THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. **Did the trial court err in disregarding South Carolina law and binding jurisprudence in determining that the Respondent was not required to register in accordance with the South Carolina Sex Offender Registry Act (SORA)?**

II. **Did the trial court err in failing to follow established and binding jurisprudence in determining which version of SORA is applicable to the initial determination of Respondent's registration requirement?**

III. **Did the trial court err in disregarding South Carolina law governing the avenues for removal from SORA, which are set forth in S.C. Code Ann. § 23-3-430?**

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

The Respondent was arrested for Criminal Sexual Conduct with a Minor in the Second Degree on April 22, 1988. The arrest report reads:

> Affiant has a formal written statement which was given by a thirteen year old female that implicates the defendant. In the statement the victim indicated the defendant did perform digital vaginal intercourse on her against her will. The victim identified the defendant to be her stepfather and stated this occurred at her residence which is [omitted].

See Arrest Warrant. (R. p. 38). Thereafter, on November 30, 1988, the Plaintiff pled guilty to Lewd Act Upon a Minor. *See* Sentencing Sheet. (R. pp. 40-44). The Respondent did not appeal his 2009 conviction or sentence. The Respondent did not apply for post-conviction relief or seek a pardon for his conviction. The Respondent has not filed a petition for a writ of habeas corpus or a motion for new trial pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure. Accordingly, the Respondent does not meet any of the statutory avenues for removal from SORA set forth in S.C. Code Ann. § 23-3-430. (Tr. p. 9-10)(R. p. 88-89)

The South Carolina Sex Offender Registry Act (SORA) was initiated in 1994 and officially codified into the South Carolina Code of Laws in 1996. *See* 1994 Act No. 497, Part II, § 112A; 1996 Act 444 § 16. As such, at the time Respondent's conviction, the South Carolina Sex Offender Registry (SORA) was not yet in existence. However, when SORA was codified into law, the Respondent's registration requirement was triggered and the Respondent *should* have begun registering in accordance with SORA as SORA applies retroactively. The Respondent did not begin registering at that time and not placed on actual notice of his registration requirement until March 14, 2019. *See* Spartanburg County Sheriff's Office Documentation (R. p. 46). At that time, the Respondent acknowledged his obligation to register as a sex offender and began doing so on March 20, 2019. *See* Spartanburg County Sheriff's Office Documentation (R. p. 45)

The Respondent filed this present action on or about September 11, 2019, seeking removal from the registry. Appellant filed a summary judgment motion and a supporting memorandum on or about May 13, 2020. The trial court issued an order that the Respondent was not lawfully ordered to register and must be removed from the SORA on or about July 15, 2020. Appellant filed a timely motion to reconsider on July 27, 2020, which was denied on August 24, 2020. Lastly, the trial court issued an amended order denying the same on September 2, 2020. This appeal follows.

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." Turner v. Milliman, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011).

"Questions of law may be decided with no particular deference to the trial court." Clardy v. Bodolosky, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009).

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

The trial court committed reversible error in disregarding established South Carolina law and binding jurisprudence in this matter. As such, based on the following, the trial court's decision must be reversed in its entirety:

I. The trial court erred in disregarding South Carolina law and binding jurisprudence in determining that the Respondent was not required to register in accordance with the South Carolina Sex Offender Registry Act (SORA).

The trial court's decision in this matter rests on the flawed premise that the SORA registry cannot be applied retroactively to individuals after their sentence and supervision have ended, and that the only statutory avenue in which persons can be provided actual notice of a SORA registration requirement is through S.C. Code Ann. § 23-3-440. This finding is flawed and constitutes legal error. The binding precedent of this State is set forth clearly and unequivocally in State v. Walls, which is a South Carolina Supreme Court decision largely analogous to this present action. 348 S.C. 26, 558 S.E.2d 524 (2002). The Supreme Court in Walls held that an individual who committed a sexual offense in offense

in 1973, *prior to the enactment of the sex offender registry*, was lawfully required to register as a sex offender. Specifically, the court held that

> Pursuant to S.C. Code Ann. § 23–3–480(B) (Supp.2000), a person convicted of an offense provided in S.C. Code Ann. § 23–3–430 (Supp.2000) prior to July 1, 1994, and who was released from custody prior to that date will not suffer the penalties enumerated in section 23–3–470 for failing to register. However, if that person has been served notice of the duty to register, then section 23–3–470 does apply. Accordingly, because appellant was given notice of the duty to register, he was required to register.

