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Case Number 269,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAMMEYIN JOHNSON,	)	
	)	
Defendant Below-Appellant,	)	No. 269, 2021
	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE
	)	ID No. 1609014541
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

OPENING BRIEF

COLLINS & PRICE

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Dated: February 8, 2022

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

NATURE OF PROCEEDINGS

Police arrested Dammeyin Johnson on September 20, 2016, charging him with Tier 5 Possession of Cocaine, Possession with Intent to Deliver Cocaine, and a traffic violation for improper window tint.[1] A November 21, 2016 indictment charged Mr. Johnson with Drug Dealing, Aggravated Possession, and the window tint violation.[2]

Mr. Johnson's original attorney filed a motion to withdraw as counsel;[3] the Superior Court granted the motion.[4] An assistant public defender entered his appearance. He filed a motion to file a suppression motion out of time[5] and a motion to suppress[6] on August 2, 2017. The next day, however, Mr. Johnson decided to accept a plea offer.[7] The Court sentenced Mr. Johnson to four years unsuspended Level V time, followed by 18 months of Level III probation.[8]

Since then, Mr. Johnson has been a prolific filer of motions. He filed his first Motion for Modification of Sentence on November 3, 2017.[9] The Court denied

[1] A12-13.
[2] A14-15.
[3] A16-21.
[4] A22.
[5] A23-26.
[6] A27-35.
[7] A36-38.
[8] A50-53.
[9] A54-66.

that motion on November 9, 2017.[10] He then filed a "motion to amend" the initial motion.[11] The Court denied that motion also.[12]

Mr. Johnson filed an appeal to this Court, but voluntarily dismissed his appeal on February 6, 2018.[13] This Court closed the case on February 8, 2018.[14]

Mr. Johnson next moved to postconviction proceedings. He filed a *pro se* Motion for Postconviction Relief[15] and a Motion for Appointment of Counsel[16] on July 10, 2018. He also filed a supplement,[17] a motion to reargue the denial[18] of the appointment of counsel,[19] and a motion for clarity of the briefing schedule.[20] The Superior Court again denied his motion for the appointment of counsel.[21]

On February 8, 2019, the Commissioner issued a Report and Recommendation that Defendant's Motion for Postconviction Relief Should be Denied.[22] The Superior Court denied the motion on May 7, 2019.[23]

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[10] A67.
[11] A68-82.
[12] A83.
[13] A84-86.
[14] A87-88.
[15] A89-94.
[16] A95-101.
[17] A102-147.
[18] A148-149.
[19] A150-169.
[20] A170-172.
[21] A173-175.
[22] *State v. Johnson*, 2019 WL 549417 (Del. Super. Feb. 8, 2019); A245-251.
[23] A256-257.

While the postconviction motion was pending, Mr. Johnson filed a motion to suspend the last six to nine months of prison time.[24] The Court denied this motion on June 19, 2019.[25] He filed another substantially similar motion on December 18, 2019,[26] which the Court denied.[27]

Mr. Johnson next filed a motion for credit time on April 27, 2020.[28] While that motion was pending, he filed another motion to modify, citing "extraordinary circumstances due to the national COVID-19 pandemic."[29] The Court denied the extraordinary circumstances motion on May 20, 2020.[30] However, the Court did grant the motion for credit time, providing two days of credit time to Mr. Johnson.[31] The Court issued a corrected sentence order.[32]

Finally, on May 26, 2021, Mr. Johnson filed the motion that is the subject of this appeal.[33] The motion is to modify his sentence to remove the GPS requirement, which was not ordered as part of his sentence, but was imposed because he is a Tier III sex offender. The Court wrote to the prosecutor requesting

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[24] A252-255.
[25] A258-259.
[26] A260-262.
[27] A263-266.
[28] A267-270.
[29] A271-275.
[30] *State v. Johnson*, 2020 WL 2563690 (Del. Super. May 20, 2020); A276-277.
[31] *State v. Johnson*, 2020 WL 4036586 (Del. Super. July 16, 2020); A282.
[32] A283-286.
[33] A288-293.

a response.[34] The State filed its response on July 9, 2021.[35] On August 10, 2021, the Superior Court issued a letter order denying Mr. Johnson's motion.[36]

Mr. Johnson appealed and filed an Opening Brief in this Court.[37] The State filed a Motion to Affirm on October 28, 2021.[38] This Court denied the motion to affirm; *sua sponte* and in the interest of justice, this Court ordered that the undersigned counsel be appointed.[39]

This is Mr. Johnson's Opening Brief.

