

69621-1

69621-1

NO. 69621-1-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER M. SMITH,

Appellant.

RECEIVED
COURT OF APPEALS
DIVISION I
FEB 2 13

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

JOHN J. JUHL
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE 1

 A. FACTS OF THE CRIME..... 1

 B. PROCEDURAL HISTORY. 3

III. ARGUMENT 3

IV. CONCLUSION 10

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Edwards</u> , 104 Wn.2d 63, 701 P.2d 508 (1985)	4
<u>State v. Enquist</u> , 163 Wn. App. 41, 256 P.3d 1277 (2011) <u>review denied</u> , 173 Wn.2d 1008, 268 P.3d 941 (2012).....	4, 5, 8
<u>State v. Heckel</u> , 143 Wn.2d 824, 24 P.3d 404, <u>cert. denied</u> , 534 U.S. 997, 122 S.Ct. 467, 151 L.Ed.2d 383 (2001)	4
<u>State v. Rice</u> , 159 Wn. App. 545, 246 P.3d 234 (2011), <u>aff'd on other grounds</u> , 174 Wn.2d 884, 279 P.3d 849 (2012)	5
<u>State v. Ward</u> , 123 Wn.2d 488, 869 P.2d 1062 (1994)....	4, 6, 7, 8, 9

FEDERAL CASES

<u>Connecticut Dep't of Pub. Safety v. Doe</u> , 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003).....	9
<u>Kennedy v. Mendoza-Martinez</u> , 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).....	7
<u>Russell v. Gregoire</u> , 124 F.3d 1079 (9th Cir. 1997).....	6, 9, 10

WASHINGTON STATUTES

Laws 1990, ch. 3, § 401	7
Laws 2006, ch. 139, § 5	2
Laws 2011, ch. 337, § 3	5
RCW 9.68A.070	1
RCW 9.94A.030	1, 2
RCW 9A.44.130	1, 5, 6, 7
RCW 9A.44.130(1)(a).....	5
RCW 9A.44.130(2)(a).....	5
RCW 9A.44.130(3)(a)(i).....	5
RCW 9A.44.130(4)(a).....	5
RCW 9A.44.130(4)(b).....	6
RCW 9A.44.130(5)(a).....	6
RCW 9A.44.130(5)(b).....	6

I. ISSUES

Does the Community Protection Act (sex offender registration and community notification law) violate the Ex Post Facto Clause of the state and federal constitutions?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

On March 10, 1998, Christopher Michael Smith, defendant, was found guilty by plea of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct, a class C felony, under former RCW 9.68A.070 (1990). On April 10, 1998, defendant was sentenced, along with several other VUCSA convictions, to 60 months confinement on the above charge in Snohomish County Superior Court case number 97-1-01736-4.¹ CP 47-72, 189-214. Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct was not an offense that required registration as a sex offender under former RCW 9A.44.130 (1996) and former RCW 9.94A.030 (1996) at the time of defendant's conviction. Both the plea statement and the judgment and sentence had the section

¹ On October 22, 1998, defendant was sentenced to 116 months under Snohomish County Superior Court case number 98-1-00444-9, to run concurrent with his sentence in case number 97-1-01736-4.

regarding sex offender registration crossed out. CP 56, 65, 198, 207.

In 2006, the Legislature classified Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct as a sex offense. Laws 2006, ch. 139, § 5; former RCW 9.94A.030(42) (2006). On June 15, 2007, at the time of his release, defendant was notified in writing that he was required to register as a sex offender and defendant began complying. CP 117-121, 128-134, 258-266, 270-276.

On May 12, 2009, defendant reported that he was homeless. He reported regularly to the Snohomish County Sheriff's Office until October 20, 2009. On October 28, 2009, defendant failed to report as required. Defendant did not report his residence again for two years. CP 182, 186-188, 257, 285-286.

On October 27, 2010, defendant reported to the Snohomish County Sheriff's Office and registered his address in Marysville. On March 20, 2011, Officer Oates attempted to contact defendant at his registered address in Marysville. Officer Oates spoke with two residents at the address, Heather Chancey and William Goddard. Both Chancey and Goddard stated that defendant no longer lived at the address. As of April 14, 2011, defendant had not registered a

new address nor reported to the Sheriff's Office. CP 35-46, 115-116, 122-123, 143-144.

