

FILED
Court of Appeals
Division I
State of Washington
4/1/2021 3:51 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
4/5/2021
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 99624-5
(Court of Appeals No. 78341-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN BATSON,

Petitioner.

PETITION FOR REVIEW

Lila J. Silverstein
Jessica Wolfe
Attorneys for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
wapofficemail@washapp.org

TABLE OF CONTENTS

A. INTRODUCTION 1

B. IDENTITY OF PETITIONER AND DECISION BELOW 2

C. ISSUES PRESENTED FOR REVIEW..... 2

D. STATEMENT OF THE CASE..... 3

 1. Many years after the crime at issue in this case, Washington amended its registration laws to require people in Mr. Batson’s position to report to the Sheriff’s office 52 times per year. 3

 2. Mr. Batson has not committed a sex offense since 1984, but registration requirements have subjected him to homelessness, poverty, and repeated incarceration. 5

 3. The Court of Appeals expressed ex post facto concerns but affirmed Mr. Batson’s conviction for failure to register on the basis that this Court has repeatedly denied review of the issue..... 6

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED 7

 1. Whether next-generation registration statutes are subject to the Ex Post Facto Clause is a significant constitutional question that has divided courts around the country and divided judges in this state 7

 a. The Ex Post Facto clauses prohibit the application of punitive laws that are more burdensome than the punishment in effect at the time of the crime. 7

 b. Although the original registration statute was regulatory, subsequent amendments have rendered it punitive as applied to homeless people. 8

 c. Courts around the country have held that current registration statutes are punitive and subject to ex post facto provisions, even though the original statutes were merely regulatory. 11

| | |
|--|----|
| 2. Whether the application of the amended registration statute to Mr. Batson violates double jeopardy is also a significant question of constitutional law warranting review | 15 |
| F. CONCLUSION..... | 16 |

TABLE OF AUTHORITIES

Washington Supreme Court Cases

State v. Batson, 196 Wn.2d 670, 478 P.3d 75 (2020)..... 4, 6

State v. Noltie, 116 Wn.2d 831, 809 P.2d 190 (1991) 15

State v. Ward, 123 Wn.2d 488, 869 P.2d 1062 (1994) ... 1, 3, 7, 8, 9, 10, 15

Washington Court of Appeals Cases

State v. Boyd, 1 Wn. App. 2d 501, 408 P.3d 362 (2017)..... 1, 6, 11, 13, 14

United States Supreme Court Cases

Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)..... 7

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)..... 9

Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)..... 8

Smith v. Doe, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) 9

Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).. 7

Cases from Other Jurisdictions

Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017)..... 12

Doe v. Cuomo, 755 F.3d 105 (2d Cir. 2014)..... 12

Doe v. State, 167 N.H. 382, 111 A.3d 1077 (N.H. 2015)..... 12, 13, 14

Does #1-5 v. Snyder, 834 F.3d 696 (6th Cir. 2016)..... 12

Starkey v. Oklahoma Department of Corrections, 2013 OK 43, 305 P.3d 1004 (Okla. 2013)..... 7, 8, 12, 13

State v. Costello, 138 N.H. 587, 643 A.2d 531 (N.H. 1994) 14

State v. Letalien, 2009 ME 130, 985 A.2d 4, 16 (Me. 2009)..... 12

| | |
|--|----|
| <i>Wallace v. State</i> , 905 N.E.2d 371 (Ind. 2009) | 13 |
|--|----|

Constitutional Provisions

| | |
|-------------------------------|----|
| Const. art. I, § 23..... | 7 |
| Const. art. I, § 9..... | 15 |
| U.S. Const. amend. V..... | 15 |
| U.S. Const. art. I, § 10..... | 7 |
| U.S. Const. art. I, § 9..... | 7 |

Statutes

| | |
|--|--------|
| 2002 Wash. Legis. Serv. Ch. 118 (S.S.B. 6488)..... | 11 |
| Alaska Stat. § 12.63.010 | 9 |
| Ariz. Rev. Stat. Ann. § 13–3821 (1983) | 3 |
| Ariz. Rev. Stat. Ann. § 13–3821 (2006) | 3 |
| Laws of 1990, ch. 3, § 401 | 3 |
| Laws of 1999, 1st Spec. Sess., ch. 6, § 2 | 4 |
| Laws of 2001, ch. 169, § 1 | 4 |
| Laws of 2010, ch. 265, § 1 | 4 |
| RCW 4.24.550 | 11 |
| RCW 9A.44.079..... | 3, 4 |
| RCW 9A.44.128..... | 4 |
| RCW 9A.44.130..... | 4, 10 |
| RCW 9A.44.130 (1990)..... | 10, 11 |
| RCW 9A.44.130 (2006)..... | 4 |
| RCW 9A.44.132..... | 11 |