See Id. The trial court disregarded this binding precedent. In fact, the Supreme Court in Walls makes clear that the registry applies retroactively to people released from custody prior to the enactment of the registry, just like the Respondent. The Court further articulated that the "lack of notice" in both *Walls* and in this matter does **NOT** remove or affect an individual's registration requirement. Rather, a lack of actual notice affects only whether or not an individual can be criminally charged for failing to properly register. The Court goes on to state that if a person convicted before the registry went into effect is served notice of the duty to register, he is required to register. This precedent applies and resolves this matter in its entirety. Therefore, even though the Respondent was released from custody before SORA became effective, the act still applies to him. Similarly, because the record establishes that the Respondent has been served with notice of the duty to register, he must now register in accordance with SORA.

Furthermore, while S.C. Code Ann. § 23-3-440 does set forth notification procedures for individuals who are being released from incarceration, it **DOES NOT** contain an exclusive list of the avenues by which a convicted person may be notified of their obligation to register. A closer examination of S.C. Code Ann. § 23–3–480 is instructive.

> (A) **An arrest on charges of failure to register**, service of an information or complaint for failure to register, or arraignment on charges of failure to register **constitutes actual notice of the duty to register**. A person charged with the crime of failure to register who asserts as a defense the lack of notice of the duty to register **shall register immediately following actual notice through arrest, service, or arraignment**. Failure to register after notice as required by this article constitutes grounds for filing another charge of failure to register. Registering following arrest, service, or arraignment on charges does not relieve the offender from the criminal penalty for failure to register before the filing of the original charge.
>
> (B) Section 23-3-470 shall not apply to a person convicted of an offense provided in Section 23-3-430 prior to July 1, 1994, and who was released from custody prior to July 1, 1994, unless the **person has been served notice of the duty to register by the sheriff of the county in which the person resides**. This person shall register within ten days of the notification of the duty to register.

S.C. Code Ann. § 23–3–480 (emphasis added). The court's finding that S.C. Code Ann. § 23-3-440 provides the only mechanisms for notification to a convicted person of an obligation to register is simply inapposite to the binding precedent of State v. Walls and the plain language of S.C. Code Ann. § 23-3-480. S.C. Code Ann. § 23-3-480(A) clearly provides for actual notice when an individual is charged with or arrested for failure to register. Additionally, S.C. Code Ann. § 23-3-480(B) provides that notice of the duty to register may be also be sent by the sheriff of the county in which the person resides. As such, the trial court's order is legally incorrect and must be reversed.

The Respondent should have been registering in accordance with SORA since 1994. The only reason he was not is because law enforcement did not provide him actual notice of his registration requirement in March of 2019. However, the Spartanburg County Sheriff's Office's appropriately provided the plaintiff notice of his obligation to register as a sex offender on March 14, 2019, and the plaintiff fully complied with such requirements at that time. *See* Spartanburg County Sheriff's Office Documentation (R. pp. 45-58)

Accordingly, the trial court erred in ruling that the Respondent was not given proper notice of his duty to register and is therefore not required to register as a sex offender. As such, the trial court's decision should be reversed in its entirety.

II. The trial court erred in failing to follow established and binding jurisprudence in determining which version of SORA is applicable to the initial determination of Respondent's registration requirement.

The trial court committed reversible error by disregarding established and binding jurisprudence in determining the version of SORA applicable to the determination of Respondent's registration requirement. The trial court properly noted that under the original version of the registry in 1994 that the Respondent's conviction would be a qualifying offense. However, the trial court failed to apply this to the Respondent as mandated by South Carolina law. *See Walls and Hazel.*

The retroactive application in Hazel v. State and State v. Walls is perfectly analogous and applicable to the Respondent as it would be for an individual that has completed incarceration and supervision. Specifically, the Respondent committed Lewd Act Upon a Minor in 1988 and the triggering event for registration was the creation of SORA in 1994. Any other such application of SORA is contrary to the proper retroactive application of the act and would defeat the stated SORA's stated purpose and intent.

