STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Orangeburg County Circuit Court
The Honorable Roger M. Young, Judge

Appellate Case No. 2022-001018

STATE OF SOUTH CAROLINA .....RESPONDENT

v.

BOWEN GRAY TURNER,.....APPELLANT

BRIEF OF RESPONDENT

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ATTORNEY FOR RESPONDENT

COURTESY OF LUNA SHARK MEDIA

TABLE OF CONTENTS

COURTESY OF LUNA SHARK MEDIA

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

COURTESY OF LUNA SHARK MEDIA

STATEMENT OF APPELLANT'S ISSUES ON APPEAL

1. Did the probation revocation judge err by denying appellant's motion for a continuance to allow Dr. Jeffrey McKee to conduct a psychosexual evaluation of appellant before the judge determined whether appellant should be required to register as a sex offender, particularly when Dr. McKee had already been retained, a funding order had been signed, and Dr. McKee was able to begin the evaluation the following week?

2. Did the probation revocation judge abuse his discretion by refusing to exercise his discretion at all when he ordered appellant to register as a sex offender maintaining he had no "leeway" in the matter?

3. Did the probation revocation judge abuse his discretion by ordering appellant to register as a sex offender where the state failed to show good cause existed for placing appellant on the registry, specifically, where there was no evidence appellant was at risk of reoffending?

4. Did the probation revocation judge abuse his discretion by ordering appellant to register as a sex offender where the judge was without statutory authority to do as the probation revocation judge?

5. Did the sentencing judge err by ruling any violation of the sex offender conditions of probation would automatically result in appellant having to register as a sex offender since the state should have been forced to show at the sentencing hearing that the violation of the sex offender conditions constituted good cause for appellant to register?

COURTESY OF LUNA SHARK MEDIA

STATEMENT OF RESPONDENT'S ISSUES ON APPEAL

1. Did the probation revocation judge err by denying the appellant's motion for a continuance when probation violation hearings are informal by nature and do not rise to the level of trials?

2. Did the probation revocation judge err by upholding the sentencing court judge's order that any violation of the sex offender conditions of probation would result in Appellant being required to register as a sex offender?

3. Did the probation revocation judge err by ordering Appellant to register as a sex offender when the sentencing court judge, which has the authority to order the registry, made registering as a sex offender a consequence of violating the sex offender conditions of probation?

4. Whether because Appellant did not appeal the original sentencing order, he cannot challenge the sentencing court's order regarding the sex offender registry, or in the alternative, whether the sentencing court was within its authority to impose such a condition?

COURTESY OF LUNA SHARK MEDIA

STATEMENT OF THE CASE

On or about June 1 into June 2, 2019, Bowen Turner (Appellant) sexually assaulted a victim during a house party in Orangeburg County, South Carolina. Plea Tr. p.13, lines 9-21. This came to the State's attention when the victim sought medical attention. Plea Tr. p.13, lines 4-8. Appellant was originally charged with criminal sexual conduct, first degree, but waived presentment to the grand jury and pleaded guilty to the offense of assault and battery in the first degree. Plea Tr. p.8, lines 8-11.

Throughout this process, Appellant was represented by C. Bradley Hutto, Esquire. At the hearing on this charge, the State was represented by David W. Miller, Esquire, of the Second Judicial Circuit.[1] Also appearing at the hearing on behalf of the victims in the matter was Sarah Ford, Esquire of the South Carolina Victims Assistance Network.[2] The trial judge was the Honorable R. Markley Dennis, Jr.

In exchange for Appellant's guilty plea, the State recommended a sentence of a Youthful Offender Act term not to exceed six years, suspended to credit for time served of 55 days and five years' probation. This probation included the sex offender supervision terms as established by the South Carolina Department of Probation, Parole and Pardon Services (the Department), as well as completion of sex offender counseling as directed by the Department. The plea court held Appellant's enrollment in the sex offender registry in abeyance so long as he had no violations of

COURTESY OF LUNA SHARK MEDIA

[1] Second Circuit Solicitor Bill Weeks notes in during the revocation hearing that his office was asked by Solicitor David Pascoe, whose jurisdiction includes Orangeburg County, to handle this matter due to conflicts. Revocation Tr. p.9, line 22-p,10, line 3.

