

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Edward W. Miller, Circuit Court Judge

THE STATE,RESPONDENT,

v.

REGINALD R. LATTIMORE,APPELLANT.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether Section 23-3-540(C) of the South Carolina Code, which mandates that the circuit court order Appellant to wear an active electronic monitoring device for the balance of his life upon a finding that he has committed a probation violation, violates the cruel and unusual punishment clauses of either the United States or South Carolina Constitutions?

RESPONDENT'S STATEMENT OF THE CASE

On February 9, 2004, Appellant pled guilty in Lexington County to lewd act on a minor under 16 and was sentenced by the Honorable Marc Westbrook to ten (10) years imprisonment. He timely filed a motion to reconsider and on April 12, 2004, Judge Westbrook amended the sentence to ten (10) years imprisonment suspended upon the service of three (3) years imprisonment and five (5) years probation. Appellant was ordered to comply with the South Carolina Department of Probation, Parole and Pardon Services (the Department's) standard conditions of probation as well as the following special conditions: No contact with the victim in this case or her family. (R.p.19-p.22). He did not appeal his guilty plea or sentence.

Appellant was subsequently charged with violating the conditions of his probation in the following respects:

By being convicted on 12/05/07 for a Bench Warrant for the offense of Driving Under Suspension and receiving a sentence of \$647.50 or 30 Days. - By being convicted for Failure to Register as a Sex Offender and receiving a sentence of 90 days HIP by the Honorable Judge Pyle in the Greenville County Court of General Sessions on 02/14/08. - By being 7 payments (\$140.00) in arrears on his supervision fee. - By failing to follow the advice and instructions of his supervising agent.

(R.p.23-p.24; R.p.17-p.18). On April 4, 2008, Appellant appeared at a probation violation hearing before the Honorable Edward W. Miller. He was represented by Thomas M. Hoskinson of the Greenville County Public Defender's Office. The State was represented by J. Benjamin Aplin, Assistant Chief Legal Counsel for the Department, and probation agent R.J. Gilbert (R.p.1).

At the hearing, Appellant admitted the violations alleged in the citation, and the court found him in willful violation. (R.p.3, line 3-p.4, line 5). Probation Agent Gilbert then

requested a partial revocation of two years and continue on probation, and noted the violation would require mandatory GPS placement because of Appellant's status as a sex offender. (R.p.4, lines 6-10). Appellant argued that GPS placement pursuant to Section 23-3-540 of the Code as a result of his probation violation would: (1) constitute an ex post facto violation; (2) constitute cruel and unusual punishment; (3) violate his constitutional right to privacy; violate the doctrine of separation of powers. Specifically, in regard to the cruel and unusual punishment claim, Appellant argued lifetime GPS monitoring was excessive and harsh. (R.p.6, line 1-p.8, line 21). The State responded that where a violation of probation could result in imprisonment, being placed on lifetime GPS monitoring would certainly not be considered a harsh enough outcome to constitute cruel and unusual punishment. (R.p.11, lines 17-23). At the conclusion of the hearing the court found Appellant in willful violation, continued him on probation, and placed him on lifetime GPS monitoring pursuant to Section 23-3-540 of the Code. Appellant timely filed a notice of intent to appeal the probation continuation. This Final Brief of Respondent follows.

ARGUMENT

Section 23-3-540(C) of the South Carolina Code, which mandates that the circuit court order Appellant to wear an active electronic monitoring device for the balance of his life upon a finding that he has committed a probation violation, does not violate the cruel and unusual punishment clauses of either the United States or South Carolina Constitutions.

The circuit court acted in compliance with the Sex Offender Accountability and Protection of Minors Act of 2006 (Jessie's Law) when it imposed active electronic monitoring (GPS monitoring) on Appellant upon finding him in violation of the conditions of his probation on April 4, 2008. S.C. Code Ann. § 23-3-540(C) (2007). Although the General Assembly gave the probation violation court the discretion to either impose GPS monitoring, or not impose GPS monitoring upon finding some probationers in violation of their probation, S.C. Code Ann. § 23-3-540(D) (2007), it did not extend that discretion to the placement of Appellant on GPS monitoring for his probation violations, because he was on probation for lewd act upon a minor. S.C. Code Ann. § 23-3-540(C) (2007). Instead, the law provides:

A person who is required to register pursuant to this article for . . . committing or attempting a lewd act upon a child under sixteen, pursuant to Section 16-15-140, and who violates a term of probation . . . must be ordered by the court . . . to be monitored by the Department . . . with an active electronic monitoring device.

