STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2019-001296

THE STATE,

Respondent,

vs.

CARL RAY FRALEY, JR.,

Appellant.

FINAL BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The lower court's orders requiring the Appellant to register as a sex offender were controlled by an error of law and a factual conclusion that was without evidentiary support and the sex registration order must be reversed.

STATEMENT OF THE CASE

Carl Ray Fraley, Jr., has appealed the orders made in this case pursuant to Rule 203 of the South Carolina Rules of Appellate Practice. This case involves a negotiated plea pursuant to *North Carolina v. Alford,* 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970). The plea entered in this case by the Appellant was an *Alford* plea.

The Appellant in this matter has denied on the record that he committed the original charge asserted by the State in this matter, which was criminal sexual conduct in the first degree (See, South Carolina Code §16-3-655(A) (1976), as amended). He has also denied on the record the allegations of the State of South Carolina pertaining to the crime referred to in the negotiated plea of "assault and battery in the first degree". (See, §16-3-600 (C)(1)(a)(i) South Carolina Code, 1976, as amended). The negotiated plea by the Appellant in this case was made pursuant to South Carolina law and in accordance with the rights of the Appellant under the South Carolina Constitution and the United States Constitution which govern an *Alford* plea.

In response to questions by the sentencing judge on February 9, 2015, the Appellant specifically denied the allegations that the State made related to the reduced charges concerning the Appellant and his granddaughter, which occurred between the dates of August 9, 2010 and May 12, 2012. (R. p.41)

At the hearing on February 9, 2015, which involved the *Alford* plea, the Lower Court issued a ten-year sentence on Indictment #2015-0614 which was suspended upon the placement of Appellant on probation supervision for five years. The conditions of that supervision included home detention, and GPS monitoring from February 9, 2015 through January 1, 2016. A "No Contact Order" was issued and the Appellant was required to participate in a psychological sexual

evaluation in order to determine the appropriateness of sex offender registry action. The Appellant complied in all respects with the Orders of the Court.

Following an evaluation of the Appellant, on September 3, 2015, Leilani Lee, M.D., F.A.P.A., Assistant Professor of Psychiatry, issued a "Sexual Behaviors Consultation Evaluation Report", which, significantly, did not contain a determination that the evidence indicated a risk by the Appellant to "reoffend sexually".

On August 16, 2017, the lower court issued an order requiring sex offender registration, which the Appellant asserts was erroneously issued based upon the evaluation done by Dr. Paul Gunter, a respected and certified clinical sexologist in Spartanburg, South Carolina, and on the lack of relevant findings by the evaluator selected by the Attorney General's Office, Assistant Professor of Psychiatry, Leilani Lee, who evaluated the Appellant on May 21, 2015 and May 27, 2015.

The Appellant filed a Motion to Reconsider the Sex Registration Order and on October 24, 2018, a hearing was held in the Court of General Sessions on the Motion to Reconsider. At the hearing the Attorney General filed three exhibits, the Lower Court's Order requiring sex offender registration dated August 16, 2017, the Motion of Appellant's counsel to reconsider the sex registration order and the Assessment of Dr. Paul Gunter, L.M.F.T., L.P.C., Certified Criminal Sexologist dated November 14, 2013, which the Appellant had relied upon in filing the Motion to Reconsider.

At the October 24, 2018 hearing on the Motion to Reconsider, Dr. Gunter gave sworn testimony and testified fully concerning his opinion that it was not appropriate for the Appellant to be required to register as a sex offender. Dr. Gunter also testified that Dr. Lee's assessment

actually strengthened his conclusion and recommendation that the Appellant should not be required to register as a sex offender.

On July 24, 2019, the lower court issued an Order Denying the Motion to Reconsider. The Appellant filed his Notice of Intent to Appeal that Order on August 1, 2019, with the Clerk of Court for Spartanburg County.

ARGUMENT

The lower court's orders requiring the Appellant to register as a sex offender were controlled by an error of law and a factual conclusion that was without evidentiary support and the sex registration order must be reversed.

The lower court's orders requiring the Appellant to register as a sex offender were controlled by an error of law and a factual conclusion that was without evidentiary support and the sex registration order must be reversed.

Section 23-3-430, South Carolina Code 1976, as amended, provides in pertinent part that every person convicted of certain designated criminal offenses, which are listed in Paragraph (C) shall be registered pursuant to the applicable provisions of Title 23, Chapter 3, Article 7, and their name will be included on the sex offender registry.