B. PROCEDURAL HISTORY.

On September 20, 2010, defendant was charged with Failure to Register for the October 2009 incident. Defendant failed to appear for Omnibus and a bench warrant issued on November 12, 2010. On October 13, 2011, defendant was charged with Failure to Register for the March 2011 incident. CP 33-36, 143-144, 183.

The two cases proceeded to stipulated bench trials on October 22, 2012. Defendant was found guilty of the two charged counts and sentenced to 60 days on each count, concurrent with each other and concurrent with his 87 month sentence under King County Superior Court case number 11-1-07703-5. CP 14-24, 160-170, 29-142, 175-284; RP 2-15. Defendant appeals.

III. ARGUMENT

Defendant argues that the sex offender registration and notification statute violates the ex post facto clauses of the United States and Washington Constitutions because the statute retroactively imposes punishment.

The ex post facto clauses of the United States and Washington Constitutions forbid the State from enacting any law that imposes punishment for an act that was not punishable when committed or that inflicts a greater punishment than could have been imposed at the time the crime was committed. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). The ex post facto analysis is essentially the same in Washington as under the federal constitution. State v. Edwards, 104 Wn.2d 63, 70, 701 P.2d 508 (1985); State v. Enquist, 163 Wn. App. 41, 45, 256 P.3d 1277 (2011) review denied, 173 Wn.2d 1008, 268 P.3d 941 (2012). A law violates ex post facto principles if it (1) is substantive, rather than merely procedural; (2) is retrospective, applying to events that occurred before the law's enactment; and (3) disadvantages the person affected by it. Ward, 123 Wn.2d at 498. A law "disadvantages" a defendant only if it enhances the punishment that existed under the prior law. Ward, 123 Wn.2d at 498.

Constitutional issues are reviewed de novo. Enquist, 163 Wn. App. at 45. The party challenging a statute has the burden of proving that it is unconstitutional beyond a reasonable doubt. State v. Heckel, 143 Wn.2d 824, 832, 24 P.3d 404, cert. denied, 534 U.S. 997, 122 S.Ct. 467, 151 L.Ed.2d 383 (2001); Enquist, 163 Wn. App.

at 45-46; see also, State v. Rice, 159 Wn. App. 545, 561 n. 10, 246 P.3d 234, (2011) (discussing the meaning and application of the beyond a reasonable doubt standard in challenges to the constitutionality of a statute) aff'd on other grounds, 174 Wn.2d 884, 279 P.3d 849 (2012).

A convicted sex offender must register at the time of release and again within 3 business days of release at the sheriff's office in the county of his residence. RCW 9A.44.130(1)(a), (3)(a)(i).² A registrant must provide (1) name and any aliases, (2) complete and accurate residential address or, if the person lacks a fixed residence, where he plans to stay, (3) date and place of birth, (4) place of employment, (5) crime for which convicted, (6) date and place of conviction, (7) social security number, (8) photograph, and (9) fingerprints. RCW 9A.44.130(2)(a).

A registrant with a fixed residence must provide written notice by certified mail of his intra-county address change within 3 business days of a move. RCW 9A.44.130(4)(a). If a registrant with a fixed residence moves to another county he must (1) register with the new county sheriff within 3 business days of moving and

² The changes to the statutes under Laws 2011, ch. 337, § 3, (effective July 22, 2011) are not applicable to defendant's requirement to register.

(2) provide written notice by certified mail to the county sheriff with whom he formerly registered within 3 business days of moving. RCW 9A.44.130(4)(b).

A registrant who lacks a fixed residence must provide signed written notice to the sheriff of the county where he last registered within 3 business days of ceasing to have a fixed residence. RCW 9A.44.130(5)(a). The person shall report weekly, in person, during normal business hours, on a day specified by the county sheriff's office, to the sheriff of the county where he is registered. The registrant must keep an accurate accounting of where he stays during the week and provide it to the county sheriff upon request. RCW 9A.44.130(5)(b).

