STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Allison R. Lee, Circuit Court Judge

Appellate Case No. 2020-000741

Billy Wayne McIntosh, ... Appellant,

v.

State of South Carolina, ... Respondent.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

W. JEFFREY YOUNG
CHIEF DEPUTY ATTORNEY GENERAL

L. DAVID LEGGETT III
ASSISTANT ATTORNEY GENERAL
Office of the Attorney General
SC Bar Number 104366
PO Box 11549
Columbia, SC 29211
Phone: (803) 734-3177
DavidLeggett@scag.gov

HARLEY L. KIRKLAND
ASSISTANT ATTORNEY GENERAL
Office of the Attorney General
SC Bar Number 100382
PO Box 11549
Columbia, SC 29211
Phone: (803) 734-0406
HKirkland@scag.gov

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court abuse its discretion by ruling that Mr. McIntosh's kidnapping was sexual in nature?
2. Does the retroactive application of S.C. Code Ann. § 23-3-430(c)(15) deny Mr. McIntosh equal protection of law?
3. Did Mr. McIntosh's receive due process through his *Thompson* hearing?

STATEMENT OF THE CASE

In 1977, Mr. McIntosh was convicted of the kidnapping and murder of Joyce Marie Heinig.

In 1994, the South Carolina Sex Offender Registry Act was enacted. It provided, *inter alia*, that "a person who has been convicted of . . . any of the following offenses shall be referred to as an offender: (15) kidnapping (Section 16-3-910) of a person eighteen years of age or older except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense." S.C. Code Ann. § 23-3-430(c)(15).

In 2016, the South Carolina Supreme Court held that individuals convicted of kidnapping prior to the enactment of the Sex Offender Registry are "entitled to a hearing to determine whether [their] kidnapping offenses were sexual in nature." *Thompson v. State*, 412 S.C. 560, 566, 785 S.E.2d 189, 192 (2016)

On July 26, 2018, Mr. McIntosh filed a Declaratory Judgment action in which he asserted that the South Carolina Department of Probation, Parole, and Pardon Services classified his kidnapping conviction as a sexual offense. He further alleged that because his conviction is considered a sex offense, he is subject to a more onerous parole process. Mr. McIntosh then argued that retroactive application of the Sex Offender Registry Act to his conviction violates the guarantee of due process of law.

Further, Mr. McIntosh alleged that his 1977 kidnapping conviction was not sexual in nature and, pursuant to *Thompson v. State*, petitioned the court to make a determination about this allegation.

The State opposed Mr. McIntosh's claim that his kidnapping was not sexual in nature and his allegation that he has been deprived of the process he was due.

A bench trial regarding Mr. McIntosh's Declaratory Judgment action was held on July 31, 2019. On April 3, 2020, Judge Lee issued an order finding that Mr. McIntosh's kidnapping was sexual in nature. Mr. McIntosh did not seek reconsideration or amendment of Judge Lee's order.

On April 30, 2020, Mr. McIntosh filed a notice of appeal. In his brief, he contends that the trial court erred in its ruling and that, despite his *Thompson* hearing, the retroactive application of the Sex Offender Registry Act to his kidnapping denies him the equal protection of the laws and due process.

STANDARD OF REVIEW

A suit for declaratory judgment may be legal or equitable, and is characterized as such by the nature of the underlying issue outlined in the complaint. *Lowcountry Open Land Trust v. State*, 347 S.C. 96, 552 S.E.2d 778 (Ct. App. 2001) (*citing Felts v. Richland County*, 303 S.C. 354, 400 S.E.2d 781 (1991); *Clark v. Hargrave*, 323 S.C. 84, 473 S.E.2d 474 (Ct. App. 1996)). "A declaratory judgment action is like a chameleon. Its color is determined by its background, *i.e.*, the underlying action." *Noisette v. Ismail*, 299 S.C. 243, 246, 384 S.E.2d 310, 312 (Ct. App. 1989) (*citing Jacobs v. Service Merchandise Co.*, 297 S.C. 123, 375 S.E.2d 1 (Ct. App. 1988)), *reversed in part* 304 S.C. 56, 403 S.E.2d 122. "Unless the cause of action and the relief sought in a declaratory judgment action are distinctly equitable, the action will be considered one at law." *Id.* at 247, 384 S.E.2d 310.

"This [c]ourt reviews all questions of law de novo." *Lollis v. Dutton*, 421 S.C. 467, 477, 807 S.E.2d 723, 728 (Ct. App. 2017) (quoting *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009); *see also Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) ("Questions of law may be decided with no particular deference to the trial court." (quoting *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008))).

For other matters, appellate courts use an abuse of discretion standard. A trial court abuses its discretion when its ruling is based on an error of law, or when its factual conclusions are without evidentiary support. *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016). "[T]he abuse of discretion standard of review does not allow [the appellate court] to reweigh the evidence or second-guess the [circuit] court's assessment of witness credibility." *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237-238 (Ct. App. 2014).