In this matter, the State initially charged the Appellant with criminal sexual conduct in the first degree pursuant to §16-3-655(A), South Carolina Code, 1976, as amended.

A conviction for criminal sexual conduct in the first degree would have required registration of the Appellant as a sexual offender. However, as a result of plea negotiations, the State of South Carolina agreed to allow the Appellant to enter a conditional plea to a lesser offense pursuant to *North Carolina v. Alford*, 400 U.S. 25, 1S.Ct. 160, 27 L.Ed.2d 162 (1970).

The negotiated *Alford* plea in this matter allowed the Appellant to enter a conditional plea under §16-3-600(C) (1)(a)(i) under a revised indictment for assault and battery in the first degree.

The revised indictment agreed to by the State of South Carolina relates to Paragraph (D) of §23-3-430 of the South Carolina Code which 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."

In this case, the lower court ordered that the Appellant would participate in a psychological sexual evaluation in order to determine the appropriateness of sex offender registry.

The "good cause" requirement found in §23-3-430(d) South Carolina Code, 1976, has been construed by the Supreme Court to mean that "the judge must consider the facts and circumstances of the case to make a determination of whether or not the evidence indicates a risk to reoffend sexually. See, *In the Interest of M.B.H.,* 387 S.C. 323, 692 S.E.2d 541, 2010 (emphasis supplied).

In this matter, the lower court committed an error of law by issuing an order that required Appellant to be in the sex offender registry based only upon a questionable determination that evidence existed to the effect that an assault and battery in the first degree had been committed by the Appellant.

In making such an order the lower court did not properly apply South Carolina law. The law is to the effect that the evidence must indicate that there is a "risk to reoffend sexually". This contemplates both that a sexual offense has been committed in this first place, which was denied by the Defendant and is questionable based on this record, and that there is evidence in the record which indicates a risk to reoffend sexually. The proper legal standard was not applied by the judge and registration as a sex offender is not appropriate in this case as a matter of law because there was no evidence to support a finding of a risk to reoffend sexually concerning the Appellant in the record before the court.

At the outset, it is important to point out that the record in this case is entirely distinguishable from the record in the case of *In the Interest of M.B.H.,* 387 S.C. 323, 692 S.E.2d

541, 2010 (cited above). The *In the Interest of M.B.H.* decision involved a juvenile, who was fourteen years old at the time of the incident, and involved admitted sexual offenses involving both a ten year old boy and a twelve year old boy. The juvenile defendant admitted delinquency to the two charges of assault and battery of high and aggravated nature.

At the hearing in that case, in which the Appellant had admitted to the two charges of ABHAN, the solicitor recommended to the judge that the Appellant undergo an inpatient evaluation and be placed on the private sex offender registry.

At the dispositional hearing, the solicitor introduced the center's evaluation report to support the request for Appellant to be placed on the private sex offender registry. The judge relied on the professional findings and recommendations in that report, which concluded that good cause existed for placing the Appellant on the sexual offender registry.

The Court in the *In the Interest of M.B.H.* decision, concluded that the record was clear that the judge considered all the facts and circumstances of the case, both aggravating and mitigating, in determining that "there is a risk of sexual re-offense". The Court in that case found that such a determination by the sentencing judge was supported by the evidence in the record, which included professional findings and recommendations in the evaluation report.

Such professional findings and evaluations are not contained in this record and the record does not indicate a risk on the part of the Appellant to "reoffend sexually".

In this case, the report of Dr. Lee does not contain a finding to the effect that the Appellant should be placed on the register of sex offenders because she did not give an opinion that there is a risk that the Appellant will reoffend sexually. In point of fact, in this case, the report of Dr. Lee, in effect, shifted the burden of addressing whether the Appellant should be registered as a sex

offender to the court by proposing an erroneous question to be determined by the court, i.e., whether the court believed Mr. Fraley was guilty of a sexual offense without a trial. An examination of Dr. Lee's report demonstrates that Dr. Lee had no opinion as to whether the Appellant presented a risk to reoffend sexually such that he should be registered as a sex offender under the statute. Dr. Lee also erroneously advised the judge that an opinion by the judge as to whether the sex offense allegations against the Appellant were true would be the determining factor in whether the Appellant should be placed on the sex offender registry. This is clearly seen on page 1 of Dr. Lee's report:

