THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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SC Court of Appeals

Robin B. Stilwell, Circuit Court Judge

Appellate Case No.: 2020-001297
Trial Court Case No.: 2019-CP-23-05360

Vance Eichelberger..Respondent,

v.

Mark Keel, in his official Capacity as Chief of the
South Carolina Law Enforcement Division......................................Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in determining that Respondent was not required to register in accordance with the South Carolina Sex Offender Registry Act (SORA) given Appellant's violation of S.C. Code Ann. § 23-3-440?

II. Did the trial court err in determining that the correct version of SORA to apply to the Respondent's registration requirement was the version in SORA in effect at the time the Appellant notified Respondent of his duty to register as a sex offender?

III. Did the trial court err in indicating that the avenues for removal from SORA set forth in S.C. Code Ann. § 23-3-430 were inapplicable because Respondent was unlawfully placed on SORA?

STATEMENT OF THE CASE

The Respondent was arrested on April 22, 1988. *See* Arrest Warrant. (R. p.). The Respondent pled guilty to Lewd Act on a Minor on November 30, 1988. *See* Sentencing Sheet (R. p.). Respondent received a 3 year sentence suspended upon the service of 4 months or $400 plus 5 years of probation with 200 hours of community service. *See* Sentencing Sheet (R. p.). Respondent completed his sentence and was discharged from supervision prior to the enactment of the sex offender registry in 1994. Respondent has not been charged with any additional offenses since being released from supervision. On March 18, 2019, Respondent was personally served a letter from the Spartanburg County Sheriff's Office directing him to register as a sex offender based on his November 30, 1988 conviction for Lewd Act Upon a Minor or face being arrested. Respondent registered and avoided arrest.

Respondent filed an action in the Court of Common Pleas in Greenville on September 11, 2019, seeking removal from the sex offender registry. *See* Summons and

Complaint (R. p.). Appellant filed a Motion for Summary Judgment on February 10, 2020. *See* Motion for Summary Judgment (R. p.). Appellant filed a memorandum in support of summary judgment and Respondent filed a memorandum in opposition to summary judgment. *See* Memorandum in Support of Summary Judgment (R. p.). *Also See* Memorandum in Opposition to Summary Judgment. (R. p.). A hearing was conducted in front of Judge Robin Stilwell on June 2, 2020. At the hearing Appellant and Respondent agreed that the case was one that the Court could properly decide as a matter of law on a final basis. *See* transcript (R. p.). After hearing arguments, the Court ruled that Appellant remove Respondent from the sex offender registry. *See* Order of Removal from Sex Offender Registry (R. p.).

Appellant filed a motion to amend the trial court's order on July 27, 2020. *See* Notice of Motion and Motion To Alter or Amend the Grant of Relief to Plaintiff (R. p.). Respondent filed a response opposing Appellant's motion to amend the Order Granting Relief to Plaintiff on August 4, 2020. *See* Response to Motion Granting Relief to Plaintiff (R. p.). The Court denied Appellant's motion based on Appellant mischaracterizing the Court's decision and lack of proper service on the court on August 24, 2020, but allowed for the Appellant to provide proof of service of its motion to the Court. *See* Order (R. p.). The Appellant then sent proof of service to the Court via email and there was an email exchange between Appellant, Respondent, and the Court from August 28, 2020 to September 1, 2020. *See* Emails (R. p.). The Court issued an Amended Order on September 2, 2020 denying Appellant's motion. *See* Amended Order Denying Defendant's Motion to Alter, Amend, or Set Aside Order Granting Relief to Plaintiff (R. p.). Appellant then filed this appeal.

STANDARD OF REVIEW

This case was presented to the trial court with stipulated facts. Generally, stipulations of fact bind the parties that make them and the Court will not go beyond the stipulation to determine the facts upon which the case is to be decided. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co., 411 S.C. 506, 769 S.E.2d 453 (Ct. App. 2015). Additionally, an unappealed ruling is considered the law of the case and requires affirmance. Id. at 524, 463. As to three issues on appeal, in a case with undisputed facts, the appellate court is free to determine whether or not the trial court properly applied those facts to the law without any deference to the lower court's legal conclusions. J.K. Constr., Inc. v. Western Carolina Reg'l Sewer Auth., 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999).