[2] Appellant was investigated by SLED for a total of three sexual assault incidents in three different counties. Victims or their representatives from all incidents were present at the hearing with Ms. Ford speaking on their behalf, as well as with some providing victim impact statements.

the terms of his probation.[3] A violation that activated his suspended sentence would automatically require registration. A violation that did not activate his sentence would require a further hearing regarding the necessity of registration. Probation would terminate upon completion of the sex offender counseling or two years, whichever is later. He was also prohibited from contact of any form with victims and their families on a permanent basis. Plea Tr. p.13, line 23-p.14, line 25.

On or about May 9, 2022, approximately one month after sentencing, Appellant was arrested for public disorderly conduct and being a minor in possession of alcohol. R. at *. The Department issued a warrant due to violation of the terms of his probation and an internal administrative hearing officer recommended revocation due to the nature of his violation, the fact it included new criminal violations, and the brief period before violation combining to prevent him from being a good candidate for supervision. *Id.*

On July 13, 2022, a hearing was held before the Honorable Roger M. Young. Representing the Department was Agent Gregory Whittaker, and Appellant was represented by Jason B. Turnblad, Esquire. Ms. Ford was also present representing the victims of the crimes for which Appellant was placed on probation as well as for his other alleged assaults. Appellant admitted to violating the terms of his probation. Revocation Tr. p.3, lines 10-17. The Department recommended a revocation and activation of the suspended sentence, and defense counsel advocated for a chance to mitigate the requirement that Appellant register as a sex offender via completion of a psychosexual evaluation, as well as consideration of Appellant's alleged alcohol problem. Revocation Tr. p.4, lines 1-4; line 25-p.6, line 12. Agent Whittaker also informed the court that, in the approximately 50 days Appellant had been incarcerated since his arrest, he was

[3] This was clarified after request by defense counsel to state that a violation leading to registration would have to be a violation of the sex offender probation terms. In other words, more than a speeding ticket. Plea Tr. p.37, line 22-p.39, line 18.

COURTESY OF LUNASHARK MEDIA

charged with threatening public officials. Revocation Tr. p.7, 9-18. This magistrate-level citation was ultimately dismissed.

Judge Young determined that, because Appellant admitted he willfully violated the terms of his probation, the only question was whether he needed to register as a sex offender. Revocation Tr. p.8, lines 20-24. To add clarity to the question, Solicitor Bill Weeks of the Second Circuit, whose office prosecuted the case, took the position that he believed probation should be revoked in full and Appellant should have to register as a sex offender. He further stated that he had been authorized by the victims and the Attorney General to provide that information to the court. Revocation Tr. p.10, lines 3-14. Ms. Ford also spoke on behalf of the victims, reiterating Solicitor Weeks' statements on the clarity of Judge Dennis' sentence. Revocation Tr. p.12, lines 8-13. Judge Young held that he had no leeway no matter what a doctor said because he was bound to enforce Judge Dennis' prior sentence. Revocation Tr. p.15, lines 5-13. Judge Young revoked probation, instated the youthful offender sentence, and ordered that Appellant must register as a sex offender.

A notice of appeal was filed by Appellant on July 19, 2022. His initial brief and designation of matter were filed by Chief Appellate Defender Robert M. Dudek, Esquire on March 16, 2023. This brief follows.

COURTESY OF LUNA SHARK MEDIA

Standard of Review

An appellate court will not disturb the Circuit Court's decision to revoke probation unless the decision was influenced by an error of law, was without evidentiary support, or constituted an abuse of discretion. *State v. Archie,* 322 S.C. 135, 470 S.E.2d 380 (Ct. App. 1996); *see also State v. White,* 218 S.C. 130, 135, 61 S.E.2d 754, 756 (1950) (stating that upon review of revocation of probation, the question is not one of formal procedure respecting either notice, specifications of

charges or trial thereon, but is simply whether the trial court abused its discretion; review therefore must be determined in accordance with principles governing exercise of judicial discretion). The decision to revoke probation is addressed to the discretion of the circuit judge. *White,* 218 S.C. at 134–35, 61 S.E.2d at 756; *State v. Proctor,* 345 S.C. 299, 546 S.E.2d 673 (Ct. App. 2001); *State v. Hamilton,* 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999). A reviewing court will only reverse this determination when it is based on an error of law or a lack of supporting evidence renders it arbitrary or capricious. *Proctor,* 345 S.C. at 301, 546 S.E.2d at 674. The court has much discretionary authority in dealing with guilty persons who are in a probationary status. *Shannon v. Young,* 272 S.C. 61, 248 S.E.2d 914 (1978).

