

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA

Petitioner,

v.

Case No. SC19-912
5th DCA No. 5D18-2206

BRIAN K. MCKENZIE,

Respondent.
_____ /

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

ASHLEY MOODY
ATTORNEY GENERAL

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Florida Bar Number 0773026
444 Seabreeze Boulevard, Suite 500
Daytona Beach, Florida 32118
(386) 238-4990/ (386) 238-4997 (fax)
crimappdab@myfloridalegal.com

COUNSEL FOR PETITIONER

RECEIVED, 02/17/2020 03:30:29 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF CONTENTS..... I

TABLE OF AUTHORITIES ii

SUMMARY OF THE ARGUMENT1

ARGUMENT2

 THE CIRCUIT COURT HAD JURISDICTION TO IMPOSE THE SEXUAL
 PREDATOR DESIGNATION UNDER SECTION 775.21.2

 A. *Under the statute’s plain language, a court retains jurisdiction until the
 mandatory designation is imposed*2

 B. *Respondent’s additional arguments in favor of relief are without merit.*7

CONCLUSION.....8

CERTIFICATE OF SERVICE8

CERTIFICATE OF COMPLIANCE.....8

TABLE OF AUTHORITIES

CASES:

Cuevas v. State,
31 So. 3d 290 (Fla. 3d DCA 2010)2,6

Florida Dept. of Env'tl. Prot. v. ContractPoint Florida Parks, LLC,
986 So. 2d 1260, 1265 (Fla. 2008).....7

Kelly v. State,
795 So. 2d 135 (Fla. 5th DCA 2001)2,3

McKenzie v. State,
272 So. 3d 808 (Fla. 5th DCA 2019)2,6

State v. Atkinson,
831 So. 2d 172, 174 (Fla. 2002).7

STATUTE:

§ 775.21, Fla. Stat. (2018).....*passim*

SUMMARY OF THE ARGUMENT

Based upon the plain language of section 775.21, Florida Statutes, (“The Florida Sexual Predators Act”) the circuit court was required to designate Respondent as a sexual predator. Sections 775.21(4)(a), (5)(a), and (c) gave the court jurisdiction to do so when the State filed a notice of Respondent’s sexual predator status. The fact that Respondent had already completed his sentence in connection with his criminal case was irrelevant. The Fifth District Court of Appeal erred when it held that by including specific instructions for the designation of persons determined to be sexual predators in civil commitment proceedings or due to out-of-jurisdiction convictions, section 775.21(5)(c) thereby excluded from the court’s jurisdiction the designation of all other sexual predators. Such a reading is inconsistent with the plain language of the statute, is contrary to clearly stated legislative intent, and leads to an absurd result.

Further, Respondent’s arguments on direct appeal that the absence of a sexual predator designation was part of his plea agreement with the State, or that the doctrines of laches, res judicata, waiver, and collateral estoppel applied, were without merit.

ARGUMENT

THE CIRCUIT COURT HAD JURISDICTION TO IMPOSE THE SEXUAL PREDATOR DESIGNATION UNDER SECTION 775.21.

- A. *Under the statute's plain language, a court retains jurisdiction until the mandatory designation is imposed.*

On October 28, 2009, Respondent pled *nolo contendere* to engaging in sexual activity with a child while in a position of familial or custodial authority. It is undisputed that he should have been designated a sexual predator at the time of sentencing but was not. Respondent completed the criminal sanctions related to his offense. Later, the State filed a notice requesting the trial court to properly designate Respondent as a sexual predator as was mandatorily required by the statute. The trial court agreed and entered an order requiring Respondent to comply with the requirements set out in section 775.21, Fla. Stat. (2018). In doing so, the trial court recognized that such action was authorized by Cuevas v. State, 31 So. 3d 290 (Fla. 3d DCA 2010). However, the Fifth District Court of Appeal in the instant matter determined that the trial court lacked subject matter jurisdiction over the case given that the criminal sanctions had been served. McKenzie v. State, 272 So. 3d 808 (Fla. 5th DCA 2019). The State disagrees.