[34] A294.
[35] A295-297.
[36] Exhibit A.
[37] A298-301.
[38] A302-339.
[39] A340-341.

SUMMARY OF ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING THAT THE GPS TRACKING REQUIREMENT IN 11 *DEL C.* § 4121(u) APPLIES TO A SUBSEQUENT SENTENCE AFTER THE OFFENDER HAS COMPLETED THE PROBATION FOR THE UNDERLYING SEX OFFENSE.

In 2007, the General Assembly enacted H.B. 100, requiring that Tier III sex offenders wear a GPS tracker as a condition of "their probation."[40] Mr. Johnson is a Tier III sex offender who completed his probation for the sex offense in 2011; the tracker was removed. In 2016, he committed drug-related offenses. When placed on probation for that offense in January 2021, the probation officer placed a GPS tracker on him because of his status as a Tier III sex offender.

The Superior Court erred in denying Mr. Johnson's motion to remove the GPS requirement. The statute is not ambiguous. In the context of the entirety of the statute, the GPS requirement applies only to the probation being served for the underlying sex offense. Even if the statute is ambiguous as yielding two possible meanings of "their probation," the phrase should be interpreted to mean only the probation for the underlying sex offense. To find that the requirement applies to any probation for the rest of the offender's life while on Tier III would yield unreasonable and absurd results.

The Superior Court's denial of Mr. Johnson's motion should be reversed.

[40] 11 *Del. C.* § 4121(u).

STATEMENT OF FACTS

Mr. Johnson is designated a Tier III sex offender and serves his sentence.

A grand jury indicted Mr. Johnson on several charges, including Kidnapping First Degree and two counts of Unlawful Sexual Intercourse Second Degree.[41] The case went to trial on September 16, 1998. A jury found Mr. Johnson guilty of Unlawful Sexual Intercourse Second Degree, Unlawful Imprisonment Second Degree, Unlawful Sexual Contact Third Degree, Assault Third Degree, and Theft.[42]

On January 8, 1999, the Superior Court sentenced Mr. Johnson as follows:

- Unlawful Sexual Intercourse Second Degree: 10 years Level V.
- Aggravated Act of Intimidation: 2 years at Level V.
- Aggravated Act of Intimidation: 2 years at Level V, suspended for one year at Level IV halfway house.
- Unlawful Sexual Contact Second Degree: Two years at Level V, suspended for two years at Level III.
- Assault Third Degree: One year at Level V, suspended for one year at Level III, concurrent.
- Theft: One year at Level V, suspended for one year Level III, concurrent.[43]

[41] A342.
[42] A344; D.I. 20.
[43] A362-367.

The sentence included special conditions, notably among them the statutory sex offender notification requirements.[44] The sentence did not include GPS monitoring.

This Court affirmed Mr. Johnson's convictions and sentence.[45]

On December 15, 2011, the Court released Mr. Johnson from probation.[46]

Enactment of House Bill 100 in 2007

On March 28, 2007, sponsors of H.B. 100 introduced the bill. It was assigned to the Judiciary Committee in the House.[47] The bill amends 11 *Del. C.* § 4121 by moving subsection (u) to (v) and inserting a new subsection (u):

> (u) Notwithstanding any provision of this Section or Title to the contrary, any Tier III sex offender being monitored at Level IV, III, II, or I, shall as a condition of their probation, wear a GPS locator ankle bracelet paid for by the probationer.[48]

The Synopsis states, "this Bill provides for GPS tracking for Tier III sex offenders while they are on probation supervised by the Department of Correction."