Whether Mr. McIntosh has been deprived the equal protection of the law or due process is a question of law; therefore, the proper standard of review is *de novo*. The appropriate standard of review for a circuit court decision in a *Thompson* hearing is a novel question. The State submits that because underlying question, whether Mr. McIntosh's kidnapping was sexual in nature, is one of fact, it should only be reviewed for an abuse of discretion.

ARGUMENT

Mr. McIntosh submits that the trial court erred in ruling that his kidnapping was sexual in nature. The ruling was supported by ample evidence, so the trial court acted well within its discretion. Additionally, Mr. McIntosh argues that his right to equal protection of the law has been violated and that he was not afforded due process. These arguments are also incorrect.

A. The Trial Court Did Not Abuse Its Discretion.[1]

Mr. McIntosh argues that the trial court erred in finding that his kidnapping was sexual in nature. The trial court's decision was supported by ample evidence, and this court should not second guess the determination of the trial court.

The trial court found that Mr. McIntosh's was sexual in nature. Specifically, Mr. McIntosh claims that the court erred by relying on the statements of his co-defendant and Ms. Cathy Sipes. Brief at 9-10. The trial court found that Mr. McIntosh was not a credible witness and instead relied on the statement of his co-defendant and Ms. Sipes. Order at 8. "[T]he abuse of discretion standard of review does not allow [the appellate court] to reweigh the evidence or second-guess the [circuit] court's assessment of witness credibility." *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237-38 (Ct. App. 2014). Because there is evidence to support the trial court's ultimate finding, this court should not proceed any further in this inquiry and should uphold the findings of the trial court.

If the court chooses to weigh the evidence relied on by the trial court, the State respectfully asks the court to affirm the circuit court's assessment of the evidence. Given Mr.

---

[1] The State submits that because the thrust of Mr. Thompson's argument here addresses factual findings and the weighing of evidence, it should only trigger an abuse of discretion review; however, regardless of whether the court reviews the underlying order for an abuse of discretion or considers the question *de novo*, the State believes that Mr. Thompson's arguments are unpersuasive.

McIntosh's poor recollection and incentive to misremember, the State believes that reliance on his statements is inappropriate. *See, e.g.*, Transcript at 16, line 19-24.

It is undisputed that Mr. McIntosh kidnapped Ms. Heinig and took her into the woods. State Ex. 1; Transcript at 19, line 7-9. Mr. McIntosh's co-defendant testified that, after some time, three gunshots were heard and Mr. McIntosh returned to the car holding Ms. Heinig's clothing. State Ex. 1. When her body was discovered several weeks later, she was completely nude. *Id.*; Brief at 9. When asked about these facts, Mr. McIntosh repeatedly stated that he had no recollection of what happened in the woods. Transcript at 16, line 19-24; at 21, line 14-20; at 22, line 14-25. Thus, not only is there evidence to support the trial court's ruling, Mr. McIntosh has not put forward evidence to counter it. Mr. McIntosh bears the burden of proving that his kidnapping was not sexual in nature. Repeating that the kidnapping was not sexual in nature – especially after denying any recollection of significant portions of the relevant time period – is insufficient.

Moreover, Mr. McIntosh's argument attempts to create a new set of facts. *See* Brief at 9 ("Appell[ant] argued that the distinctly different size bullet holes in the victim's head indicates that each wound was inflicted by a weapon of different caliber.") *Thompson* hearings are for the purpose of determining whether a kidnapping involved a sexual element, not re-litigating an individual's guilt or innocence. Claims of actual innocence must be brought either on direct appeal or in a post-conviction relief action. Therefore, Mr. Thompson's efforts to do so should be denied and the order of the circuit court affirmed. To the extent that Mr. McIntosh is pointing this out to discredit the version of events set forth by his co-defendant, the trial court's discretion in considering the evidence before it should not be disturbed.

B. Mr. McIntosh's Right to Equal Protection of the Laws Has Not Been Violated.

Mr. McIntosh argues that his right to equal protection has been violated. *Hendrix v. Taylor* provides the relevant framework for considering an equal protection claim in this context.

> The equal protection clause of United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *see also* S.C. Const. art. I, § 3. If a statutory provision "does not involve a suspect classification or a fundamental right, . . . the question under equal protection analysis is whether the legislation is rationally related to a legitimate state purpose." *Curtis v. State,* 345 S.C. 557, 574, 549 S.E.2d 591, 600 (2001).

Hendrix v. Taylor, 353 S.C. 542, 549, 579 S.E.2d 320, 323 (2003).

In Mr. McIntosh's case, he argues that he is treated differently from individuals convicted of kidnapping after the enactment of the Sex Offender Registry Act, but individuals subject to retroactive application of the Sex Offender Registry Act are not a suspect class. Thus, any difference in treatment is not attributable to his membership in a suspect class, and the rational basis test applies.