Section 775.21, Fla. Stat. (2018), is entitled “The Florida Sexual Predators Act.” The importance the Legislature placed on this designation and the fact it was mandatory was highlighted in Kelly v. State, 795 So. 2d 135 (Fla. 5th DCA 2001),

when the court wrote the following:

The Act is a substantive law enacted to implement the declared public policy of this state. *See* § 775.24, Fla. Stat. (2000). The Legislature enacted the Act based on its finding that “[r]epeat sexual offenders, sexual offenders who use physical violence, and **sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety.**” § 775.21(3)(a), Fla. Stat. (2000). Moreover, the Legislature found that “[t]he state has a compelling interest in protecting the public from sexual predators and in protecting children from predatory sexual activity,” section 775.21(3)(c), Florida Statutes (2000), and that “in order to protect the public, it is necessary that the sexual predator be registered with the department and that members of the community and the public be notified of the sexual predator's presence.” § 775.21(3)(d), Fla. Stat. (2000).

Given the fact that the sexual predator designation is part of a substantive statutory enactment designed and intended to accomplish these policy objectives, **the courts have recognized that the designation is neither a sentence nor a punishment.** Payne v. State, 753 So. 2d 129 (Fla. 2d DCA), rev. denied, 773 So. 2d 56 (Fla. 2000); Burkett v. State, 731 So. 2d 695, 698 (Fla. 2d DCA), rev. denied, 719 So. 2d 892 (Fla. 1998); Rickman v. State, 714 So. 2d 538, 539 (Fla. 5th DCA 1998); Ortega v. State, 712 So. 2d 833 (Fla. 4th DCA 1998); Collie v. State, 710 So. 2d 1000 (Fla. 2d DCA), rev. denied, 722 So. 2d 192 (Fla.) and cert. denied, 525 U.S. 1058, 119 S.Ct. 624, 142 L. Ed. 2d 563 (1998); Fletcher v. State, 699 So. 2d 346 (Fla. 5th DCA 1997), rev. denied, 707 So. 2d 1124 (Fla. 1998); see also Nelson v. State, 780 So. 2d 294 (Fla. 1st DCA 2001); Donovan v. State, 773 So. 2d 1264 (Fla. 5th DCA 2000). . . .

(Emphasis added); Kelly v. State, 795 So. 2d at 137-138.; see also, section 775.21(3), Fla. Stat. (2018).

The Fifth District acknowledged that the designation was not criminal given it is neither a sentence nor a punishment; however, it still embraced Respondent’s

argument that because the criminal aspect of the case ended the circuit court did not have subject matter jurisdiction. On page 9 of Respondent's answer brief, he set out several cases that stand for the position that a criminal court does not retain jurisdiction over any criminal aspects of a case once the criminal sentence has been completed. For example, these cases prohibit a trial court from imposing a sentence for violation of probation if the defendant has already completed his sentence. The flaw in this position is that this is not about a defendant's criminal sentence. It is about a mandatory designation that the trial court erroneously failed to impose. Further, this designation is not criminal being neither a sentence nor a punishment.

The State would submit jurisdiction clearly lies in the circuit court, period. Section 775.21 makes it clear that when an offender qualifies the designation is mandatory. Since the issue is not a revisiting of the criminal sanction after such had been completed the fact there is an expired criminal sentence is irrelevant. Interestingly, Respondent's jurisdictional concerns do not seem to limit the power of the circuit court when it has someone before it who was civilly committed under the Jimmy Ryce Act or when someone has moved to Florida from another jurisdiction (another state for example) but has committed a qualifying offense. See, section 775.21(5)(a)1. and 3., Fla. Stat. (2018). Under Respondent's logic, evidently, the Legislature only intended to exempt a circuit court's jurisdiction for individuals who fall into his category – people who committed a mandatory

qualifying offense who were not properly designated and who have completed their criminal sanctions.