RCW 9A.44.142..... 10

Rules

RAP 13.4(b) 2, 3, 15

Other Authorities

Elizabeth Esser-Stuart, *The Irons are Always In the Background: The Unconstitutionality of Sex Offender Post-Release Laws as Applied to the Homeless*, 96 Tex. L. Rev. 811 (2018) 13

A. INTRODUCTION

This Court upheld Washington's first-generation sex offender registration statute against an ex post facto challenge in *State v. Ward*, 123 Wn.2d 488, 511, 869 P.2d 1062 (1994). Because the statute merely required people to fill out one form, this Court concluded the statute was not punitive and therefore the Ex Post Facto Clauses did not apply. *Id.*

The statute has been amended since *Ward*, and now requires people without homes to report in person every week at a designated time and place. Other courts have held their jurisdictions' similarly amended statutes are punitive and subject to ex post facto limitations, and Judge Becker recently urged Washington courts to "join the jurisdictions holding that frequent in-person reporting requirements render a registration statute so punitive that applying it retroactively violates the constitution." *State v. Boyd*, 1 Wn. App. 2d 501, 528, 408 P.3d 362 (2017) (Becker, J., dissenting).

In the instant case, the Court of Appeals sympathized with Judge Becker's position, but believed its hands were tied because this Court has repeatedly denied review of the issue. App. A at 5. It is time for this Court to address the critical constitutional question presented. The retroactive application of the amended registration statute to Benjamin Batson violated the Ex Post Facto Clauses, and this Court should grant review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Benjamin Batson, petitioner here and appellant below, asks this Court to review the opinion of the Court of Appeals in *State v. Batson* (No. 78341-6-I, filed March 8, 2021). A copy of the opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The Ex Post Facto Clauses of the federal and state constitutions prohibit the infliction of punishment that is greater than the punishment permitted at the time of the crime. Several courts have held that although sex offender registration statutes did not originally impose punishment, increasingly onerous amendments converted formerly regulatory statutes into punitive provisions that may not be applied to defendants whose crimes were committed before the amendments were enacted. Does the application of the registration statute to Mr. Batson violate the prohibition on ex post facto laws, where the extraordinarily burdensome requirements for homeless people were enacted after Mr. Batson's crime, and where his out-of-state conviction did not originally require registration in Washington? RAP 13.4(b)(3), (4).

2. Does the application of the registration statute to Mr. Batson also violate his constitutional right to be free from double jeopardy, where

he already served his sentence for the crime in Arizona, but is now being punished again in Washington? RAP 13.4(b)(3), (4).

D. STATEMENT OF THE CASE

1. Many years after the crime at issue in this case, Washington amended its registration laws to require people in Mr. Batson's position to report to the Sheriff's office 52 times per year.

In 1984, Benjamin Batson pleaded guilty to engaging in sexual conduct with a 16-year-old. CP 246, 248. The conduct was consensual and racial bias may have contributed to criminal charges being filed. RP 166–67. Although 16 is the age of consent in Washington, *see* RCW 9A.44.079, Mr. Batson lived in Arizona at that time. CP 246, 248. He moved to Washington decades later, in 2009. App. A at 2.

At the time of Mr. Batson's crime, Arizona required people convicted of sex offenses to register with the Sheriff's office within 30 days of conviction. Ariz. Rev. Stat. Ann. § 13–3821 (1983). Mr. Batson simply had to appear one time to fill out a form and provide a photo and fingerprints. *Id.* Arizona later amended its laws to require in-person registration for homeless people, but only once every 90 days. Ariz. Rev. Stat. Ann. § 13–3821 (2006).

