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NO. 53197-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent.

v.

BRETT HAMPTON,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Nelson, Judge

No. 18-1-00863-0

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant has failed to demonstrate manifest constitutional error. Appellant has failed to manifestly demonstrate that the sexual offender registration statute is unconstitutional beyond a reasonable doubt as applied to him. The only factor distinguishing petitioner's claim from controlling Supreme Court precedent is an unproven assertion of homelessness. Even if appellant could prove his homelessness, prior authority from this Court and Division I forecloses appellant's argument.

II. RESTATEMENT OF THE ISSUES

- A. Has appellant presented an Ex Post Facto Clause violation?
- B. Has appellant demonstrated manifest constitutional error?
- C. Should the interest accrual provision in the judgment and sentence be deleted because it contravenes RCW 10.82.090?

III. STATEMENT OF THE CASE

RCW 9A.44.128(i) defines "sex offense" as "[a]ny federal conviction classified as a sex offense under 42 U.S.C. Sec. 16911 (SORNA)." Sex offenders have a duty to register under RCW 9.94A.130 and RCW 9.94A.140. Appellant was convicted of a felony classified as a sex offense under 42 U.S.C. Sec. 16911. Plaintiff's Exhibit 17. Appellant did not register as a sex offender as required by law. CP 99-101.

IV. ARGUMENT

A. Appellant's Ex Post Facto Clause claim is foreclosed by both precedent and the weight of persuasive opinion.

Appellant argues that “[t]he ex post facto clauses prohibit the application of punishment pursuant to SORNA.” Appellant’s Brief at 9. That argument is meritless because punishment in this case was imposed pursuant to Washington (not federal) law.¹ CP 104-117. Appellant frames his argument around the registration requirements imposed upon homeless people by Washington law. Appellant’s Brief at 15. However that argument was rejected by this Court in *State v. Enquist*, 163 Wn. App. 41, 45, 256 P.3d 1277 (2011) and more recently by Division I in *State v. Boyd*, 1 Wn.App. 2d 501, 513, 408 P.3d 362 (2017), *review denied*, 190 Wn.2d 1008, 414 P.3d 578 (2018), *cert. denied*, 139 S. Ct. 639, 202 L. Ed. 2d 491 (2018). Washington’s sexual offender registration requirement does not violate the Ex Post Facto Clause. *State v. Ward*, 123 Wn.2d 488, 869 P.2d 1062 (1994). The United States Supreme Court is in accord. *Smith v. Doe*, 538 U.S. 84, 89, 123 S. Ct. 1140, 1145, 155 L. Ed. 2d 164 (2003) concluded that Alaska’s sex offender registration act, a materially similar statute, was not a retroactive punishment prohibited by the *Ex Post Facto Clause*. *Id.*

¹ The ex post facto clauses of Washington and United States constitutions are coextensive. *State v. Gresham*, 153 Wn. App. 659, 670, 223 P.3d 1194, 1200 (2009), *reversed on other grounds*, 173 Wn.2d 405, 269 P.3d 207 (2012).

Appellant notes that SORNA formed the basis for registration in this case, but every federal court of appeals to consider the issue has concluded that the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16911, et seq., does not violate the Ex Post Facto Clause.² *United States v. Parks*, 698 F.3d 1, 6 (1st Cir. 2012),³ *United States v. Guzman*, 591 F.3d 83 (2d Cir.2010), *United States v. Shenandoah*, 595 F.3d 151 (3d Cir.2010), abrogated on other grounds by *Reynolds v. United States*, 565 U.S. 432, 132 S.Ct. 975, 181 L.Ed.2d 935 (2012); *United States v. Gould*, 568 F.3d 459, 466 (4th Cir. 2009); *United States v. Young*, 585 F.3d 199, 204 (5th Cir. 2009);⁴ *United States v. Felts*, 674 F.3d 599, 606 (6th Cir.2012); *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011); *United States v. May*, 535 F.3d 912, 919 (8th Cir.2008), *cert. denied*, 556 U.S. 1258, 129 S.Ct. 2431, 174 L.Ed.2d 229 (2009); *United States v. Elkins*, 683 F.3d 1039, 1045 (9th Cir. 2012); *United States v. Hinckley*, 550 F.3d 926, 936–37 (10th Cir.2008), *cert. denied*, 556 U.S. 1240, 129 S.Ct. 2383, 173 L.Ed.2d 1301 (2009); *United States v. W.B.H.*, 664 F.3d 848, 859–60 (11th Cir. 2011). The D.C. Circuit has not considered the federal statute, but it

² The issue does not appear to have been presented in the D.C. Circuit, but the District Court has also held that SORNA does not violate the Ex Post Facto Clause. *United States v. Morgan*, 255 F. Supp. 3d 221, 232 (D.D.C. 2017).

³ “Accordingly, we join every circuit to consider the issue and reject the main claim made by Parks.” *Id.* 698 F.3d at 6.