In Ward the Court rejected the argument that retroactive requirement for registration of sex offenders under the Community Protection Act violated the ex post facto clause of the state and federal constitutions. Ward, 123 Wn.2d at 511; see also, Russell v. Gregoire, 124 F.3d 1079, 1089 (9th Cir. 1997) (holding that the Community Protection Act does not violate the ex post facto clause of the state and federal constitutions). The Court held that the registration requirement did not constitute a punishment. Ward, 123 Wn.2d at 511. The Court noted that the legislature's statement

of intent was an expression of regulatory intent rather than a punitive one. Ward, 123 Wn.2d at 499 (“[T]he Legislature unequivocally stated that the State's policy is to ‘assist local law enforcement agencies’ efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in [RCW 9A.44.130].”) quoting Laws 1990, ch. 3, § 401.

The Court in Ward used the Mendoza-Martinez³ factors in concluding that the registration statute was not punitive. Those four characteristics have not significantly changed. First, registration does not overly burden or restrain offenders because it requires that they provide limited information to law enforcement and it does not significantly limit their movement or activities. Ward, 123 Wn.2d at 500–507. Under the current statute the registrant is required to provide essentially the same information. Sex offenders are still free to move within their community or from one community to another, so long as they comply with the statute's registration requirements. Ward, 123 Wn.2d at 501.

³ Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).

Second, registration has not been historically regarded as punishment. Ward, 123 Wn.2d at 507–508. In the nineteen years since Ward registration has not been regarded as punishment. In 2011 Division Two found that the transient registrant requirements were not punitive under the reasons articulated in Ward. State v. Enquist, 163 Wn. App. at 49 (holding that defendant failed to prove beyond a reasonable doubt that the transient registration provision violates the ex post facto clauses of the United States and Washington Constitutions).

Third, registration is not primarily designed to deter future crime, which is a traditional purpose of punishment, it is designed to aid law enforcement agencies' efforts to protect communities by providing increased access to necessary and relevant information. Ward, 123 Wn.2d at 508. The current statute is still designed to aid law enforcement agencies' efforts to protect communities by providing increased access to necessary and relevant information. The fact that a prior sex offense conviction is an element of “failure to register” is of no consequence; the crime of failing to register constitutes a separate offense. “It is hornbook law that no ex post facto problem occurs when the legislature creates a new offense that includes a prior conviction as an element of the offense, as

long as the other relevant conduct took place after the law was passed.” Russell v. Gregoire, 124 F.3d at 1088-1089.

Fourth, registration is not excessive in relation to the important community interest served by having law enforcement know the presence and location of sex offenders in the community. Ward, 123 Wn.2d at 508–510. Registration still serves this important community interest.

The Ninth Circuit specifically considered the notification portion of the Community Protection Act. Russell v. Gregoire, 124 F.3d at 1089-1093. States may publish names, pictures, and other information about convicted sex offenders on the Internet without providing each offender a prior hearing to determine current dangerousness. Connecticut Dep’t of Pub. Safety v. Doe, 538 U.S. 1, 7-8, 123 S. Ct. 1160, 1164-1165, 155 L. Ed. 2d 98 (2003). The Ninth Circuit concluded that the notification provisions were intended to be regulatory and not punitive. Id. at 1093. The court held as a matter of law:

[T]he possible effects of the notification provision are not so punitive in fact as to prevent us from legitimately viewing the Act as regulatory in nature. Even less do the possible effects amount to “the clearest proof” of a punitive effect sufficient to overcome the legislature's nonpunitive intent. This is especially so given the strong remedial goals of the

notification provision. The notification provisions of the Act do not amount to punishment subject to the Ex Post Facto Clause.

Russell v. Gregoire, 124 F.3d at 1093.

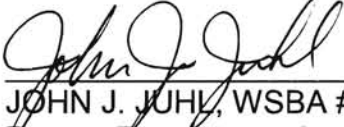
In the present case, defendant fails to prove beyond a reasonable doubt that the sex offender registration and community notification provisions of the Community Protection Act violate the ex post facto clauses of the United States and Washington Constitutions.

IV. CONCLUSION

For the reasons stated above, defendant's appeal should be denied and his convictions affirmed.

Respectfully submitted on October 30, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

JOHN J. JUHL, WSBA #18951
Deputy Prosecuting Attorney
Attorney for Respondent