Washington did not implement sex offender registration until 1990. *Ward*, 123 Wn.2d at 493 (citing Laws of 1990, ch. 3, § 401). Like

Arizona's initial statute, Washington's imposed minimal burdens, requiring the registrant to simply fill out "a short form with eight blanks." *Ward*, 123 Wn.2d at 501. The statute did not require registration at all for people like Mr. Batson, whose conduct would not have been criminal in Washington. *State v. Batson*, 196 Wn.2d 670, 672, 478 P.3d 75 (2020) (citing RCW 9A.44.079; Former RCW 9A.44.130(10)(a)(iv)(2006)).

In 1999, Washington began requiring registrants who lacked a "fixed residence" to report in-person at their local sheriff's office on a monthly or weekly basis, depending on assessed risk level. *See* Laws of 1999, 1st Spec. Sess., ch. 6, § 2. In 2001, Washington began requiring all homeless registrants to report weekly. Laws of 2001, ch. 169, § 1. And in 2010, Washington added another requirement, mandating that homeless registrants provide the sheriff with an "accurate accounting" of where they stayed during the week. Laws of 2010, ch. 265, § 1. Also in 2010, the legislature amended the statutes to require registration for "[a]ny out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction." RCW 9A.44.128(10)(h); RCW 9A.44.130(1)(a).

2. Mr. Batson has not committed a sex offense since 1984, but registration requirements have subjected him to homelessness, poverty, and repeated incarceration.

Mr. Batson has struggled to hold down jobs and find stable housing. *See* 3/29/18 RP 168–69. Each time he was able to find work in construction or a fast food restaurant, discovery of his prior sex offense conviction would soon land him out of a job. *See id.* Washington law has prohibited him from using housing vouchers because of his conviction, despite his status as a Vietnam veteran. *See id.* at 171–73.

After Washington amended its registration statute in 2010, Mr. Batson could not live with family members due to fears for their safety. *See id.* at 173. As a result, Mr. Batson has been homeless, bouncing between shelters and the streets. *See id.* at 171–73.

Because of the onerous requirement of weekly in-person reporting, Mr. Batson was not always able to comply with the duty to register. After he was charged with failure to register in the instant case, Mr. Batson filed a motion to dismiss on several constitutional grounds, including violations of the nondelegation doctrine and the ex post facto, double jeopardy, and equal protection clauses. CP 209-258. The trial court denied the motion and convicted Mr. Batson following a stipulated facts bench trial. CP 405-08.

3. The Court of Appeals expressed ex post facto concerns but affirmed Mr. Batson's conviction for failure to register on the basis that this Court has repeatedly denied review of the issue.

The Court of Appeals reversed the conviction for a violation of the non-delegation doctrine, but this Court reversed the Court of Appeals. *Batson*, 196 Wn.2d at 672. This Court remanded to the Court of Appeals to address the remaining issues. *Id.* at 677.

The Court of Appeals held the application of the registration requirement to Mr. Batson is not punitive and therefore does not violate the ex post facto or double jeopardy clauses. App. A at 3-6. The court acknowledged Judge Becker's opinion explaining "it is time to reconsider the ex post facto analysis of the statute in light of the changes since *Ward*." App. A at 5 (quoting *Boyd*, 1 Wn. App. 2d at 528 (Becker, J., dissenting)). But it stated, "While we may agree with many of the policy arguments articulated in the dissent [in *Boyd*], these same arguments were previously rejected by this court and our Supreme Court has refused to accept review each time." App. A at 5.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Whether next-generation registration statutes are subject to the Ex Post Facto Clause is a significant constitutional question that has divided courts around the country and divided judges in this state.

- a. The Ex Post Facto clauses prohibit the application of punitive laws that are more burdensome than the punishment in effect at the time of the crime.

The ex post facto clauses of the federal and state constitutions prohibit the application of a law which increases the punishment for a crime beyond that which was prescribed when the crime was committed. U.S. Const. art. I, §§ 9, 10; Const. art. I, § 23; *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); *Ward*, 123 Wn.2d at 496-97. Stated differently, if a law makes the punishment for a crime “more burdensome,” then that punishment may not be imposed upon a person whose crime pre-dated the law. *Ward*, 123 Wn.2d at 497 (citing *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)).

Because the ex post facto clauses are in the body of the Constitution and were not left to the amendment process, “it is evident the framers viewed the ban on ex post facto laws as fundamental to the protection of individual liberty.” *Starkey v. Oklahoma Department of Corrections*, 2013 OK 43, 305 P.3d 1004, 1018-19 (Okla. 2013).

