THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Dec 09 2020
S.C. SUPREME COURT

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable Frank R. Addy
Circuit Court Judge

Appellate Case No.: 2020-001486

Andrew Young, ... Petitioner,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in denying the Petitioner's request for removal from the South Carolina Sex Offender Registry Act (SORA) registry because the Petitioner does not meet any of the statutory criteria for removal set forth in SORA and the Court of Appeals was correct to affirm this decision.

STATEMENT OF THE CASE

The Petitioner pled guilty to the offense of Lewd Act on a Minor in violation of § 16-15-140 of the South Carolina Code of Laws in 1995. (Appendix p. 35).[1] The Petitioner concedes that this conviction required him to register as a sex offender pursuant to the South Carolina Sex Offender Registry Act, § 23-3-400 *et seq*. ("SORA") and that the Petitioner did in fact so register. Subsequently, because the Petitioner was sentenced pursuant to the Judge William R. Byars Youthful Offender Act (YOA), § 24-19-5 *et seq.*, he sought and received an expungement for this offense (Appendix pp. 35-6). Nevertheless, the Petitioner does not meet any of the statutory criteria for removal set forth in the plain language of SORA. *See* S.C. Code Ann. § 23-3-430(E), (F), (G). (Appendix p. 36). Put simply, expungement is not grounds for removal. *Id*. Accordingly, the Petitioner is required to continue registering pursuant to SORA.

The Honorable Frank R. Addy denied the Petitioner's request for a declaratory judgment in this matter in an order filed on December 19, 2017. The South Carolina Court of Appeals affirmed Judge Addy in a published decision filed on August 19, 2020 and denied the Petition for Rehearing on October 8, 2020. This petition follows.

[1] The offense of Lewd Act was repealed and recodified as Criminal Sexual Conduct with a Minor in the third degree (S.C. Code Ann. § 16-3-655(C)) in 2012. *See* 2012 Act 255.

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. An issue essentially one at law will not be transformed into one in equity simply because declaratory relief is sought." Felts v. Richland Cty., 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991).

"Whether an individual must be placed on the sex offender registry is a question of law." Lozada v. South Carolina Law Enforcement Div., 395 S.C. 509, 512, 719 S.E.2d 258, 259 (2011).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Id*.

When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. WDW Properties v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000).

ARGUMENT

I. The trial court did not err in denying the Petitioner's request for removal from the South Carolina Sex Offender Registry Act (SORA) registry because the Petitioner does not meet any of the statutory criteria for removal set forth in SORA and the Court of Appeals was correct to affirm this decision.

Based on the following, Respondent avers that the trial court correctly denied the Petitioner's request for removal from the SORA registry and that the South Carolina Court of Appeals was correct to affirm the same.

STATUTORY AVENUES FOR REMOVAL FROM SORA

The Petitioner concedes that he was convicted of Lewd Act on a Minor (formerly S.C. Code Ann. § 16-15-140) in 1995. Since the earliest inception of South Carolina's Sex Offender Registry Act (SORA) registry, this offense has been a mandatory SORA registry offense. *See* S.C. Code Ann. § 23-3-430(c)(11) (1996 Supp.); 1996 South Carolina Laws Act 444 (S.B. 1286). As such, South Carolina law mandates that Petitioner register in accordance with SORA.[2] Further, all SORA registration in South Carolina is **for life**. *See* S.C. Code Ann. § 23-3-460 (setting forth SORA's lifetime registration requirement in an unambiguously worded statute – to wit: "for life") (emphasis added). Accordingly, regardless of the Petitioner's expungement, he is required to continue registering in accordance with SORA for life unless he meets one of the statutorily enumerated grounds for removal. *See* S.C. Code Ann. § 23-3-430(E), (F), (G). However, Petitioner concedes he does not. (Appendix p. 36).

[2] South Carolina's SORA applies retroactively. *See* State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) (holding South Carolina's registry constitutional and specifically finding that "the Act does not violate the *ex post facto* clauses of the state or federal constitutions.").

The plain and unambiguous language of SORA sets forth avenues by which an individual's lifetime registration requirement can be removed. *See* S.C. Code Ann. § 23-3-430(E), (F), (G). As noted by the trial court, these are the **only** lawful avenues under which a lifetime registration requirement can be lifted. *See also* Johnson v. Lloyd, 399 S.C. 470, 476–77, 732 S.E.2d 198, 201 (Ct. App. 2012), *overruled on other grounds by* Johnson v. Lloyd, 407 S.C. 610, 757 S.E.2d 705 (2014) ("The General Assembly enacted an unambiguously worded statute that sets forth the legal remedies available to an individual on the [SORA] registry. Because the sex offender registry statute provides an adequate remedy…, it was error for the circuit court to fashion an equitable remedy in this case."). Pursuant to § 23-3-430(E), "SLED shall remove a person's name and any other information concerning that person from the sex offender registry immediately upon notification by the Attorney General that the person's adjudication, conviction, guilty plea, or plea of nolo contendere for an offense listed in subsection (C) was reversed, overturned, or vacated on appeal and a final judgment has been rendered." S.C. Code Ann. § 23-3-430(E). Pursuant to § 23-3-430(F), an offender who receives a pardon "based on a finding of not guilty specifically stated in the pardon" shall be removed. S.C. Code Ann. § 23-3-430(F). And finally, pursuant to § 23-3-430(G) individuals exonerated subsequent to filing a petition for a writ of habeas corpus or a motion for a new trial are removed. S.C. Code Ann. § 23-3-430(F). However, unfortunately for the Petitioner, **none of these avenues apply to him**. (Appendix p. 36). Simply put, an expungement is not an enumerated ground for removal of an individual's lifetime registration requirement recognized in SORA. As such, the South Carolina Court of Appeals was correct to affirm the trial court.