On May 2, 2007, the House Judiciary Committee released the bill with five members voting on its merits and no unfavorable votes.[49] The minutes of the

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[44] A368.
[45] *Johnson v. State*, 753 A.2d 438 (Del. 2000).
[46] A361; D.I. 163.
[47] A371.
[48] A385. The subsection was amended to make the payment requirement inapplicable to juvenile Tier III sex offenders. 11 *Del. C.* § 4121(u).
[49] A371.

committee meeting are brief; the general discussion was that Tier III offenders are the worst offenders and that the GPS tracking will provide information as to where the offenders are.[50] Representative Wagner, the primary sponsor, stated that the purpose of the tracking was not to arrest offenders if they neared a prohibited area, but rather to act as a deterrent.[51]

It appears no discussion was had about whether the tracking was intended for the probation within the offender's sex offense or whether it was for any offense for the rest of the offender's life if on probation.

On June 5, 2007, the House took up the bill. Debate was brief. Representative Wagner stated that Tier III sex offenders are the most dangerous sex offenders.[52] There were only a few questions, regarding payment for the trackers and how the GPS data would be used. Representative Wagner responded that sometimes the offenders are homeless, and authorities do not know where they are.[53] Finally, Representative Wagner noted that Representative Schwartzkopf and she had discussed the bill; Representative Schwartzkopf's understanding is that very few Tier III sex offenders ever get out of jail – "but if they do, this is the way we can track them."[54]

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[50] A377.
[51] *Id.*
[52] A381.
[53] *Id.*
[54] *Id.*

Again, no discussion occurred as to the scope of the bill and whether it applied to Tier III sex offenders who had completed their sentences and were on probation for some other case.

The House voted 39-0 in favor of H.B. 100, with two not voting.[55]

The Senate took up the bill on June 30, 2007.[56] Debate lasted only a few minutes. One senator asked whether there should be a fiscal note with the bill; Senator Sokola explained that the probationer is required to pay for the GPS.[57] Senator Sokola noted that the GPS requirement may get some of the unnecessary prison populations out of the prisons while still protecting the public.[58]

No discussion occurred as to the scope of the bill and whether it applied to probationers serving the sentence for their sex offense or whether the GPS requirement applied to any subsequent probationary sentence.

The Senate voted 20-0 in favor of the bill, with one senator absent.[59]

The Governor signed the bill into law on July 12, 2007.[60]

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[55] A371.
[56] *Id.*
[57] A384.
[58] *Id.*
[59] A371.
[60] *Id.*

Probation places a GPS tracker on Mr. Johnson; the Superior Court denies his motion to remove the tracker.

On May 26, 2021, Mr. Johnson filed a motion to modify his sentence to remove the tracking requirement.[61] Probation and Parole had placed the tracker on him after his release from Level IV and entry into Level III probation, citing the fact that he is a Tier III sex offender and the GPS is a requirement.[62] Mr. Johnson argued this enhanced requirement violated his constitutional rights, particularly double jeopardy and the *ex post facto* clauses.[63]

The State responded to the motion.[64] It asserted that a plain reading of the statute does not limit the GPS monitoring requirement solely to the sentence for the offense that put a defendant on the registry.[65] The State also offered to have a sentence review, and if the Court was amenable, the State would not oppose a reduction of Mr. Johnson's Level III time from eighteen to twelve months.[66]

The Superior Court adopted the State's "plain reading" argument and denied the motion.[67] The Court also declined to reduce the length of Mr. Johnson's probationary period.[68]

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[61] A288-293.
[62] A290.
[63] *Id.*
[64] A295-297.
[65] A296.
[66] A297.
[67] Exhibit A at 1.
[68] Exhibit A at 2.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING THAT THE GPS TRACKING REQUIREMENT IN 11 *DEL C.* § 4121(u) APPLIES TO A SUBSEQUENT SENTENCE AFTER THE OFFENDER HAS COMPLETED THE PROBATION FOR THE UNDERLYING SEX OFFENSE.