[R]etroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsiveness to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Id. at 1019 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 266, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)).

- b. Although the original registration statute was regulatory, subsequent amendments have rendered it punitive as applied to homeless people.

The dispositive issue in determining whether a registration statute is subject to the ex post facto clauses is whether the statute imposes punishment or is merely regulatory. *See Ward*, 123 Wn. 2d at 499-500; *Starkey*, 305 P.3d at 1019. If the statute is punitive, it may not be applied retroactively to defendants whose crimes occurred before the statute's enactment. *See id.*

Even if the legislature intended a statute to be regulatory, if the *effect* is punitive, the statute may not be applied retroactively without running afoul of ex post facto provisions. *Ward*, 123 Wn.2d at 499. To determine whether a law is punitive in effect, courts consider several factors: whether the law imposes an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote

the traditional aims of punishment (retribution and deterrence), whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. *Id.* (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)).

In *Smith v. Doe*, the U.S. Supreme Court applied these factors to Alaska's registration statute. *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). The Ninth Circuit had found the statute was punitive and could not be applied retroactively, in large part because the court believed a verification clause mandated in-person updates. *Smith v. Doe*, 538 U.S. at 101. In fact, Alaska law requires only *written* updates, and only once per quarter. *Id.*; Alaska Stat. § 12.63.010. Thus, the Supreme Court found it did not impose a significant disability or restraint, and did not violate the ex post facto clause when applied retroactively. *Smith v. Doe*, 538 U.S. at 101.

In *Ward*, this Court determined that the Washington registration statute that existed 30 years ago was not punitive in purpose or effect, and therefore its application to defendants who committed their crimes prior to its enactment did not violate the prohibition on ex post facto laws. *Ward*, 123 Wn.2d at 511. At that time, homeless people did not have to register

at all. RCW 9A.44.130 (1990); *Pickett*, 95 Wn. App. at 478. Defendants with fixed addresses simply had to fill out and send in a short form with their name, address, and other basic information, and had to send written notice of an address change if they moved. *See id.* This Court concluded, “it is inconceivable that filling out a short form with eight blanks creates an affirmative disability.” *Ward*, 123 Wn.2d at 501.

However, the statute has been amended numerous times since *Ward*, and now includes particularly onerous obligations for homeless people which render the formerly regulatory statute punitive. Unlike people with fixed residences, who simply have to send in a short form each time they change addresses, homeless people must report to their county sheriff’s office *in person* during specified hours *52 times per year*, and must write down where they slept each night. RCW 9A.44.130(6). Even those like Mr. Batson, whose qualifying crime would not constitute a crime in Washington, must perform this task for at least 15 years—i.e., *a minimum of 780 times*. RCW 9A.44.142(1)(c).

Furthermore, the end date is illusory for homeless people. If the person misses a check-in and is convicted of failure to register, the clock starts over. *Id.* To make matters worse, the punishment for non-compliance has increased over the years, such that failure to register is

now a class B felony if the person has two prior convictions for the crime.

Compare RCW 9A.44.130(7) (1990) *with* RCW 9A.44.132(1)(b).

The statute has also been amended to include Internet notification. The Washington Association of Sheriffs and Police Chiefs was tasked with providing a publicly available registered sex offender website in 2002 – well after *Ward* and well after Mr. Batson’s predicate offense. *See* RCW 4.24.550(5); 2002 Wash. Legis. Serv. Ch. 118 (S.S.B. 6488).¹ The goal of this provision was to promote public safety, but it also serves to publicly shame persons convicted of sex offenses. Furthermore, unlike offenders with homes, whose names are disseminated online only if they are high-risk, *all* homeless registrants’ pictures are posted. RCW 4.24.550.

As Judge Becker concluded, these amendments are punitive, and their retroactive application violates the constitutional prohibition on ex post facto laws. *Boyd*, 1 Wn. App. 2d at 528 (Becker, J., dissenting).

- c. Courts around the country have held that current registration statutes are punitive and subject to ex post facto provisions, even though the original statutes were merely regulatory.

Legislatures in other states have also amended their registration statutes over the years to make them more and more burdensome.

¹ *See also*

<http://www.waspc.org/assets/SexOffenders/so%20community%20notification%20model%20policy%20july%202015.docx%20final.pdf> at 4.

