justification behind the governmental action, not the fundamental right itself. Where, as here, the circumstances might change, the governmental action needs to change with it. Where the

“privacy right” is implicated, but the governmental action provides no opportunity to demonstrate, the rationale no longer applies, due process is violated. This is the precise situation we have.

In discussing the “privacy right,” this Court has already acknowledged concerns espoused with how modern electronic devices would impact this protection.

As noted by the Court of Appeals, the drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches. *See* Committee to Make a Study of the Constitution of South Carolina, 1895, Minutes of Committee Meeting 6 (Sept. 15, 1967). According to their minutes, “The committee agreed that [the search and seizure provision] should remain, but that is [sic] should be revised to take care of the invasion of privacy through modern electronic devices.” *Id.* However, the committee also recognized that the provision would have an impact beyond just the area of electronic surveillance. As Committee Member Sinkler stated, “I think this is an area that, really, should develop and should not be confined to the intent of those who sit around this table.” *Id.* at 6 (Oct. 6, 1967).

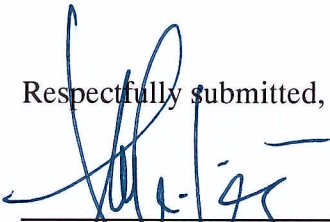
State v. Forrester, 343 S.C. 637, 647, 541 S.E.2d 837, 842 (2001)

We are now realizing how modern electronic devices impact “privacy rights.” As Louisiana noted, their almost identical “privacy right” protects against the collection and dissemination of public records. *See State v. Perry*, 610 So. 2d at 756 (La. 1992)(citing Trahan v. Larivee, 365 So.2d 294 (La.App. 1978)). Alaska in Doe, found the same thing. *See Doe*, 444 P.3d at 129 South Carolina’s Sex Offender Registration Act implicates these privacy rights without the ability to ever demonstrate that the enunciated purposes of the Act may no longer be applicable to a particular individual. Because of this, due process is violated.

CONCLUSION

For the reasons stated herein, as well as those previously outlined in the initial briefing and the Supplemental Brief, SORA violates both the United States and South Carolina Constitutions.

Appellant is entitled to a determination that SORA, and the lifetime registration requirement for those convicted of unenumerated offenses, without the possibility of removal or judicial review, is unconstitutional.

Respectfully submitted,


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