COURTESY OF LUNASHARK MEDIA

Arguments

1. **The probation revocation judge did not abuse his discretion by refusing to grant a continuance.**

Appellant argues the probation revocation judge erred by refusing to grant his motion for a continuance in order to allow a psychosexual evaluation be conducted before the court considered placing him on the sex offender registry. He argues the judge abused his discretion by not granting the continuance.

Respondent submits that the probation revocation judge did not abuse his discretion, because probation violation hearings are informal hearings that do not rise to the level of criminal trials. *See Gagnon v. Scarpelli*, 411 U.S. 778, 93 S,Ct, 1756 (1973), citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972). While due process rights require a hearing when there are violations alleged, that hearing does not to rise to the level of a trial. *Brewer* at 489. ("We emphasize there is no thought to equate this second stage of parole revocation to a criminal

prosecution in any sense.") *See also State v. Franks*, 276 S.C. 636, 639, 281 S.E.2d 227, 228 (1981) "[T]here is quite a difference between a criminal prosecution and a probation revocation hearing. The courts have, accordingly, recognized that the rights of an offender in a probation revocation hearing are not the same as those extended him by the United States Constitution upon the trial of the original offense." (citation omitted.)

"The denial of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in prejudice." *State v. Meggett*, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001).

Furthermore, reversals for not granting continuances are extremely uncommon. "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." *State v. McMillian*, 349 S. C. 17, 21, 561 S.E.2d 602, 604 (2002) (citing *State v. Lytchfield*, 230 S.C. 405, 95 S.E.2d 857 (1957).

In this case, Appellant was not prejudiced by the judge refusing to grant the continuance. Specifically, he admitted in court that he violated his probation. There is prejudice because he admitted to the violations.

In a similar vein, the probation revocation court did not err by not holding the matter of the sex offender registry in abeyance. As will be discussed in Part 3 of Respondent's argument, the probation revocation judge's authority to impose or decline to impose the sex offender registry requirement was a direct result of the sentencing judge's order. Therefore, the question of Appellant's likelihood to reoffend was not at issue because the authority to impose the registry was provided solely by the original sentence. Delaying the proceedings for a psychosexual

COURTESY OF LUNA SHARK MEDIA

evaluation was purely within the discretion of the probation revocation court, and it did not abuse that discretion when it denied the continuance. Considering how rare reversals of refusals to grant continuances are, this exercise of discretion by the probation revocation judge is not one of those limited occurrences that would warrant reversal.

2. **The probation revocation judge did not abuse his discretion by upholding the sentencing court's order when it was clear the Appellant violated sex offender conditions.**

Appellant argues the revoking judge erred when he ordered him to register as a sex offender, claiming his violations did not rise to the level of seriousness requiring being placed on the registry.

Respondent submits the probation revocation court was properly effecting the order that the sentencing court had originally imposed. The sentencing court had laid out clear consequences for Appellant should he violate the conditions of probation to the extent that they result in a revocation – that of being required to register as a sex offender.

"Probation is a matter of grace[.]" *State v. Hamilton*, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (1999). In this case, Appellant stood accused of criminal sexual conduct first degree. As part of the plea process, he not only was allowed to plead guilty to a greatly reduced charge, but he received a recommendation by the State for a youthful offender sentence suspended to probation. In being allowed to plead to assault and battery first degree, Appellant was no longer required to register as a mandatory consequence of conviction, but instead was given the opportunity – much like the probationary sentence itself – to avoid the collateral consequence of the conviction. The sentencing court was clear: "[I]f [Appellant] has completed five years without any violation and done all of the counseling necessary, then he will not have to register as a sex offender. If he

COURTESY OF LUMA SHARK MEDIA

violates one time, one violation, he has to register as a sex offender." Plea Tr. p.34, line 25-p.35, line 4.

Appellant argues that the sentencing court clarified that minor violations, like receiving a speeding ticket, would not trigger the registry requirement and that his admitted violations – disorderly conduct and a dismissed charge of threatening a public official – are equivalent to a speeding ticket. Furthermore, he alleges that the court refused to exercise discretion when imposing the registry requirement because of the relatively minor (as he claims) violations.