Rather, the trial court incorrectly concluded that it would only be appropriate to apply the provisions of SORA at the time at which the State asserted its right to have the Plaintiff register. This analysis is incomplete and its conclusion constitutes reversible error. *See Id*. In Hazel v. State, the respondent was convicted of kidnapping in 1979. He was not released from incarceration until 2002 so the previous amended version of the

registry in 1999 is what governed his registration requirements. Specifically, the Supreme Court held that

> … [T]he applicable statute is the statute that existed at the time of respondent's release from prison. Applying the law as it read on the date of respondent's release best fulfills the legislature's intent…

Hazel v. State, 377 S.C. 60, 64, 659 S.E.2d 137 (2008). The trial court's attempts to distinguish its analysis from the above stated binding precedent is legal error and must be reversed.

Specifically, the trial court stated that in situations where the Courts have applied sex offender registry requirements retroactively, such as in Hazel v. State and State v. Walls, the Court has applied the provisions of SORA that existed while the individual was still either incarcerated or under supervision and that because the Respondent discharged all aspects of his sentence prior to the creation SORA, this same standard should not apply. As discussed in detail above, an individual does not need to be incarcerated or under supervision and any attempt to distinguish otherwise disregards established binding precedent.

However, assuming *arguendo* the version of SORA most properly applied to the Respondent is what existed in 2019 when he was provided notice to register, then registration is still proper and mandated pursuant to South Carolina law and jurisprudence. The Respondent's sex offense, formerly called Lewd Act Upon a Minor and now recognized as Criminal Sexual Conduct with a Minor – Third Degree ("CSCM-Third"),

requires Respondent to register as a sex offender. *See* S.C. Code Ann. § 23-3-430(C)(6). *Compare* S.C. Code Ann. § 16-15-140 (repealed) *with* S.C. Code Ann. § 16-3-655(C).[1]

Legislative history confirms this logical conclusion. When Lewd Act Upon a Minor was repealed, the legislature made clear that CSCM – Third was replacing it in nearly every respect:

> AN ACT TO AMEND SECTION 16-3-655, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO CRIMINAL SEXUAL CONDUCT WITH A MINOR OFFENSES, SO AS TO CREATE THE OFFENSE OF CRIMINAL SEXUAL CONDUCT IN THE THIRD DEGREE WHEN THE ACTOR IS OVER THE AGE OF FOURTEEN AND COMMITS CERTAIN ACTS WITH A CHILD UNDER THE AGE OF SIXTEEN,… ***TO AMEND SECTION 23-3-430, AS AMENDED, RELATING TO THE SEX OFFENDER REGISTRY***, TO AMEND SECTION 23-3-490, AS AMENDED, RELATING TO PUBLIC INSPECTION OF THE SEX OFFENDER REGISTRY, TO AMEND SECTION 23-3-540, AS AMENDED, RELATING TO ELECTRONIC MONITORING OF PERSONS CONVICTED OF CERTAIN CRIMINAL SEXUAL CONDUCT WITH A MINOR OFFENSES, …AND TO AMEND SECTION 63-7-2360, RELATING TO PLACEMENT OF MINOR SEX OFFENDERS PURSUANT TO THE CHILDREN'S CODE, ALL SO AS TO MAKE CONFORMING AMENDMENTS TO REFERENCE APPROPRIATE CRIMINAL SEXUAL CONDUCT WITH A MINOR OFFENSES AND TO DELETE REFERENCES TO THE FORMER LEWD ACT UPON A CHILD UNDER THE AGE OF SIXTEEN; AND TO REPEAL SECTION 16-15-140 RELATING TO COMMITTING OR ATTEMPTING TO COMMIT A LEWD ACT UPON A CHILD UNDER THE AGE OF SIXTEEN.

South Carolina Bill History, 2012 Reg. Sess. H.B. 3667 (emphasis added).

[1] "It shall be unlawful for any person over the age of fourteen years to wilfully and lewdly commit or attempt any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child . . . ." *State v. Hardee*, 279 S.C. 409, 412, 308 S.E.2d 521, 524 (1983) (quoting S.C. Code Ann. § 16-15-140).