It is inarguable that if the South Carolina Legislature had intended for an expungement to relieve an individual's SORA registration requirement, the Legislature would have specifically stated such in statute. However, because the Legislature did not, the canon of statutory construction *expressio unius est exclusion alterius*, which holds that to express or include one thing implies the exclusion of another, is determinative. *See* Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000); Black's Law Dictionary 602 (7th ed. 1999). South Carolina courts have noted that this "maxim should be used to accomplish legislative intent [*i.e.* lifetime registration in South Carolina], not defeat it." S.C. Dep't of Consumer Affairs v. Rent-A-Ctr., Inc., 345 S.C. 251, 256, 547 S.E.2d 881, 884 (Ct. App. 2001).

Moreover, YOA expungements came into existence in 2003. *See* 2003 Act No. 1. Since that time, SORA has been amended seven (7) times, including one amendment to the statutory criteria for removal.[3] However, despite these numerous opportunities, not once has the Legislature ever included YOA expungements, or any expungement for that matter, in the list of statutory avenues for removal from lifetime SORA registration. *See* S.C Code Ann. § 23-3-430(E), (F), (G). As such, the legislative intent that a YOA expungement does not relieve an individual's SORA registration requirement is clear and unequivocal. *See* Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) (acknowledging that the cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent.)

[3] These amendments are: 2004 Act No. 208, § 14; 2005 Act No. 141, § 2; 2008 Act No. 335, § 16, eff June 16, 2008 (amending the criteria for removal set forth in S.C. Code Ann. § 23-3-430(F)); 2010 Act No. 212, § 3, eff June 7, 2010; 2010 Act No. 289, § 8, eff June 11, 2010; 2012 Act No. 255, § 5, eff June 18, 2012; 2015 Act No. 7 (S.196), § 6.D, eff April 2, 2015.

In addition, this Court has also held explicitly that a "court's equitable powers **must yield** in the face of an unambiguously worded statute." Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989)(emphasis added); *see also* Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007) (finding error in fashioning an equitable remedy in the face of an unambiguously worded statute). SORA's lifetime registration requirement is set forth in an unambiguously worded statute, *i.e.* "for life". S.C. Code Ann. § 23-3-460. As such, there is simply no statutory or equitable relief available in this matter, and the Court of Appeals affirmance of trial court's decision must stand.

Furthermore, for any court to fashion an equitable remedy in the face of an unambiguously worded statue would be a clear violation of the South Carolina Constitution's mandate for the separation of powers. *See* S.C. Const. art. I, § 8. The South Carolina Constitution specifically provides that "the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. Const. art. I, § 8. The duration of sex offender registration is a matter of public policy that is solely in the province of the South Carolina Legislature. As such, any attempt by any court to invade the Legislature's exclusive province is a violation of the separation of powers and is unconstitutional. *Id*. In addition, the South Carolina Supreme Court has specifically held that

> [i]f a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (internal quotes and citation omitted). Instead, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or

> expand the statute's operation. *Id.* Moreover, **"it is beyond this Court's power to effect a change in the statutes enacted by the Legislature**." State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000); *see also* Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (this Court does "**not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly**").

Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (2007) (emphasis added). This entire action seeks for the courts to impermissibly and unconstitutionally act as a "superlegislature" and to add language to an unambiguously worded constitutional statute. This is not permitted by South Carolina law. *Id*. As such, the trial court was correct to reject this attempt and the Court of Appeals was correct to affirm this decision.

APPLICATION OF S.C. CODE ANN. § 22-5-920

In addition, Petitioner's reliance on S.C. Code Ann. § 22-5-920 is misplaced. An expungement pursuant to this section does not operate as a reversal, overturn, or vacation of the Petitioner's conviction on appeal and does not affect the Petitioner's overall SORA registration requirement. As correctly noted by the trial court, the Petitioner's expungement "does not change or rewrite history; it does not operate to vacate or undo a prior adjudication." (Appendix p. 7). Moreover, § 22-5-920 deals only with the publication of certain arrest and conviction records - nothing more - and certainly not overall SORA registration.