> "should the court opine that the sexual offense allegations against Mr. Fraley, as asserted are true, he would also meet criteria for a Pedophilic Disorder... However, should the court find that the allegations against Mr. Fraley are not true, he would not meet criteria for a Pedophilic Disorder. Thus, based on the lack of the diagnosis of Pedophilic Disorder and his ability to refrain from sexually offending children, it would not be recommended that Mr. Fraley register as a sex offender in the state of South Carolina." (R. p.61)

The opinions of Dr. Lee are equivocal and do not support placing the Appellant on the sexual offender registry.

It is important in this case that the Appellant denied on the record that the allegations made by the State of South Carolina against him were true. This denial is contained in the transcript of record at the hearing on February 9, 2015. (R. p.41, Lines 17-20)..

In the transcript of the record of the sentencing hearing, the lower court had the following exchange with the Appellant concerning the allegations made against him by the State of South Carolina, as stated by the attorney from the Attorney General's Office:

The Court: All right. Well, let me put it this way. The attorney general says that you committed sexual abuse, sexual acts, against your granddaughter. Do you recall her recitation of facts?

The Defendant: Yes, Sir.

The Court: She claims you committed criminal sexual acts against your granddaughter. Do you understand that?

The Defendant: I do.

The Court: Do you agree or disagree with her allegations, her representation as to what the facts are?

The Defendant: I disagree that I did it, but I'm willing to accept the sentence of the Court.

The Court: Well, I understand but that – we're getting there. But right now my question is did you agree with her version of those facts.

The Defendant: No, sir.

(R. p.41. Lines 5-20)

However, the Appellant in accordance with South Carolina law and his constitutional rights pursuant to *North Carolina v. Alford, supra,* agreed to the reduced charge and the negotiated sentence and made the decision to enter the *Alford* plea.

In this case, as testified to by Dr. Gunter, the State's evidence as to whether there was any sexual offense by the Appellant concerning his granddaughter was questionable and speculative and there was no evidence that there was any risk to reoffend sexually by the Appellant. Dr. Paul Gunter testified as follows with regard to the questionable nature of the charges against the Appellant and his opinion that the Appellant should not be placed on the sex offender's registry because he did not present a risk to reoffend sexually. The following testimony by Dr. Gunter is

clear and is not contradicted. It indicates that Dr. Lee's assessment is actually supportive of Dr. Gunter's conclusion that Appellant should not be placed on the sexual offender registry:

> **A:** And so I was grateful to receive Dr. Lee's assessment to fill in some gaps for me, which it did. And after spending quite a bit of time with her report and getting some consultation as well from the people at Abel Assessment, I didn't change my decision as far as my recommendation about being on the registry. It strengthened it. Enough said about that.
>
> **Q:** I'll let you take it from there. Strengthen it in what way?
>
> **A:** Well, there are two principles or two problems that exist in this – in this case. There are serious problems in the credibility of allegations that were made, and it's up to someone else to decide whether or not they're going to choose to believe that. But there are as many, almost as many, accusations against Mr. Fraley as there are denials that anything happened.
>
> His girlfriend at the time, Memmie, is accused of sexually molesting him three times. And she hasn't been tried or charged, I don't believe.
>
> **Q:** Let me stop you one second so the Court knows where we are.
>
> As far as – and Judge Cole may very well – but you're referring to the M.U.S.C. report where she talked about the inconsistencies –
>
> **A:** Yes.
>
> **Q:** -- on the tapes of the girl.
>
> **A:** Yes. If you want took at the page, it's page 16.
>
> **Q:** Yes, sir. All right.
>
> **A:** I just gleaned them out –
>
> **Q:** No. That's fine – that's fine. I just want to make sure it's clear here. Go ahead.
>
> **A:** Well, she goes on to say that her grandfather was a mass murderer and that she was one of his victims and then accused her parents of attempting to murder her grandfather because they saw him doing something bad to her.
>
> The problems with all of that erratic inconsistency is what are we – what do we stand on and how do we make the decision, because there's really no definitive data

to support a sexual offense anywhere except that forensic interview with those five snippets from forensic interviews where in four of them she said something happened, but some of those she also said nothing happened. So it's too inconsistent. So much so, I've never seen this happen in 16 years of doing this. DSS did not accept the report given by the alleged victim.