Although some courts have held such amendments are constitutionally insignificant,² courts in several jurisdictions have held that these amended registration statutes are punitive and subject to ex post facto limitations. See *Commonwealth v. Muniz*, 164 A.3d 1189, 1210-11 (Pa. 2017); *Does #1-5 v. Snyder*, 834 F.3d 696, 703 (6th Cir. 2016); *Doe v. State*, 167 N.H. 382, 111 A.3d 1077, 1100 (N.H. 2015); *Starkey v. Oklahoma Department of Corrections*, 2013 OK 43, 305 P.3d 1004, 1018-19 (Okla. 2013); *State v. Letalien*, 2009 ME 130, 985 A.2d 4, 16 (Me. 2009).

Critical to these courts' analyses was the addition of in-person reporting requirements. See *Muniz*, 164 A.3d at 1210-11; *Does #1-5 v. Snyder*, 834 F.3d at 703; *Doe v. State*, 111 A.3d at 1094; *Starkey*, 305 P.3d at 1022; *Letalien*, 985 A.2d at 18. Courts found these provisions punitive even though offenders in other jurisdictions have to register in person *at most* monthly, and in most cases only two to four times per year. See *id.*

The Maine Supreme Court, for example, held that quarterly in-person registration for life "imposes a disability or restraint that is neither minor nor indirect." *Letalien*, 985 A.2d at 18. The Oklahoma Supreme Court similarly held that the Ex Post Facto Clause applied to that state's statute, which required in person registration annually for some offenders,

² E.g., *Doe v. Cuomo*, 755 F.3d 105, 112 (2d Cir. 2014)

semi-annually for other offenders, and every 90 days for habitual sex offenders. *Starkey*, 305 P.3d at 1022. The court noted:

Although SORA poses no physical restraints on registrants the affirmative “in person” registration and verification requirements alone cannot be said to be “minor and indirect” especially when failure to comply is a felony subject to 5 years imprisonment and a fine not to exceed \$5,000.

Id.

In Washington, homeless people like Mr. Batson have to report in-person 52 times per year. This obligation is one of the most burdensome in the nation. *Boyd*, 1 Wn. App. 2d at 525 (Becker, J., dissenting); Elizabeth Esser-Stuart, *The Irons are Always In the Background: The Unconstitutionality of Sex Offender Post-Release Laws as Applied to the Homeless*, 96 Tex. L. Rev. 811, 835, 856 & n. 160 (2018). Given that other states’ amended statutes were found to be punitive and subject to the Ex Post Facto Clause, our statute certainly should be.

Courts in other jurisdictions also recognized the punitive nature of online notification requirements. *Doe v. State*, 111 A.3d at 1097; *Starkey*, 305 P.3d at 1023-25; *Wallace v. State*, 905 N.E.2d 371, 380 (Ind. 2009).

As the New Hampshire Supreme Court noted:

Our communities have grown, and in many ways, the internet is our town square. Placing offenders’ pictures and information online serves to notify the community, but also holds them out for others to shame or shun.

Doe v. State, 111 A.3d at 1097.

Like this Court, the New Hampshire Supreme Court in 1994 rejected an ex post facto challenge to that state's original registration statute. *Id.* at 1084 (citing *State v. Costello*, 138 N.H. 587, 643 A.2d 531 (1994)). But in 2015 the Court reviewed the amended statute and held it was punitive and violated the ex post facto clause as applied to defendants who committed their crimes before the amendments. *Doe v. State*, 111 A.3d at 1100.

Judge Becker similarly recognized that the amendments to Washington's registration statute trigger a duty to reevaluate ex post facto implications. *Boyd*, 1 Wn. App. 2d at 528 (Becker, J., dissenting). She concluded:

Our statute has grown steadily harsher, especially as applied to homeless offenders. I believe it is time to reconsider the ex post facto analysis of the statute in light of the changes since *Ward*. I would join the jurisdictions holding that frequent in-person reporting requirements render a registration statute so punitive that applying it retroactively violates the constitution.

Id.

In sum, whether next-generation registration statutes are subject to the Ex Post Facto Clause is a significant constitutional question that has

divided courts around the country and divided judges in this state. This Court should grant review. RAP 13.4(b)(3), (4).

2. Whether the application of the amended registration statute to Mr. Batson violates double jeopardy is also a significant question of constitutional law warranting review.