A. Question Presented

Whether the Superior Court erred in finding that the GPS tracking requirements for Tier III sex offenders extends beyond the original sentence and to any subsequent sentence for the offender. This question was preserved when Mr. Johnson filed a Motion for Modification of Probationary Period of Sentence on May 26, 2021.[69]

B. Standard of Review

This Court reviews questions of law, including the interpretation of statutes, *de novo*.[70] When interpreting a statute, this Court attempts to ascertain and give effect to the General Assembly's intent.[71]

[69] A288-293.
[70] *Rehoboth Bay Homeowners' Association v. Hometown Rehoboth Bay, LLC*, 252 A.3d 434, 441 (Del. 2021).
[71] *ACW Corp. v. Maxwell*, 242 A.3d 595, 599 (Del. 2020).

C. Merits of Argument

Applicable legal precepts

If a statute is not ambiguous, then the plain meaning of the statutory language controls.[72] A statute is ambiguous if it is "reasonably susceptible to different interpretations, or if giving a literal interpretation to the words of the statute would lead to an unreasonable or absurd result that could not have been intended by the legislature."[73] The United States Supreme Court and this Court have held, "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed."[74]

This Court has had occasion to consider legal issues regarding 11 *Del. C.* § 4121(u). In *Smith v. State*, this Court held that the sex offender registration requirement itself did not violate the *ex post facto* clause because the community notification provisions are not punitive in nature.[75] In 2011, this Court applied that same reasoning to find the GPS tracking requirement did not violate the *ex post facto* clause, either.[76]

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[72] *Wiggins v. State*, 227 A.3d 1062, 1066 (Del. 2020).
[73] *Arnold v. State*, 49 A.3d 1180, 1183 (Del. 2012).
[74] *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Friends of H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055, 1059 (Del. 2011).
[75] *Smith v. State*, 919 A.2d 539, 541 (Del. 2006).
[76] *Hassett v. State*, 2011 WL 446561, at *1 (Del. Feb. 8, 2011).

The litigants in *Smith* and *Hassett* were serving the sentences for their original sex offense that put them on the registry. This Court has not had occasion to consider whether § 4121(u) applies to offenders who have completed their original sentences and are serving a probationary sentence for a later, wholly unrelated offense.

The statute is not ambiguous; it requires GPS monitoring for Tier III sex offenders only during the term of their qualifying sentence, not all sentences into the future.

The subsection requiring GPS monitoring states, in relevant part,

> (u) Notwithstanding any provision of this section or title to the contrary, any Tier III sex offender being monitored at Level IV, III, II or I, shall as a condition of their probation, wear a GPS locator ankle bracelet paid for by the probationer.[77]

Although inelegantly worded, the phrase "their probation" clearly refers to the probation for the offense that resulted in the registry requirement. The meaning of a statute must, in the first instance, be sought in the language in which the act is framed.[78] A review of the whole statute makes clear that the subsection refers only to the probation for the sex offense.

[77] 11 *Del. C.* § 4121(u).
[78] *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Friends of H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055, 1059 (Del. 2011).

The section first defines a sex offender by establishing what offenses qualify for sex offender status.[79] Next, the statute requires the sentencing court to inform the offender of the tier level to which the offender is assigned.[80]

The statute establishes that an offender who pleads guilty to a lesser included offense of a qualifying offense is still designated a sex offender.[81] The statute provides that if the person "has violated the terms of *that person's own probation or parole* as set forth in paragraph (a)(4)(f)," the offender shall be sentenced to the tier for the originally charged offense.[82]

The statute also permits application by Tier III offenders to reduce their risk assessment tier to Tier II, if 25 years have passed from their last day of Level V or IV time. However,

> If the offender has been convicted of any subsequent offense (other than a motor vehicle offense) or has been otherwise found to have violated the terms of any probation, parole or conditional release relating to the sentence originally imposed following the conviction for the underlying sex offense, no petition or redesignation shall be permitted until 25 years have elapsed from the date of the subsequent conviction or finding of a violation, during which time no additional convictions or findings of violation can have occurred.[83]

[79] 11 *Del. C.* § 4121(a)(4).
[80] 11 *Del. C.* § 4121(b).
[81] 11 *Del. C.* § 4121(a)(4)(e).
[82] 11 *Del. C.* § 4121(c)(emphasis added).
[83] 11 *Del. C.* § 4121(e)(2)(a).