Mr. McIntosh asserts that individuals convicted after the Sex Offender Registry Act was enacted have a determination regarding whether their kidnapping sexual in nature made concurrent with their conviction, while he did not. Individuals convicted after the passage of the Sex Offender Registry Act have the opportunity to have the court of general sessions determine whether their kidnapping convictions involved a criminal sexual assault or attempted criminal sexual assault at the time of their conviction, while Mr. McIntosh had to petition the court for such a determination after his conviction. Mr. McIntosh received different treatment because time only moves in one direction. Because they were convicted prior to the enactment of the Sex Offender Registry, individuals like Mr. McIntosh, could not have possibly had a determination made at the time of their conviction.

The Supreme Court addressed Mr. McIntosh's situation in *Thompson v. State*, 415 S.C. 560, 785 S.E.2d 189 (2016). In *Thompson*, the Court held that individuals convicted of kidnapping before the Sex Offender Registry Act, like Mr. McIntosh, are entitled to an opportunity to ask for a determination regarding whether their kidnapping convictions involved a criminal sexual assault or attempted criminal sexual assault. However, because "the sex offender registry is a civil requirement separate and apart from the criminal punishments associated with sexual offenses in this state," this determination is made by the court of common pleas, not the court of general sessions. *Thompson v. State*, 415 S.C. at 564, 785 S.E.2d at 191. Any difference in treatment is due only to temporal necessity and the State's inability to reverse time. This necessity satisfies the rational basis analysis. Accordingly, Mr. McIntosh's right to equal protection has not been violated.

It is important to note that while S.C. Code Ann. §23-3-430(C)(15) allows the criminal court to make a determination regarding whether a kidnapping was sexual in nature, it is an inherently civil determination. *See Thompson v. State*, 415 S.C. at 564, 785 S.E.2d at 191 ("[T]he sex offender registry is a civil requirement separate and apart from the criminal punishments associated with sexual offenses in this state . . . ."). Furthermore, the circuit court is a court of general jurisdiction which is comprised of both the court of general sessions and the court of common pleas. While general session and common pleas are different, they are both part of the same circuit court, and thus, both have the same subject matter jurisdiction.

C. Mr. McIntosh's right to due process has not been violated.

Mr. McIntosh also argues he has been deprived liberty without due process. Pursuant to the United States Constitution and the South Carolina Constitution, no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. V; U.S. Const.

amend. XIV, § 1; S.C. Const. art. I, § 3. Any due process violations created by the retroactive application of S.C. Code Ann §23-3-430(C)(15) were addressed and cured by *Thompson v State*, which allowed Mr. McIntosh to have a bench trial concerning whether his kidnapping was sexual in nature.

In his argument, Mr. McIntosh implies that his due process rights have been deprived because he has not been afforded a fair and meaningful opportunity to present his case. However, Mr. McIntosh was able to meaningfully participate in the hearing and had full ability to engage in the adversarial process. Simply being an indigent inmate does not deprive him of due process of law. *See Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) ("The United States Supreme Court has never held that an indigent party has a constitutional right to counsel in any civil case.") (*referencing Baxter v. Palmigiano,* 425 U.S. 308 (1976); *Wolff v. McDonnell,* 418 U.S. 539 (1974); *United States v. Kras,* 409 U.S. 434 (1973)).

CONCLUSION

Mr. McIntosh has not been denied the equal protection of the laws nor deprived of his liberty without due process. Any problems created by the retroactive application of S.C. Code Ann. § 23-3-430(C)(15) were addressed and cured by *Thompson v State*, which allowed individuals like Mr. McIntosh to seek a bench trial concerning whether their kidnapping was sexual in nature. Mr. McIntosh sought and received a *Thompson* hearing. After the trial, Judge Lee correctly held that Mr. McIntosh failed to meet his burden. *Thompson* guarantees the right to a hearing not to a particular outcome. Therefore, the State asks that this court affirm the decision of the trial court.

[Signature page to follow]

Respectfully Submitted,

ALAN WILSON
ATTORNEY GENERAL

W. JEFFREY YOUNG
CHIEF DEPUTY ATTORNEY GENERAL

LEON DAVID LEGGETT III
ASSISTANT ATTORNEY GENERAL
Office of the Attorney General
SC Bar Number 104366
PO Box 11549
Columbia, SC 29211
Phone: (803) 734-3177
DavidLeggett@scag.gov

HARLEY L. KIRKLAND
ASSISTANT ATTORNEY GENERAL
Office of the Attorney General
SC Bar Number 100382
PO Box 11549
Columbia, SC 29211
Phone: (803) 734-0406
HKirkland@scag.gov

By: Harley L Kirkland

ATTORNEYS FOR THE STATE OF SOUTH CAROLINA

JUNE 11, 2021.
COLUMBIA, SOUTH CAROLINA.