ARGUMENT

The trial court correctly decided that Respondent should be removed from the sex offender registry after being unlawfully placed on the registry more than a quarter-century after the completion of his sentence and despite any lack of additional criminal record. As such, the trial court's decision should be affirmed.

I. The trial court correctly decided that the Appellant could not require the Respondent to register as a sex offender pursuant to Appellant's violation of the requirements of S.C. Code Ann. § 23-3-440.

The purpose in enacting the sex offender registry can be found in S.C. Code Ann. § 23-3-400. It is to "provide for the public health, welfare, and safety of its citizens … [and] … provide law enforcement with the tools needed in investigating criminal offenses." State v. Ross, 423 S.C. 504, 509, 815 S.E.2d 754, 756 (2018). S.C. Code Ann. § 23-3-400 also indicates that "[s]tatistics show that sex offenders often pose a high

risk of re-offending." In this case, Respondent completed his entire sentence and was discharged from probation before the enactment of the sex offender registry in 1994. *See* Transcript (R. p. transcript 11). Respondent has not been on probation or in the custody of the Department of Corrections since the enactment of the sex offender registry. *See* Memorandum in Opposition to Summary Judgment (R. p.).

In determining whether Respondent should be required to register as a sex offender for a crime that was committed before the enactment of the registry, the Court should look to the plain language of the statute that refers to how the registration process is to occur. S.C. Code Ann. § 23-3-440 (4) provides that "[t]he Department of Corrections, the Department of Probation, Parole and Pardon Services, and the Department of Juvenile Justice shall provide to SLED the initial registry information regarding the offender prior to his release from imprisonment or relief of supervision." This language has not changed from the original version of the statute that was enacted in 1994. *See* 1994 Act. No. 497 (R. p.). Respondent takes the position that this language evinces the Legislature's intent that while the registry was to be applied retroactively, it was only to be applied retroactively to those individuals currently under supervision subject to being released for concerns about re-offending.

Appellant has raised the issue that the trial court erred in refusing to consider properly the precedent in State v. Walls, 348 S.C. 26, 558 S.E.2d 524 (2002). However, Walls is distinguishable from the current case in that it was an appeal from a conviction for failing to register as a sex offender after being served a notice to register while Walls was incarcerated. Id. Walls also never argued the provisions of S.C. Code Ann. § 23-3-440, and instead based his entire argument on the basis that the sex offender registry

violated the ex post facto provisions of the United States Constitution. Id. As such, Appellant's reliance on this case as authority authorizing an individual to register more than 25 years after being released from custody and supervision in violation of S.C. Code Ann. §23-3-440 is misplaced. Respondent would also note that Appellant acknowledges that S.C. Code Ann. § 23-3-440 does set forth the notification to register as a sex offender procedures, though Appellant claims that the procedures set forth in S.C. Code Ann. § 23-3-440 are not exhaustive. *See* Appellant's Initial Brief (R. p. 4). However, Appellant fails to cite any authority for registration procedures other than those enumerated in S.C. 23-3-440 and instead bases its argument on the penalty provisions for failing to register as a sex offender contained in S.C. Code Ann. § 23-3-480.

II. The trial court correctly determined that the correct version of SORA to apply in this case was at the time that Appellant asserted its right to have Respondent register as a sex offender.

Courts now generally apply the provisions of S.C. Code Ann. § 23-3-430 at the time of the sentencing of the individual. Given that the registry was not yet in existence at the time of Respondent's sentencing, this is not possible in Respondent's case. In determining the correct version of the SORA to apply to Respondent, it is instructive to consider other cases in which individuals were convicted of crimes triggering registry before the enactment of SORA in 1994.

One of the most relevant cases in determining which version of SORA to apply retroactively is that of Hazel v. State, 377 S.C. 60, 659 S.E.2d 137 (2008). In Hazel, the defendant had been convicted of kidnapping in 1979, and he was contesting his requirement to register with the kidnapping as being the triggering offense after his release from prison in 2002. Id. The Court in Hazel considered numerous revisions of

the SORA with the kidnapping triggering provisions under S.C. Code Ann. § 23-3-430 having been different applications in 1994, 1996, 1998, and 1999. Id. at 63, 139-140. Ultimately, the Court held in Hazel that the 1999 provision of the SORA was applicable because "Section 23-3-430 had no effect on respondent until he was released from prison and required to register as a sex offender." Id. at 64, 140.