It is axiomatic that actual SORA in-person registration and the publication of SORA conviction information on a website are separate and distinct matters governed by separate and distinct statutes. To that end, S.C. Code Ann. § 23-3-450 mandates that offenders "register with the sheriff", and specify that registration entails providing "information as prescribed by SLED." This is SORA registration and is completely

unaffected by S.C. Code Ann. § 22-5-920. Separately, S.C. Code Ann. § 23-3-490 speaks to the public accessibility of and the publication of SORA information. To that end, § 23-3-490 states that all "information collected for the offender registry is open to public inspection" and specifically authorizes the use of "computerized or electronic transmission of data or other electronic or similar means" *i.e.* the internet, to accomplish such publication. Accordingly, even assuming *arguendo* that § 22-5-920 could be read to limit the public's access to **all** of the SORA registry information related to the Petitioner, which it does not, there is simply no possible way to read § 22-5-920 to authorize the removal of the Petitioner's separate and distinct lifetime SORA registration requirement. Rather, the only lawful avenues to remove this mandatory lifetime SORA registration requirement are set forth in SORA itself. *See* S.C Code Ann. § 23-3-430(E), (F), (G). However, unfortunately for the Petitioner, as the trial court correctly found, none of these avenues are available to the Petitioner. *See above*. Accordingly, the Petitioner's claims must fail.

Moreover, the proper application of § 22-5-920, which speaks only to the publication of certain arrest and conviction records, requires only that Respondent seal from the public view the actual charge of conviction on the Petitioner's publically accessible SORA website entry. Respondent has done such. Accordingly, Respondent is informed and believes that it is in full compliance with both § 22-5-920 and with SORA. However, there is simply no reading of § 22-5-920, a statute dealing only with the publication of records, that can evidence a Legislative intent to remove an individual's overall SORA registration requirement. *See* Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). Accordingly, the Petitioner's argument was correctly rejected by the trial court and correctly upheld by the Court of Appeals.

SORA REGISTRATION IN SOUTH CAROLINA IS NOT PUNISHMENT

In South Carolina, Courts have also consistently and unequivocally held that registration pursuant to SORA is **NOT** punishment. *See* State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003) (finding that "the length of time one must be listed on the sex offender registry is non-punitive, and it cannot constitute a deprivation of a constitutionally protected liberty interest."); In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) (finding that "sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated."); In the Interest of Justin B., a Juvenile under the Age of Seventeen, 419 S.C. 575, 799 S.E.2d 675 (2017) (reaffirming the constitutionality of SORA and reaffirming unequivocally that SORA is not punishment).

Rather, the South Carolina Legislature has evidenced a clear intent that SORA is "to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens" and to "provide law enforcement with the tools needed in investigating criminal offenses." S.C. Code Ann. § 23-3-400. In State v. Walls, the South Carolina Supreme Court noted the following:

> 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. Hence, the language indicates the General Assembly's intention to create a non-punitive act. We find the Act is not so punitive in purpose or effect as to constitute a criminal penalty. Accordingly, the Act does not violate the *ex post facto* clauses of the state or federal constitutions.

348 S.C. 26, 30-31, 558 S.E.2d 524, 525-26 (2002).

The most recent South Carolina Supreme Court opinion in this area, In the Interest of Justin B., a Juvenile under the Age of Seventeen, 419 S.C. 575, 799 S.E.2d 675 (2017),

is instructive and determinitive. This case involved a challenge by a juvenile offender to mandatory lifetime public registration. *Id*. In denying every challenge to SORA brought before it, the Court, not only provided a comprehensive review of the history of SORA jurisprudence, but also stated the following:

> The requirement that adults and juveniles who commit criminal sexual conduct must register as a sex offender and wear an electronic monitor is not a punitive measure, and the requirement bears a rational relationship to the Legislature's purpose in the Sex Offender Registry Act to protect our citizens—including children—from repeat sex offenders. The requirement, therefore, is not unconstitutional. **If the requirement that juvenile sex offenders must register and must wear an electronic monitor is in need of change, that decision is to be made by the Legislature—not the courts.** The decision of the family court to follow the mandatory, statutory requirement to impose lifetime sex offender registration and electronic monitoring on Justin B. is **AFFIRMED**.

Id. at 586–87, 681 (emphasis added).

Similarly, the Respondent would assert that should South Carolina's SORA laws be in need of amendment to include expungement as an available route for removal from the SORA registry, which Respondent certainly does not concede, that is a decision that can **only** be made by the South Carolina Legislature. *Id*.; S.C. Const. art. I, § 8; Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 379 S.E.2d 119 (1989); Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007). However, in the absence of such legislative change, there is simply no lawful relief on which the Petitioner's claim can be granted. Accordingly, the trial court was correct in denying Petitioner's claim, and Court of Appeals was correct to affirm this decision.

CONCLUSION

In conclusion, based on the foregoing and the applicable laws and jurisprudence of the State of South Carolina, this Court should uphold and affirm the South Carolina Court of Appeals decision in this matter.

Respectfully Submitted,

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