My experience has been DSS just needs about that much for them to move forward on a case. I've seen them move forward on much less, or in this situation.

It's significant to me that she identifies five eye witnesses of her being sexually abused by Mr. Fraley. All of them have been questioned. Four of them have clearly said I've never seen anything. So to me that's significant because they're all older and more mature, and if they saw something you'd sure think they would report it.

So the principle of it, there are serious problems with the credibility of the allegations, is one.

The second one is there's credible clinical evidence to support that he's a low risk or no risk and not a threat to society and therefore not appropriate for the sex offender registry. Two independent clinical assessments came up with the same conclusion about him not being a threat.

He self reports that he does not have current sexual fantasies involving children. That was confirmed by both reports.

He does not use cognitive distortions that are used commonly by sexual abuse – those who sexually abuse children. His probability score is low showing that he's not similar at all to a denier simulator who molests children and attempts to conceal it.

There's no evidence of psychopathy, which is a mental condition where you lack a moral compass and the ability to learn from mistakes and the ability to have loving relationships.

He's lived successfully in the community without incurring another offense or a single offense, and the risk of recidivism declines the longer a sex offender lives in the community.

His primary sexual interests are in adult adolescent females, which is appropriate for a heterosexual male. And he's not been diagnosed with any condition that would impair his ability to refrain from acting on sexual impulse with children.

So when I see all of that together I think to make the jump from that to you need to be on the registry, just from my point of view as a professional, seems overreaching. It seems incongruent. So that's what I would say.

Q: All right. Your opinion based on your evaluation and the evaluation from the report out of Charleston, there's nothing in any of these reports saying in my opinion he's a pedophile and needs to register, is there?

A: Dr. Lee doesn't make a decision. I would say her – hers is inconclusive and it hinges on whether or not you believe the reported allegations of the little girl.

And I was compelled by many of the things that she concluded in her report, as well as the Abel Assessment, to stick my neck out a little further and say it doesn't fit.

I've worked with – done sex offender treatment for Spartanburg County for 16 years now. I've worked with several hundred sex offenders and feel like I know them fairly well. That don't mean I don't get fooled every now and again, but it just seems like a square peg in a round hole in this situation.

Dr. Paul Gunter, direct examination (R. p. 115, Line 9-; R. p.119, Line 12) of record October 24, 2018, Page 17, at Line 9 through Page 21, Line 12

The record also demonstrates improper reliance by the lower court on confusing and questionable testing procedures relating to sexual arousal and lie detector examinations (See, *Billips v. Commonwealth,* 274 Va. 805, 652 S.E.2d 99 (2007) ; and *State v. Pressley,* 290 S.C. 251, 349 S.E.2d 403 (1986) which are discussed in the Appellant's Motion for Reconsideration).

Additionally, this matter involves a very difficult family situation with a great deal of division between the family members.

A number of the reasons that the State of South Carolina and the Appellant made a determination to enter into the negotiated plea agreement are enunciated in the record of the *Alford* plea and demonstrate the questionable nature of the State's evidence which led to the negotiated

plea agreement. The record contains the following exchange between the Lower Court and Appellant's counsel:

> **The Court:** All right. I'll accept your guilty plea and hear from you and Mr. Vieth and anybody else on your behalf.
>
> **Mr. Vieth:** May it please the Court, Your Honor.
>
> This is one of the most difficult cases. This Court has been on the bench a long time and I've been practicing law a long time, and it's a very difficult case when you have families that have this much division between them, and it's unfortunate.
>
> This case has been going on for three years, and the anxiety of it ends today. We're done. The pain of it is going to last for probably ever between the Fraley family and children. The pain's not going to go away. The question is always going to be whether or not it actually happened or not.
>
> Until yesterday I had every intention that we'd be giving opening statements today in a trial, and we were prepared to go forward with a – what we felt was a good defense, just as the prosecutor feels like they had a good position of guilt.
>
> When you talk about seeking justice, sometimes justice is a compromise. Sometimes you have to look at it in strength and weaknesses of both sides and take a look at what the best opportunity or options are for both sides and see if you can reach some solution.
>
> One solution if we went to trial and was found not guilty, The child might be damaged irreparably for thinking some didn't believe her.
>
> If they go to trial and Rusty doesn't win it, it's basically a life sentence – 67 years old with a mandatory 25 years.
>
> So there was some definite give-and-take in this situation. I personally would go to trial, but I cannot tell anyone what to do. We can just make offers, counteroffers and see how it best plays out. I'm not saying that I wish we had gone to trial, but I was not afraid to go to trial on the facts we had. And Mr. – and Ken Anthony who is his business attorney and associated with me on this case, we were well prepared.
>
> This is sad. I have – wasn't planning on going through an opening or closing argument, of course, as we had a negotiated plea, but I can't just let everything that was said just go unanswered.