This assertion is incorrect. As an initial matter, the sentencing court clarified that "[a]ny violation of the sex offender conditions of probation will cause him to have to register." Plea Tr, p.39, lines 14-16. One of the standard sex offender conditions is to not drink alcohol, which Appellant clearly violated when he was arrested for disorderly conduct and underage drinking. Furthermore, witness accounts of Appellant's actions at the bar described him as "'acting weird' and asking women to take him home," and that "women complained of being harassed by Mr. Turner's behavior," causing him to be asked to leave the establishment. R. at *.

Appellant's actions and violations very clearly warranted a revocation as well as met the sentencing court's order that violations of the sex offender conditions would result in him registering as a sex offender. The revocation court did not abuse its discretion, nor did it fail to exercise its discretion when imposing the sentencing court's order.

Furthermore, the law regarding the sex offender registry has been amended so that registering as a sex offender is no longer the lifetime requirement that it used to be. *See* Act No. 221, 2022 S.C. Acts 2004. Under the revised law, sex offenses and offenders are divided into tiers based on the severity of the convicted offense, and eligibility to be removed from the registry is based upon the tier.

COURTESY OF LUNA SHARK MEDIA

In Appellant's case, he would be a Tier 1 offender pursuant to S.C. Code § 23-3-430(C)(1)(i). As a Tier 1 offender, he will be eligible for removal from the registry fifteen years after the conclusion of his sentence, so long as he successfully completes his sex offender treatment, complies with the registry requirement, and is not convicted of another sexual offense. S.C. Code § 23-3-462(1)(a), (3), (4), and (5).

Respondent respectfully submits that the level of scrutiny over the registry requirement is significantly lessened now that the registry is no longer a lifetime obligation. Recently, the South Carolina Supreme Court found that the "lifetime registration requirement without judicial review violates due process." *Powell v. Keel*, 433 S.C. 457, 464, 860 S.E.2d 344, 348 (2021). However, the Court has also stated, "We find the initial mandatory imposition of sex offender registration satisfies the rational relationship test in light of the General Assembly's stated purpose." *Id.* at 466, 348.[4]

As a result of recent legislative changes to the sex offender registry and most notably a mechanism for removal of the requirement to register, the level of due process required in order for a court to impose the registry should no longer be heightened to the level as it once was. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey*, 408 U.S. at 481, 92 S.Ct. at 2600. At the very least, this Court should find that due process was met by the circumstances of this case: a defendant who admitted to sexual battery and was given an opportunity to avoid the registry by fulfilling the conditions of probation violated his probation by being drunk underage at a bar, harassing women, and demanding a woman take him home.

COURTESY OF LUNA SHARK MEDIA

[4] It bears repeating that the registry in the instant case was discretionary, not mandatory, and it was Appellant's own actions in violating multiple conditions of probation that brought about the registry requirement.

3. **The probation revocation judge's authority to impose the sex offender registry was a direct result of the sentencing court's order.**

Appellant argues that the probation revocation court lacked the authority to impose the sex offender registry, citing *State v. Davis*, 375 S.C. 12, 649 S.E.2d 178 (Ct. App. 2007). In *Davis*, this Court held that the probation revocation judge erred when it, on its own accord, imposed the sex offender registry as a result of a violation of probation when the sentencing court specifically ordered the defendant was not to register.

The facts distinguishing *Davis* and this case are obvious. In this case, the sentencing court specifically conditioned staying off the registry with abiding by the sex offender conditions of probation. Failing to do so, the sentencing judge ordered, would result in Appellant being required to register. This is distinctively different from the facts in *Davis*, where the sentencing judge intentionally ordered no requirement to register.

Appellant ignores *State v. Herndon*, 403 S.C. 84, 742 S.E.2d 375, entirely when he argues that a probation revocation court cannot impose the registry when the sentencing court specifically orders registration as a consequence of violating probation. In *Herndon*, the defendant entered into a negotiated *Alford*[5] plea, with the condition that he would be required to register as a sex offender if he violated the conditions of probation.

The Supreme Court's primary issue in *Herndon* was regarding the nature of the *Alford* plea and whether pleading under *Alford* absolved him of the requirements of the sex offender counseling required as a part of the sex offender conditions of probation, but the result is clear: a sentencing court may direct a defendant to register as a sex offender if he violates probation. By necessity, it falls upon the probation revocation court to effect the sentencing court's order, because

[5] *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970).

COURTESY OF LUNA SHARK MEDIA

the probation revocation court has the authority to determine if the conditions of probation were violated. *See Hamilton,* 333 S.C. at 647, 511 S.E.2d at 96. Therefore, Appellant's argument that *Davis* applies and prevents the probation revocation court from imposing the registry requirement is without merit.