The double jeopardy clauses of the Fifth Amendment to the federal constitution and article I, section 9 of the state constitution protect “a defendant from a second trial for the same offense and against multiple punishments for the same offense.” *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991); U.S. Const. amend. V; Const. art. I, § 9.

Washington’s registration requirement punishes Mr. Batson for a crime for which he already served his sentence in Arizona, warranting review under RAP 13.4(b)(3). Moreover, the ex post facto and double jeopardy issues are intertwined because both depend on whether the amended registration statute is punitive. *See Noltie*, 116 Wn.2d at 848; *Ward*, 123 Wn. 2d at 499-500. Thus, if this Court reviews the ex post facto issue, it should also review the double jeopardy issue.

F. CONCLUSION

For the reasons set forth above Benjamin Batson respectfully requests that this Court grant review.

DATED this 1st day of April, 2021.



Lila J. Silverstein, WSBA #38394
Jessica Wolfe, WSBA #52068
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

| | | |
|----------------------|---|---------------------|
| STATE OF WASHINGTON, |) | No. 78341-6-I |
| |) | |
| Respondent, |) | DIVISION ONE |
| |) | |
| v. |) | UNPUBLISHED OPINION |
| |) | |
| BENJAMIN BATSON, |) | |
| |) | |
| Appellant. |) | |
| _____ |) | |

ANDRUS, A.C.J. — Benjamin Batson challenges his 2017 conviction for failing to register as a sex offender. In August 2019, this court reversed the conviction, concluding RCW 9A.44.128(10)(h) was an unconstitutional delegation of legislative authority. State v. Batson, 9 Wn. App. 2d 546, 447 P.3d 202 (2019). On December 24, 2020, the Washington Supreme Court reversed this holding and remanded Batson’s case to this court to consider his other challenges. State v. Batson, __ Wn.2d __, 478 P.3d 75 (2020).

In addition to the issue resolved by the Supreme Court, Batson claims the duty to register under RCW 9A.44.128(10)(h) violates the prohibition on ex post facto laws, double jeopardy, the Equal Protection Clause of the United States Constitution, and privileges and immunities clause of the Washington State

Constitution. We conclude Batson has not established any constitutional violations and affirm his conviction.¹

FACTS

In 1984, Batson was convicted in an Arizona court of two counts of sexual conduct with a minor and ordered to register as a sex offender for life. Batson, 478 P.3d at 76.

Batson moved to Washington before April 2009. Id. At the time, the State required individuals to register as sex offenders only if their out-of-state conviction would have been classified as a sex offense in Washington. Id. Because Batson's Arizona conviction arose from sexual conduct with a sixteen-year-old, his offense would not have been a crime in Washington. Id.

In 2010, the state legislature amended the state registration statute to require registration for any felony or out-of-state conviction for an offense for which the person would be required to register while residing in the state of conviction. LAWS OF 2010, ch. 267, § 1(6)(d); RCW 9A.44.128(10)(h). This change required Batson to register as a sex offender in Washington because he would have been required to register had he been living in Arizona. Batson, 478 P.3d at 76.

Batson was convicted in 2018 for failing to register between August 2016 and November 2017. Id.

¹ Batson also challenges a \$100 DNA collection fee. The State concedes that Batson should not be required to pay the \$100 DNA fee in light of State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018). We remand the case to the trial court solely for purpose of striking the \$100 DNA fee from Batson's judgment and sentence.

ANALYSIS

Standard of Review

Batson raises a number of constitutional challenges to the registration statute. We review a statute's constitutionality de novo. State v. Bassett, 192 Wn.2d 67, 77, 428 P.3d 343 (2018). Statutes are presumed constitutional, and the defendant has the burden of proving otherwise. Id.

Ex Post Facto Violation

Batson argues that requiring him to register violates the prohibition on ex post facto laws. He claims that the registration statute is excessively burdensome to individuals lacking a "fixed residence," and that, by imposing registration requirements on him retroactively, the state legislature has increased his punishment for the underlying sex offense.

"The ex post facto clauses of the federal and state constitutions forbid the State from enacting any law which imposes punishment for an act which was not punishable when committed or increases the quantum of punishment annexed to the crime when it was committed." State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). A law violates the ex post facto clauses of the federal and state constitutions if: (1) the law is substantive, as opposed to "merely procedural;" (2) the law is retrospective, meaning it applies to events occurring before its enactment; and (3) the law "disadvantages" the person affected by it. Id. at 498 (quoting In re Powell, 117 Wn.2d 175, 185, 814 P.2d 635 (1991)). All three factors must be present for a violation of ex post facto prohibitions. Id. at 510-11.

