STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From McCormick County
William P. Keesley, Circuit Court Judge

THE STATE,

Respondent,

vs.

ANDREW JAMES HARRELSON, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

NORMAN MARK RAPOPORT
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

Lexington County Judicial Center
205 East Main Street
Lexington, SC 29072-3490
(803) 359-8352

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF ISSUE ON APPEAL

Did Harrelson's sentence which mandated that he wear an active electronic monitoring device for his conviction for lewd act on a minor violate the Eighth Amendment's prohibition against cruel and unusual punishment and disproportionate sentencing?

STATEMENT OF THE CASE

Appellant Andrew James Harrelson, Jr., was indicted in McCormick County for first degree criminal sexual conduct with a minor. He appeared before the Honorable William P. Keesley on February 24 & 27, 2009. After Harrelson waived presentment, he pled guilty to lewd act on a minor. Harrelson was sentenced pursuant to the Youthful Offender Act (YOA) for an indeterminate period not to exceed six years and placement upon electronic monitoring. A Notice of Appeal was filed and served.

ARGUMENT

Harrelson's sentence which mandated that he wear an active electronic monitoring device on his conviction for lewd act on a minor did not violate the cruel and unusual punishment clauses of either the United States or South Carolina Constitutions.

(Harrelson's Issue).

Harrelson was indicted for first degree criminal sexual conduct with a minor and pled guilty to lewd act on a minor.

The State presented a factual basis for the charge, as follows:

> . . . on Saturday, August 11th, 2007, the Church of [G-d] from Aiken . . . put together an opportunity for the young people to go to Parksville and swim in Clark Hill Lake, Strom Thurmond Lake. The group went there. And during that period of time, several people from both families present here today were there.
>
> [The victim], who was eight years old at the time, was part of the group as was [Harrelson], he was then 16. [Harrelson's] friends of the family. They have a daughter - - [the victim's family] have a daughter . . . who was 16 also, both attended school together, go to the same church, everybody knows everybody.
>
> During the period of time the event went on, several people did notice [the victim] acting a little differently, guarded, not wanting to go back out in the water after they'd seen her out there in the water with [Harrelson], out in the deeper water. But when she got home, she told her sister . . . who did not get to go on the trip, asked her how it had been and she began to explain that while she was out in the deep water at the lake in McCormick in Parksville playing with [Harrelson], he touched her under her bathing suit.
>
> She said the first time she thought it could have been an accident, but she didn't say anything so she just ignored it, but then did it again and she tried to swim away and he grabbed her feet and pulled her back. A minute later he did it again. She told him to stop. He said okay, okay, but a few minutes later he did it again. During the period of time that

> [the victim] was telling her older sister this, she was very upset.
>
> This resulted in a police investigation and evaluation forensically of what [the victim] had to say. And doing that forensic interview in September, she was asked how this happened, how did he get inside of her bathing suit. She said he took his hand and went up the side and she didn't remember if he did this to the upper part of her body, but he asked about how this happened, you know, how did he touch her. She said, well, like, he went in there. And she moves her finger in relation to the question along the private portion of her body.
>
> And she said - - he said, Did he touch you, where and how? She says, On my private with his hand. And she says, Something went inside of that part. And she said, It was his finger, didn't feel good. She said, Finger went inside.
>
> She said there were other people around, but she doesn't
>
> think anybody knew exactly what was going on. She said the
>
> water was up to her neck so all of the touching was under
>
> water. . .

(R. 34-36).

After accepting Harrelson's guilty plea, the trial judge sentenced Harrelson pursuant to the YOA for an indeterminate period not to exceed six years and imposed active electronic monitoring (GPS monitoring).

At sentencing, defense counsel objected to the "electronic portion of the sentence," because, *inter alia*, it violated the prohibition against cruel and unusual punishment. Defense counsel argued that Harrelson was sixteen years old at the time he committed the crimes and eighteen at sentencing, and thus objected to the imposition of lifetime GPS monitoring. (R. 51-52).