4. **Appellant did not timely appeal the sentencing judge's order that a violation of the conditions of probation would result in his inclusion on the sex offender registry.**

Appellant argues that the sentencing judge erred in his order regarding the sex offender registry. Respondent submits that because Appellant did not appeal the order within ten days of the sentence, it became the law of the case. Any claim on this ground is untimely and unable to be considered at this stage.

South Carolina law states that a ruling that is not objected to becomes the law of the case. *See State v. Lee*, 350 S.C. 125, 132-33, 564 S.E.2d 372, 376 (Ct.App. 2002), citing *State v. Sampson*, 317 S.C. 423, 545 S.E.2d 721 (1995). Quite simply, because neither side objected, Respondent was subject to the order that he would be required to register as a consequence for violating the sex offender conditions of probation. Indeed, he significantly benefitted from the terms of the plea agreement and recommendation by the State.

In the event this Court wishes to address the sentencing court's decision to make the sex offender registry a possible consequence of violating probation, Respondent submits that the sentencing court was well within its authority and discretion to impose such a condition on Appellant.

Under the sex offender registry law, certain enumerated offenses automatically require registration for those convicted. S.C. Code Ann. § 23-3-430(A) (2007 & Supp. 2022). "The Act

COURTESY OF LUNASHARK MEDIA

also provides judges with discretion to order, as a condition of sentencing, a person convicted of an offense not listed in the statute to be included in the sex offender registry if good cause is shown *by the solicitor*. *Id.* § 23-3-430(D)" *Powell v. Keel*, 433 S.C. at 462-463, 860 S.E.2d at 347 (emphasis added).

In this case, the solicitor recounted the facts that Appellant "forced himself sexually on the victim." Plea Tr. p.13, lines 20-21. The solicitor then recommended that the court hold the sex offender registration in abeyance provided Appellant successfully complete the terms of probation. Plea Tr. p.14, lines 8-18. It was clear from the transcript of the plea that the solicitor provided good cause and a reasonable recommendation – Appellant would not have had to register as a sex offender if he had obeyed the terms of probation. The sentencing court did not err when it conditionally ordered the sex offender registry based on the solicitor's recommendation.

Conclusion

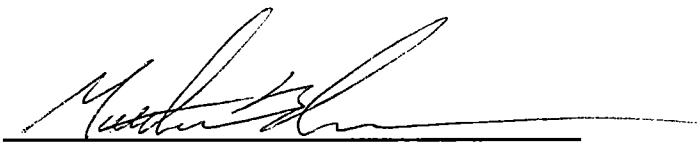
The sentencing court was within its authority to order the sex offender registry as a consequence for violating the sex offender conditions – which Appellant then did in blatant fashion by getting intoxicated, harassing women in a bar, and threatening public officials when he was arrested. He admitted that he violated his probation. The probation revocation court did not abuse its discretion by refusing to grant a continuance, nor did it fail to exercise its sound discretion when it revoked Appellant's suspended sentence and ordered him to register as a sex offender.

For the foregoing reasons, Respondent respectfully requests this Court sustain the order of the probation revocation court and dismiss this appeal.

Signature follows.

COURTESY OF LUNA SHARK MEDIA

Respectfully submitted,



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Columbia, South Carolina
April 14, 2023

COURTESY OF LUNA SHARK MEDIA

STATE OF SOUTH CAROLINA
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STATE OF SOUTH CAROLINA .....RESPONDENT

v.

BOWEN GRAY TURNER,.....APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within *Initial Brief of Respondent and Designation of Matter* on Appellant this 14th day of April, 2023, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Robert Dudek, Chief Appellate Defender
Lara Caudy, Appellate Defender
SC Commission on Indigent Defense
PO Box 11589
Columbia, S.C. 29211-1589

I further certify that all parties required by Rule to be served have been served.

Dawn K. Nichols
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COURTESY OF LUMA SHARK MEDIA

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SC Court of Appeals

COURTESY OF LUNA SHARK MEDIA

April 14, 2023

The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

Re: State v. Bowen Gray Turner
22-001018

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Respondent and Designation of Matter dated April 14, 2023, along with proof of service in the above referenced case.

Sincerely,

Matthew C. Buchanan
General Counsel

MCB:dn

Enclosures

cc: Robert Dudek, Chief Appellate Defender
Lara Caudy, Appellate Defender

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