This subsection makes clear that the only penalty imposed on Tier III offenders who subsequently commit unrelated offenses is that it restarts the clock on their ability to petition for a tier reduction. This would have been the place for the General Assembly to include language that the provisions of § 4121(u) apply to any subsequent unrelated offenses. The General Assembly did not do so.

As the foregoing demonstrates, when read in the context of the sex offender registration statute, the GPS requirement for Tier III offenders applies only during "their probation" – that is to say, the probation for their qualifying sex offenses. The entire statute imposes requirements on the offender *for the sex offense* and not for anything else. Moreover, the statute elsewhere never imposes on those Tier III offenders who subsequently commit non-qualifying offenses any other sanction, other than a delay of when they can apply for tier reduction.

The Superior Court erred in finding that a plain reading of the statute does not limit the GPS tracking only to the underlying sex offense.[84] Mr. Johnson's motion to relieve him of the Level III GPS requirement should have been granted.

If the phrase "their probation" is ambiguous, it should be interpreted to mean the probation from the original qualifying sex offense; any other interpretation would lead to unreasonable and absurd results.

The phrase "their probation" within § 4121(u) is arguably ambiguous because it is reasonably susceptible to two different meanings. The statute could

[84] Exhibit A at 1-2.

mean just the probation for the qualifying sex offense, or it could mean any probation ever while the offender remains a Tier III offender. The legislative history of § 4121(u) provides no guidance, as it appears the issue was never considered or discussed. This may be because the bill's sponsor in the House believed that Level III offenders rarely get out of prison.[85]

As argued previously, the surrounding subsections in the act itself militate in favor of the interpretation being that the subsection applies only during the sex offender's probation for the qualifying offense, and not subsequent probations. Moreover, interpreting the subsection to apply to *any* subsequent probation would yield unreasonable or absurd results.

Mr. Johnson's case provides a good example. He was released from probation in 2011. The GPS monitor was removed at the conclusion of his probation. From 2011 to 2016, he was required to report and fulfill all sex offender requirements. But he was not GPS-tracked. In 2021, ten years later, due to probation for an unrelated conviction, he was placed back on a GPS monitor. He committed no new sex offense that would justify enhanced monitoring. It is arbitrary and unreasonable to impose a GPS requirement to which he was not sentenced, when in accordance with the statute, he required no GPS tracking from

[85] A382.

2011 to 2016. He did not become any more dangerous as a sex offender in 2021 by the commission of an unrelated offense.

Tier III offenders, "the most dangerous of offenders," according to the bill's sponsor,[86] are not GPS-tracked at all after they complete probation. They have reporting requirements and face criminal liability for violating those requirements. But the authorities are not tracking them. After the probation period ends, there will never be further GPS tracking so long as the offender complies with reporting requirements. However, if subsequently placed on Level I, II, or III probation for *any* non-sex offense, they would suddenly be considered more dangerous *as a sex offender* and require GPS tracking.

Such an interpretation yields an absurd and unreasonable result and is not reflective of the General Assembly's intent. Had it been the intent, the bill would have been crafted to ensure that any subsequent offense resulting in probation would require GPS monitoring. The General Assembly declined to include such language in the bill. It would not have been logical anyway. There is no nexus or relationship between the dangerousness of a Tier III sex offender and whether they subsequently commit unrelated offenses. The offender's danger to the community is the same as before the unrelated offense – when the offender was not being tracked.

[86] A381.

To the extent § 4121(u)'s "their probation" phrasing is ambiguous, it should be resolved to define "their probation" as the probation directly related to the underlying sex offense that created Tier III status. The Superior Court erred in finding otherwise and should be reversed.

CONCLUSION

For the foregoing reasons, Appellant Dammeyin Johnson respectfully requests that this Court reverse the judgment of the Superior Court.

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