Our Supreme Court in Ward assumed the sex offender registration requirements are substantive, not procedural. Id. at 498. Additionally, it concluded the law is retrospective because it was passed in 2010 and Batson was convicted in 1984. The State concedes that Batson has met these two elements of the test.

At issue, however, is whether Batson is “disadvantaged” by the registration statute. “The sole determination of whether a law is disadvantageous is whether the law alters the standard of punishment which existed under prior law.” State v. Boyd, 1 Wn. App. 2d 501, 507, 408 P.3d 362 (2017) (internal quotation marks omitted) (quoting Ward, 123 Wn.2d at 498). “While the requirement to register as a sex offender may indeed be burdensome, the focus of the inquiry is whether registration constitutes punishment.” Ward, 123 Wn.2d at 499.

In Ward, our Supreme Court concluded the sex offender registration requirements in effect at the time were not a criminal punishment and therefore did not violate the ex post facto prohibition. Id. at 510-11. It reasoned that the purpose of the statute was to assist local law enforcement in protecting their communities, and was not intended to be punitive in nature. Id. at 499. It also concluded that the actual effect of the statute was not so punitive in nature as to negate this regulatory intent. Id. at 499-500.

Batson asks us to revisit Ward because “the sex offender registration law evaluated by the Ward court in 1994 imposed very different burdens on registrants than the modern-day version imposes on Mr. Batson.” He maintains that the current registration statute imposes significant burdens on individuals lacking a fixed residence, like Batson, unlike the statute under review in Ward.

Division Two of this court rejected the same argument in 2011. State v. Enquist, 163 Wn. App. 41, 45, 256 P.3d 1277 (2011) (transient offender registration requirements do not violate ex post facto prohibition), review denied, 173 Wn.2d 1008 (2012). Division One did so in 2017. Boyd, 1 Wn. App. 2d at 510.

Batson's arguments are no different than those rejected in Enquist and Boyd. Batson relies on the dissent in Boyd to argue that "it is time to reconsider the ex post facto analysis of the statute in light of the changes since Ward." Id. at 528 (Becker, J., dissenting). While we may agree with many of the policy arguments articulated in the dissent, these same arguments were previously rejected by this court and our Supreme Court has refused to accept review each time. See State v. Smith, No. 69621-1-1, slip op. at 4-5 (Wash. Ct. App. Aug. 18, 2014) (unpublished), <https://www.courts.wa.gov/opinions/pdf/696211.pdf> (noting that the Supreme Court denied review in Enquist and that "[t]he supreme court, not this court, is the proper court to 'reexamine' Ward"), review denied, 182 Wn.2d 1015 (2015).

As the Supreme Court recently instructed "[w]herever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality." Batson, 478 P.3d at 77 (quoting State v. Abrams, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008)). We therefore follow the Supreme Court's holding in Ward and our prior decisions in Enquist and Boyd and conclude the sex offender registration requirements do not violate the prohibition on ex post facto laws because they are not punitive in nature.

Double Jeopardy

Batson next argues that the sex offender registration requirement violates the double jeopardy clauses of the Fifth Amendment to the United States Constitution and article I, § 9 of the Washington State Constitution.

The constitutional guaranty against double jeopardy protects a defendant against multiple punishments for the same offense. State v. Noltie, 116 Wn.2d 831, 848, 809 P.2d 190 (1991). But the double jeopardy clause does not prohibit the imposition of all sanctions that could, in common parlance, be described as punishment. Hudson v. United States, 522 U.S. 93, 98-99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). It only proscribes the imposition of multiple criminal punishments for the same offense. Id. at 99.

To determine whether a sentencing requirement is sufficiently punitive to trigger the double jeopardy protections, we apply a two-part test. State v. Medina, 180 Wn.2d 282, 293, 324 P.3d 682 (2014). First, we ask whether the government intended the registration requirements to be punitive. Id. If not, then we ask whether the requirements' purpose or effect is nevertheless so punitive as to negate the nonpunitive intent. Id. The parties agree this test is the same as we apply in an ex post facto challenge.