I want to hand up to the Court just for Your Honor to view – these are family photos back in – just to show you the family of the happy days with the child involved and, all of the family in 2011, including the children of Brian and Casey Fraley.

And these times were good times. The bad times all started so early in the game, Judge, if we'd have gone to trial we were going to show that when Erin gave birth to the child some of the Fraley family was about a day late from getting to the hospital to see her, and due to her being angry that they didn't come – they didn't get to see the child for two years. During those two years between 2008 and 2009 there was a psychological – a psychiatric consult done that I'm going to hand up. And this came from the discovery from the prosecutor, so they've got it. But I wasn't planning on bringing all of this up, but I can't just let it go with news media and let everything just slip out like it's our fault.

She went, because she had seizures, to Spartanburg Regional Hospital in September of 2009, and they diagnosed her. They tried to do everything to see if she had epileptic seizures and what not. And part of the doctor – Dr. Potes who was going to testify Wednesday afternoon was going to be able to testify that he saw her, recommended that she stay in the hospital to get an E.E.G. video done to see what caused, if at all, the seizures.

They also recommended as part of that evaluation a psychiatric consult, which was done by Dr. Caritiney (sic) who now lives in Waynesville, North Carolina, and was planning to come here and testify Thursday morning as to her evaluation, her diagnosis from the psychiatric consult.

I hand that up to you. And what would be relevant to us is – and it starts here where I've highlighted some areas – "The patient states that she's been depressed since the birth her child 13 months ago."

At the last paragraph, "the patient states that since childhood she has been visited by her deceased grandparents who provide her comfort, and she also sees other people that have come to her and has helped her in, quotes, going to the light. The patient states that in her dreams the grand parents have sent messages to her and relayed to other family members."

And then, more importantly, "the patient is also some paranoid, believes that her in-laws are going to somehow take her child. The patient has obsessive worry something bad is going to happen to her child and wakes up at least five times during the night to check on her child to make sure there's nothing wrong with her. Patient denies any new stressors. The patient states the conflict with her in-laws has caused a conflict with her husband, but other than they get along well."

> And the ultimate diagnosis was major depressive disorder recurrent with psychotic features, obsessive compulsive disorder, generalized anxiety disorder. And above that, positive paranoia and delusions.
>
> So we knew in 2009 that she was paranoid, that Rusty and/or his ex-wife were going to take that child away in 2009. In that timeframe he was having zero contact with the child because of that 2-year window after the child was born before they got to see the child again. We felt this would be compelling testimony on Thursday morning.
>
> Transcript of hearing dated February 9, 2015 (R. p. 42, Line 12; p.46, Line 17)

As is demonstrated in the record, the Appellant, through a negotiated *Alford* plea, was allowed the opportunity to plead to a lesser offense. He denied the allegations of the State relating to any sexual offense against his granddaughter and he complied fully with the directions of the Court concerning the psychological evaluation. The evaluation did not contain a determination or opinion by a professional that there was a "risk to reoffend sexually".

Based on the record in this case, it is clear that the decision of the lower court to place the Appellant on the register of sexual offenders was controlled by error of law and is not supported by the evidence.

CONCLUSION

Based on the record in this case and the foregoing arguments and the applicable law, the decision of the lower court to place the Appellant on the sex offender registry was controlled by error of law and is not supported by the evidence in the record.

Accordingly, the order of the lower court should be reversed and this Court should remand the case with the instruction that the Appellant should not be registered as a sex offender under South Carolina law.

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July 14, 2020

ATTORNEY CERTIFICATION

The undersigned attorneys for Appellant, Carl Ray Fraley, Jr., hereby certify that this Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules and the April 15, 2014, Order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and other sensitive information in Appellate Court Filings".

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