S.C. Code Ann. § 23-3-540(C) (2007) (emphasis added). Likewise, the General Assembly did not give the circuit court discretion to limit the duration of GPS monitoring once it has been imposed. Instead, regardless of which of the several avenues under Jessie's law that GPS monitoring is imposed, the law provides:

The person shall be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device for the duration of time the person is required to remain on

the sex offender registry pursuant to the provisions of this article,
unless the person is committed to the custody of the State.

S.C. Code Ann. § 23-3-540(H)(2007)(emphasis added). Since this language is mandatory, it left no discretion for either the probation court or the State to decline to impose GPS monitoring, or to limit the duration of the GPS placement.

Acknowledging the requirements of the law and his probation violations, Appellant argues that the law itself, which requires him to wear an electronic monitoring device for the balance of his life, constitutes cruel and unusual punishment under the facts of his case. The State submits this argument is without merit. 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.” U.S. Const. Amend. VIII. Similarly, the South Carolina Constitution provides: “Excessive bail shall not be required; nor shall excessive fines be imposed; nor shall cruel, nor corporal, nor unusual punishment be inflicted” S.C. Const. Art. I, § 5. The United States Supreme Court notes that at its core the Eighth Amendment prohibits excessive sanctions. Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002). Punishment is “excessive,” and therefore prohibited by Eighth Amendment, if it is not graduated and proportioned to the offense. Id. Thus, for Eighth Amendment purposes, the court conducts a proportionality analysis to determine whether the punishment is disproportionate to the crime committed. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001 (1983). Likewise, in analyzing the prohibition against cruel and unusual punishment in the South Carolina Constitution, our courts have recognized the concept of requiring a sentence to be in proportion to the crime. State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2001);

Stockton v. Leeke, 269 S.C. 459, 237 S.E.2d 896 (1977). Indeed our Courts have held that a sentence, though not cruel and unusual in kind, may be so severe in duration as to be cruel and unusual. State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948). Yet, underlying any proportionality analysis is the acknowledgment that the burden of demonstrating a sentence is cruel and unusual is on the person asserting the constitutional violation. Stockton at 463, 237 S.E.2d at 897. Here, that burden has not been met by Appellant, either in an argument to the circuit court, or in this appeal. Instead, Appellant simply asserts the duration of GPS monitoring, a life time, is so severe as to fall within the meaning of cruel and unusual punishment.

A determination of whether punishment in a particular case is unconstitutionally excessive in light of evolving community standards should be informed by objective factors to the maximum possible extent, the with clearest and most reliable one being legislation enacted by the State's legislature. Atkins, supra. The mere fact that the Legislature enacted a law requiring lifetime GPS monitoring for individuals who: (1) are registered sex offenders; (2) committed sex crimes against children; and (3) have been found in violation of the terms of their probation; is strong evidence that the alleged “punishment” is not excessive under community standards. This is particularly true considering the nature of the “punishment” Respondent finds objectionable. GPS monitoring is a far cry from incarceration. Indeed, as long as the person subject to GPS monitoring complies with requirements for maintaining functionality of the device (charging the battery, allowing the satellite to acquire a signal, etc.) his or her liberty is virtually unrestricted. Although Jessie’s Law allows the Department some leeway to establish additional conditions of its GPS Tracking Program, the primary purpose for gathering tracking information is as an investigative tool for law enforcement. S.C. Code Ann. § 23-3-540(A)

(2007). The State submits that taking all of this into consideration, the statute mandating that Appellant be placed on lifetime GPS monitoring as a result of his probation violation comports with currently prevailing standards of decency and punishment, and does not violate the cruel and unusual punishment clauses of the United States and South Carolina Constitutions. Therefore, Appellant's argument is without merit and should be dismissed.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the probation continuation order of the circuit court be affirmed and that Appellant' s appeal be dismissed.

Respectfully submitted,

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