Instead of this being what the Legislature intended, the State asserts that the Legislature was well aware that normally the state attorney's offices would not intervene in matters involving out of state individuals or involving civilly committed individuals. So, the Legislature set out specific details that the state attorney shall act when made aware of such qualified offenders. Stated differently, the circuit court has jurisdiction over all offenders who qualify for sexual predator status; however, the Legislature made clear that the circuit court had jurisdiction even over out-of-state and civilly committed individuals who the circuit court may have never had before it. The general power was there; the designation was mandatory. Circuit courts shall designate those that qualify. The Fifth District's opinion added limitations to the statute removing the power from the court when the criminal sanction was completed; however, nothing in the plain language of the statute supports that limitation.

Respondent was neither from out-of-state nor did he fall under the civilly committed section. However, the designation is mandatory and ongoing. Interestingly, section 775.21(5)(c), Fla. Stat. (2018), sets out the following:

If the Department of Corrections, the department, or any other law enforcement agency obtains information which indicates that an offender meets the sexual predator criteria but the court did not make

a written finding that the offender is a sexual predator as required in paragraph (a), the Department of Corrections, the department, or the law enforcement agency shall notify the state attorney who prosecuted the offense for offenders described in subparagraph (a)1., or the state attorney of the county where the offender establishes or maintains a residence upon first entering the state for offenders described in subparagraph (a)3. The state attorney shall bring the matter to the court's attention in order to establish that the offender meets the sexual predator criteria.

Again, this highlights that jurisdiction is not granted to the circuit court based on some connection to a previous criminal case. In fact, the state attorney where the offender lives is even authorized to act in certain situations (unrelated to any prior criminal prosecution).

Thus, as set out in its initial brief, the State would submit McKenzie erred when it ignored the Legislature's mandate and the statute's general grant of jurisdiction that all sexual predators sentenced after October 1, 1993, be designated and registered as such in favor of any argument that the trial court lost jurisdiction because the criminal sanctions had been served. The Fifth District created a requirement that an offender must still be under sentence by the original felony court, but there is no such requirement in the statute. As recognized by Cuevas, a reasonable reading of section 775.21 does not allow the court to ignore section (4)(a)'s mandate simply because it overlooked its obligation at the time of sentencing. Cuevas, 31 So. 3d at 291-92.

To adopt Respondent's position, the Legislature's concern for public safety

was so great that it intended to provide mandatory sexual predator requirements. But, if an offender was not properly designated, the recapture only applied to the very limited group that moved here from out-of-state or that had been civilly committed. The State would respond that a statute should not be read in a way that fails to give effect to each clause. Florida Dept. of Env'tl. Prot. v. ContractPoint Florida Parks, LLC, 986 So. 2d 1260, 1265 (Fla. 2008). Nor should it be read to yield an absurd result. See State v. Atkinson, 831 So. 2d 172, 174 (Fla. 2002).

B. Respondent's additional arguments in favor of relief are without merit.

In addition to the points made in the initial brief in response to the general arguments made by Respondent, the State would note that his argument that the State should be barred given the delay in seeking imposition of the sexual predator designation is refuted by the very existence of the statute. The recapture provisions contemplate that errors may occur, but the Legislature believed that public safety demanded an offender be properly designated regardless of when the error was discovered. Once committing a qualifying offense, an offender is not entitled to an incorrect designation because of an error. The clear purpose of the designation is public safety which is met when the offender complies with the statute's requirements.

CONCLUSION

WHEREFORE, based on the arguments and authorities presented herein, Petitioner respectfully requests this Honorable Court approve the decision of the Third District Court of Appeal in Cuevas, and disapprove the Fifth District Court of Appeal's decision in McKenzie.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner has been furnished via Florida's e-Portal to counsel for Respondent, Terrence E. Kehoe, Esq., P.O. Box 540025, Orlando, FL 32854-0025, at tekehoelaw@aol.com, on the 17th day of February 2020.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ Wesley Heidt _____
WESLEY HEIDT
Assistant Attorney General
Florida Bar Number 0773026
444 Seabreeze Boulevard, Suite 500
Daytona Beach, Florida 32118
(386) 238-4990/ (386) 238-4997 (fax)

crimappdab@myfloridalegal.com
wesley.heidt@myfloridalegal.com

COUNSEL FOR PETITIONER