Additionally, the South Carolina Supreme Court has repeatedly acknowledged the equivalency of the former lewd act upon a minor and CSCM-Third in appeals concerning the sex offender registry. *See* State v. Nation, 408 S.C. 474, 477, 759 S.E.2d 428, 430 (2014), *abrogated on other grounds by* State v. Ross, 423 S.C. 504, 815 S.E.2d 754 (2018) ("At the time of Appellant's indictment, section 16–15–140 codified the crime of 'lewd act upon a child under sixteen.' S.C. Code Ann. § 16–15–140 (1996). However, the General Assembly later renamed this crime CSCM–Third and re-codified it in S.C. Code Ann. § 16–3–655(C) (Supp. 2010). For ease of reference, we refer to 'lewd act upon a child under sixteen' as CSCM–Third."); *See also* State v. Ross, *Id.* ("His conviction for lewd act—which is now reclassified as criminal sexual conduct (CSC) with a minor in the third degree[1]—is the only sexual offense of which Ross has been convicted.…In 1979, the crime of lewd act upon a child was codified in section 16-15-140 of the South Carolina Code (1976) (repealed 2012). CSC with a minor in the third degree is codified in subsection 16-3-655(C) of the South Carolina Code (2015)".)

Accordingly, under either theory mandating registration, the Respondent was properly provided notice he register as a sex offender, and he did. As such, both the 1994 SORA and the 2019 SORA would mandate registration, and the Court erred in dismissing that it would then be proper to evaluate whether Respondent meets the statutorily enumerated grounds for removal. Therefore, the trial court's decision should be reversed in its entirety.

III. The trial court erred in disregarding South Carolina law governing the avenues for removal from SORA, which are set forth in S.C. Code Ann. § 23-3-430.

South Carolina law clearly specifies lifetime registration for all persons required to register pursuant to S.C. Code Ann. §§ 23-3-430 and 23-3-460. South Carolina's Sex Offender Registry statutes, S.C. Code § 23-3-400 *et seq*., list the only mechanisms and avenues by which an individual can be removed from the Sex Offender Registry.[2] *See* S.C. Code Ann. § 23-3-430(E), (F), (G). South Carolina law is clear that these are only lawful and permissible avenues by which an individual placed on the Registry can be removed. However, there is no genuine issue of material fact to suggest that Plaintiff meets any of these statutory criteria. Rather, the Plaintiff was convicted of Lewd Act Upon a Minor in 1988, and this conviction mandates lifetime registration. *See* S.C. Code Ann. §23-3-430; S.C. Code Ann. § 23-3-460 (setting forth lifetime registration in South Carolina in an unambiguously worded statute - "for life"). Accordingly, there is no legal or constitutional basis for the Plaintiff to be removed from South Carolina's Sex Offender Registry and the Defendants are entitled to judgment as a matter of law. *See* S.C. Code Ann. § 23-3-460 (mandating lifetime registration in South Carolina); S.C. Code Ann. § 23-3-430 (setting forth the only avenues for removal).

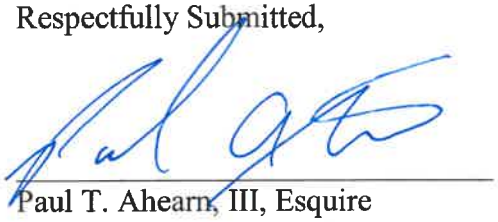
[2] In fact, the mechanisms for both placement on and removal from the South Carolina sex offender registry are provided by this same code section. *See* S.C. Code § 23-3-430.

CONCLUSION

The trial court erred in not finding that the Respondent was convicted of a mandatory registration offense, given proper notice by the Spartanburg County Sheriff's Department that he was required to register, is properly registering, and that he does not meet any of the specifically enumerated avenues for removal.

In conclusion, based on the foregoing, the clear and unambiguous laws of the State of South Carolina applicable to this matter, and the binding jurisprudence applicable to this matter, the Appellant respectfully requests that this Court REVERSE the trial court's decision in its entirety and grant Appellants' summary judgment as a matter of law.

Respectfully Submitted,



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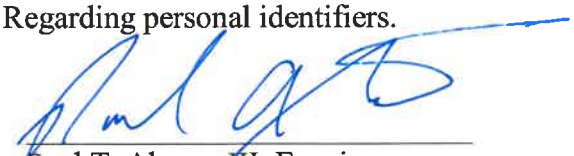
RULE 211(b) CERTIFICATION

I hereby certify that the Final Brief of Appellant complies with Rule 211(b), SCACR and the August 13, 2007 Supreme Court Order Regarding personal identifiers.



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