The current version of S.C. Code Ann. § 23-3-430 was in effect on March 18, 2019, when Respondent was given notice to register as a sex offender for his 1988 conviction. Since SORA had no effect on Respondent until March 18, 2019, the current version of SORA was properly applied. For the sake of argument, had the Court applied the version of SORA to Respondent that existed at the time of his release from custody, Respondent would have no obligation to register as SORA did not exist at that time. Appellant has argued that the correct version of SORA applicable to this Respondent's registration requirement was the original version as enacted in 1994. *See* Appellant's Initial Brief (R. p. 6). This argument is without merit.

A current reading of S.C. Code Ann. § 23-3-430 (C) does not list the offense of Lewd Act Upon a Minor as a qualifying offense for SORA registry. In 2012, the offense of Lewd Act Upon a Minor was repealed in the same bill that the provisions of S.C. Code Ann. § 23-3-430 (C) were rewritten. The Court correctly noted that the legislature could have introduced language into S.C. Code Ann. § 23-3-430 indicating that a person previously convicted of S.C. Code Ann. § 16-15-140 would still have to register, but it declined to do so in that bill and in the 2015 amendment to the statute. Therefore, the Court correctly found that Respondent did not meet the criteria for registry pursuant to S.C. Code Ann. § 23-3-430 under the version of SORA in effect on March 18, 2019.

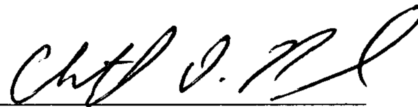
III. The trial court correctly determined that the avenues set forth for removal from SORA in S.C. Code Ann. § 23-3-430 were inapplicable because the Respondent was unlawfully placed on SORA.

The question in this case is not one of removal from the registry based upon the underlying conviction being somehow overturned, but instead whether or not Respondent should have ever been placed on SORA on March 18, 2019, more than a quarter-century after being released from supervision. This argument lacks foresight because then an individual could be illegally or improperly placed on the registry with no realistic means for removal. Respondent would reassert his previous arguments regarding Appellant requiring him unlawfully to register under SORA.

CONCLUSION

The trial court properly found that Respondent should be removed from the sex offender registry given the Appellant's violation of S.C. Code Ann. § 23-3-440 and that Respondent's crime is not an enumerated offense listed in S.C. Code Ann. § 23-3-430 at the time he was notified to register. In conclusion, Respondent asks that this court AFFIRM the trial court's decision in its entirety.

Respectfully Submitted,



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ATTORNEY FOR RESPONDENT

November 23, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
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Robin B. Stilwell, Circuit Court Judge

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Vance Eichelberger..Respondent,

v.

Mark Keel, in his official Capacity as Chief of the
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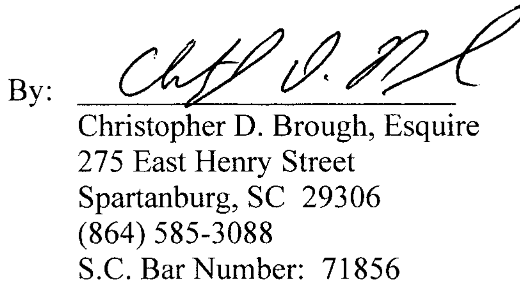
PROOF OF SERVICE

I hereby certify that I served the **Initial Brief of Respondent** and **Respondent's Designation of Matter to be Included in the Record of Appeal** on the Appellant by depositing a copy of the same in the United States mail, postage prepaid, and addressed to counsel of record as follows:

Paul T. Ahearn, III
Post Office Box 21398
Columbia, SC 29211-1398

On November 23, 2020, from Spartanburg, South Carolina.

By: 

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of The South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211-1629

Re: Vance Eichelberger v. Mark Keel, et al.
Appellate Case No.: 2020-001297

Dear Madam Clerk:

In accordance with SCACR Rules 208 and 209, enclosed for filing is the **Initial Brief of Respondent** and **Respondent's Designation of Matter to be Included in the Record on Appeal.** I have also enclosed the original **Proof of Service** for the same.

If you should have any questions or concerns, please feel free to contact me at (864) 585-3088 or via email at christopherbrough@broughlaw.com.

Sincerely,

Christopher D. Brough
The Brough Law Firm

Enclosures – listed in text

Cc: Paul T. Ahearn, III, Esquire

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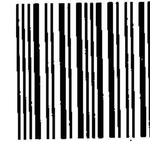

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