On appeal, Harrelson argues the imposition of indefinite GPS monitoring when he was just eighteen years old is inconsistent with evolving standards of contemporary values and grossly disproportionate to the crime, and thus "cruel and unusual punishment for a youth who had not matured fully nor proved to be hard core and worthy of such harsh punishment at this young age." (BOA at 6).[1]

S.C. Code Ann. §23-3-540(A) (Supp. 2008) provides:

> Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or committing or attempting a lewd act upon a child under sixteen, pursuant to Section 16-15-140, the court must order that the person, upon release from incarceration, confinement, commitment, institutionalization, or when placed under the supervision of the Department of Probation, Parole and Pardon Services shall be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

[1]Harrelson fails to argue any of the other grounds raised at sentencing. These grounds are, therefore, deemed abandoned and cannot be addressed on appeal. See State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981)[issues which are not argued in brief are deemed abandoned and preclude consideration on appeal]; State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009) [defendant abandoned appellate claim regarding his cooperation with police about co-defendant's subsequent murder, where defendant's appellate brief did not contain any arguments about this claim]; see also Caprood v. State, 338 S.C. 103, 525 S.E.2d 514, 518 (2000)[holding a trial judge's ruling which is not appealed is the law of the case and will not be considered on appeal].

The trial judge acted in compliance with the "Sex Offender Accountability and Protection of Minors Act of 2006" (Jessie's Law) when he imposed GPS monitoring upon Harrelson's conviction for lewd act on a minor. Since GPS monitoring is mandatory, it left no discretion to decline to impose it or to limit the duration of GPS placement, regardless of Harrelson's age when he committed the lewd act.

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The cruel and unusual punishment clause requires that the duration of a sentence not be grossly disproportionate with the severity of the crime. State v. McKnight, 352 S.C. 635, 576 S.E.2d 168, 177 (2003).

The Supreme Court recently recognized that "what constitutes cruel and unusual punishment, and thus, what violates the Eighth Amendment, is determined by 'evolving standards of decency that mark the progress of a maturing society.' " State v. Pittman, 373 S.C. 527, 647 S.E.2d 144, 162 (2007)[quoting State v. Standard, 351 S.C. 199, 569 S.E.2d 325, 328 (2002)]. In implementing this test, the appellate courts look to objective evidence of how our society views a particular punishment today. State v. Wilson, 306 S.C. 498, 413 S.E.2d 19, 26 (1992); State v. Williams, 380 S.C. 336, 669 S.E.2d 640, 645-46 (Ct. App. 2008). Legislation enacted by the legislature is the "clearest and most reliable objective evidence of contemporary values." Pittman, 647 S.E.2d at 162. "[T]he Constitution requires the court's own judgment to be brought to bear on the issue by 'asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.' " Id., 647 S.E.2d at 163 [quoting Atkins v. Virginia, 536 U.S. 304, 313 (2002)]. It is not the burden of the State to establish a national consensus approving what their citizens have

voted to do; rather, it is the heavy burden of the defendant to establish a national consensus against it. Wilson, 413 S.E.2d at 26; Williams, 669 S.E.2d at 646.

Additionally, the " 'proportionality' bedrock of Eighth Amendment jurisprudence" is equally important a principle as the "evolving standards of decency," and " 'it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" Pittman, 647 S.E.2d at 163 [quoting Atkins, 536 U.S. at 311]. In order to establish that evolving standards of decency preclude his punishment, Harrelson bears the " 'heavy burden' of showing that our culture and laws emphatically and well nigh universally reject it." Id., 647 S.E.2d at 164; Williams, 669 S.E.2d at 646.

In Standard, the Supreme Court found, based upon sentences imposed in other cases, that lengthy sentences or sentences of life without parole imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment, and that an enhanced sentence based upon a prior "most serious" conviction for a crime which was committed as a juvenile does not offend evolving standards of decency so as to constitute cruel and unusual punishment. Id., 569 S.E.2d at 329. Accordingly, Standard's sentence of life without the possibility of parole based on a previous "most serious" armed robbery conviction when he was seventeen and his subsequent "most serious" conviction of burglary in the first degree did not violate the Eighth Amendment.