Because the Supreme Court held in Ward that sex offender registration requirements were not intended to be punitive and we previously concluded in Enquist and Boyd that the purpose or effect of the transient offender registration requirements are not so punitive as to negate any nonpunitive intent, we reject Batson's double jeopardy challenge.

Equal Protection

Batson finally argues that requiring him to register as a sex offender violates his right to equal protection.

The equal protection clause of the Fourteenth Amendment to the United States Constitution and the privileges and immunities clause of article I, §12 of the Washington State Constitution “require similar treatment under the law for similarly situated persons.” Ward, 123 Wn.2d at 515. “Where persons of different classes are treated differently, there is no equal protection violation.” Id. The two clauses “are substantially identical and have been considered by this court as one issue.” Am. Network, Inc. v. Wash. Utilities & Transp. Comm'n., 113 Wn.2d 59, 77, 776 P.2d 950 (1989).

“Where the [constitutional] challenge does not involve a suspect class and the right at issue is not a fundamental right, we utilize the rational basis test.” State v. Mathers, 193 Wn. App. 913, 925, 376 P.3d 1163 (2016). Sex offenders are not a suspect class for purposes of equal protection review. Ward, 123 Wn. App. at 516. The parties agree that rational basis is the appropriate level of scrutiny.

Under the rational basis test, “the law being challenged must rest upon a legitimate state objective, and the law must not be wholly irrelevant to achieving that objective.” State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). When evaluating equal protection challenges under the rational basis test, we look at three factors: (1) whether the classification applies to all members within the designated class alike, (2) whether some rational basis exists for reasonably distinguishing between those within the class and those outside the class, and (3)

whether the challenged classification bears a rational relation to the purpose of the challenged statute. Morris v. Blaker, 118 Wn.2d 133, 149, 821 P.2d 482 (1992). Under this deferential standard, legislation is presumed to be rational and the challenger bears “the heavy burden of negating every conceivable basis which might support the legislation.” King County Dep’t of Adult and Juvenile Det. v. Parmelee, 162 Wn. App. 337, 359, 254 P.3d 927 (2011).

Batson argues that imposing a registration requirement on individuals with out-of-state sex offense convictions based on conduct that is not criminal in Washington is not rationally related to any legitimate government interest. We disagree. First, the legislature reasonably could have wanted to deter individuals convicted of sex offenses from moving to this state simply to avoid the registration requirements of the state of conviction. Second, the legislature could have determined that someone unwilling to abide by laws regarding the age of consent pose a danger to the community.

Finally, the legislature could have concluded that the former statute, requiring registration only for those convicted of “comparable” Washington offenses was too difficult to administer. In State v. Howe, 151 Wn. App. 338, 212 P.3d 565 (2009), Division Two reversed a failure to register conviction after concluding a California conviction for lewd acts against a child was not comparable to any Washington crime. In State v. Werneth, 147 Wn. App. 549, 197 P.3d 1196 (2008), Division Three reversed a similar conviction, holding that a Georgia conviction for child molestation was not comparable to any Washington offense. Both Howe and Werneth were decided before the legislature passed the 2010

amendment to RCW 9A.44.128(10)(h), which effectively eliminates the need for such a comparability analysis.

Batson has thus failed to meet his burden of negating “every conceivable basis” for requiring an individual required to register in the state of conviction to register here. We therefore reject Batson’s equal protection challenge to the sex registration statute.

We affirm Batson’s conviction but remand the case to the trial court for the sole purpose of striking the DNA fee from the judgment and sentence.

Andrus, A.C.J.

WE CONCUR:

[Signature]

Chun, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 78341-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Gavriel Jacobs, DPA
[gavriel.jacobs@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit
[PAOAppellateUnitMail@kingcounty.gov]
- petitioner
- Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 1, 2021

WASHINGTON APPELLATE PROJECT

April 01, 2021 - 3:51 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 78341-6
Appellate Court Case Title: State of Washington, Respondent v. Benjamin Batson, Appellant

The following documents have been uploaded:

- 783416_Petition_for_Review_20210401155102D1501687_1549.pdf
This File Contains:
Petition for Review
The Original File Name was washapp.040121-06.pdf

A copy of the uploaded files will be sent to:

- gaviel.jacobs@kingcounty.gov
- jessica@washapp.org
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Lila Jane Silverstein - Email: lila@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20210401155102D1501687