The Eighth Amendment protection against "cruel and unusual punishment" is triggered, however, only if there is punishment. Trop v. Dulles, 356 U.S. 86, 96 (1958). Section 23-3-400 (2007) provides:

> The intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens. Notwithstanding this legitimate state purpose, these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws.
>
> The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to

> protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

From this language, it is clear the legislature 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. The language thus indicates the legislature's intent to create a non-punitive act. See In re Ronnie A., 355 S.C. 407, 585 S.E.2d 311, 312 (2003) [finding lifelong sex offender registration is non-punitive and therefore no liberty interest is implicated]; State v. Walls, 348 S.C. 26, 558 S.E.2d 524, 526 (2001)[holding sex offender registration is not so punitive in purpose or effect as to constitute a criminal penalty]; Williams v. State, 378 S.C. 511, 662 S.E.2d 615, 617 (Ct. App. 2008)[holding registration on the sexual offender registry is not intended to punish sex offenders and is only regulatory in nature]; see also Smith v. Doe, 538 U.S. 84 (2003) [finding Alaska's sex offender registration act to be non-punitive and so its retroactive application did not violate the *ex post facto* laws].

Because §23-3-540 is regulatory and not punishment, the Eighth Amendment provision prohibiting cruel and unusual punishment is not implicated in this case.

In any event, Harrelson's sentence that mandated lifetime GPS monitoring was not excessive under community standards. GPS monitoring is a far cry from incarceration. In fact, as long as Harreslson complies with the requirements for maintaining functionality of the device (charging the battery, allowing the satellite to acquire a signal, etc.) his liberty in matters such as where to live and work is virtually unrestricted. GPS monitoring is therefore similar to sex-offender registration requirements in this regard and it is

distinguishable from probation, parole, and post-release supervision. Most important and as previously noted, the primary purpose of Jessie's Law is for gathering tracking information as an investigative tool for law enforcement and not punishment. Taking all of this into consideration, placing Harrelson on GPS monitoring as a result of his conviction for lewd act on a minor comports with currently prevailing standards of decency. Harrelson's age when he committed the lewd act is irrelevant. See Ronnie A., 585 S.E.2d at 312 [holding that §23-3-430(C)(4) applies to "any person regardless of age . . . who has been adjudicated delinquent" for certain sex offenses]. Public safety concerns persist regardless of whether Harrelson was 16 when he committed the crime against the eight-year-old victim or had reached the age of maturity at the time of the sexual assault against her. Because Harrelson has offered no valid basis upon which to distinguish his conduct for purposes of GPS monitoring, particularly in light of the disgusting facts presented in his case, the terms of his sentence pursuant to §23-3-540 do not constitute cruel and unusual punishment. See id. [holding lifelong sex offender registration of juvenile fulfilled the legislature's intent to protect the public from offenders who may re-offend]. Therefore, Harrelson's argument is without merit and should be dismissed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted the sentence of the lower court should be affirmed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

NORMAN MARK RAPOPORT
Senior Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

BY:_____
NORMAN MARK RAPOPORT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 6, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From McCormick County
William P. Keesley, Circuit Court Judge

THE STATE,

Respondent,

vs.

ANDREW JAMES HARRELSON, JR.,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

NORMAN MARK RAPOPORT
Senior Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

By:_____
NORMAN MARK RAPOPORT

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 6, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From McCormick County
William P. Keesley, Circuit Court Judge

THE STATE,

Respondent,

vs.

ANDREW JAMES HARRELSON, JR.,

Appellant.

PROOF OF SERVICE

I certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Wanda H. Carter, Esquire, Deputy Chief Appellate Defender, S.C. Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

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

This 6th day of November, 2009.

NORMAN MARK RAPOPORT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

November 6, 2009

Wanda H. Carter, Esquire
Deputy Chief Appellate Defender,
S.C. Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

Re: State v. Andrew James Harrelson, Jr.

Dear Ms. Carter:

I am enclosing two copies of the Final Brief of Respondent, along with proof of service, in the above-referenced case.

Sincerely,

Norman Mark Rapoport
Senior Assistant Attorney General

NMR/erd
Enclosure

cc: The Honorable Jeanette F. Barber
(original and 9 copies enclosed)

Victim Services
(with enclosure)

Wanda H. Carter, Esquire
Deputy Chief Appellate Defender,
S.C. Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211