⁴ Noting that the Supreme Court in *Smith v. Doe* has provided a framework for determining whether “a sex offender registration law constitutes retroactive punishment forbidden by the Ex Post Facto Clause.” *Id.*, 585 F.3d at 204.

has held that the Sex Offender Registration Act enacted by the District of Columbia, an analog to the federal SORNA statute, does not violate the Ex Post Facto Clause. *Anderson v. Holder*, 647 F.3d 1165, 1169 (D.C. Cir. 2011).⁵

B. Alternatively, appellant’s Ex Post Facto Clause as applied claim does not present manifest constitutional error.

1. Appellant must prove the invalidity of the registration requirement beyond a reasonable doubt.

Appellant has the burden of proving beyond a reasonable doubt that RCW 9A.44.130 and RCW 9A.44.140 violate the Ex Post Facto Clause. *State v. Boyd*, 1 Wn. App. 2d at 507 (citing *Ward*, 123 Wn.2d at 496).

2. Appellant has not presented a record sufficient for review of his Ex Post Facto Claim.

Appellant raises his ex post facto claim for the first time on appeal. Accordingly, appellant must demonstrate manifest constitutional error. RAP 2.5(a). On appeal, if the record is insufficient to evaluate a claim of error on its merits, the error is not manifest under RAP 2.5(a)(3). *Lakewood v. Willis*, 186 Wn.2d 210, 218, 375 P.3d 1056, 1060 (2016) (citing *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

⁵ Three of the circuit courts cited above rely upon the fact that the defendant in a SORNA case is punished for conduct occurring after the statute’s effective date to determine that SORNA does not violate the Ex Post Facto Clause. That conduct was failure to register in *Gould*, and failure to register plus interstate travel in *Guzman* and *Shenandoah*. *Id.* In those cases it was unnecessary to go through the analysis of *Smith v. Doe, supra*. The remainder follow the *Smith* framework.

The evaluation of appellant's ex post facto claim depends upon the determination that appellant was homeless to a significant degree because homelessness is the only assertion distinguishing appellant's ex post facto claim from the otherwise directly controlling precedent of *State v. Ward, supra*. Appellant's asserted homelessness is relied upon in three of the six factors presented in appellant's argument Appellant's Brief at 15-19. If appellant's homelessness is in doubt, then appellant's ex post facto claim has not been proven beyond a reasonable doubt.

Substantial evidence in the record suggests that appellant was not homeless. At trial, the appellant presented evidence that he was not homeless. At trial, appellant testified that at the time of this incident he had an address,⁶ had a place to live,⁷ was taking care of a person at that place,⁸ received mail there,⁹ had a place to pay rent,¹⁰ had a place to store all his belongings,¹¹ had a place to eat,¹² had a place to buy food for,¹³ slept at that place,¹⁴ and that place was his "temporary home."¹⁵ That place was 2106

⁶ 12/7/18 VRP 201.

⁷ 12/7/18 VRP 201.

⁸ 12/7/18 VRP 201-02.

⁹ 12/7/18 VRP 196

¹⁰ 12/7/18 VRP 202.

¹¹ 12/7/18 VRP 196, 202.

¹² 12/7/18 VRP 202.

¹³ 12/7/18 VRP 202.

¹⁴ 12/7/18 VRP 196.

¹⁵ 12/7/18 VRP 202.

South M. Street.¹⁶ The homeowner allowed appellant to live there with him.
12/7/18 VRP 196. Only for a period of time did appellant not sleep there.
12/7/18 VRP 196-99, 202. These facts enabled appellant's trial lawyer to
make the following statement in closing argument:

Well, we haven't gone beyond 2018, but he's gone through this whole year. He registered at the address in 2016, M Street, and he lived at that address until he was arrested and then he couldn't live there anymore. But -- and he's subsequently registered at -- not at that address, but in the timeframe that we're talking about here, in January 2018 to March of 2018, he still lived there. He still lived at that address. He kept all of his stuff there. He used it as his mailing address. He had permission to be there. He was a resident of that house. And on some occasions, according to the evidence, he stayed at the Mission sometimes. There is no requirement, and even under -- on his 2016, the registration requirement, April 14th, 2016, it even says, if you have a living situation that is a fixed residence as defined below, you must register at this address. Failure to do so can result in a criminal charge. If you register as homeless or lacking a fixed address but actually have a fixed address, criminal charges can be filed against you then, too. So it's not clear under any law here what he was supposed to be following. He had a fixed address where he lived and kept all of his stuff and got his mail and he paid rent and he did everything he was supposed to do there. But he also stayed sometimes at the Mission. That, to me, is the same as going on a vacation or staying someplace else or going to Grandpa's house for Thanksgiving holiday. You don't change your address when you do that. If you stay someplace else temporarily, you're not changing your address at all.

12/7/18 VRP 248-49.

¹⁶ 12/7/18 VRP 196.

Likewise, substantial evidence in the record suggests that appellant was homeless. This evidence was summarized in the State's closing argument at trial:

So based off of the evidence presented by the State, admitted evidence, the exhibits of the Rescue Mission records, and -- and the testimony, it's clear that Mr. Hampton was not staying at his last registered address, in addition to the intake form that Xavier Mendiola from the Rescue Mission testified to stating in the defendant's own writing that he had been homeless consistently for six months prior to entering the Rescue Mission.

So based on the evidence, the State has proved that the defendant was in violation of his registration requirements and had ceased to have a fixed address according to the law.

12/7/18 VRP 192.

The trial court had no need to resolve whether or not appellant was homeless because homelessness is not an element of the offense of failing to register. RCW 9A.44.130, RCW 9A.44.140; Findings of Fact, CP 98-103. The findings of fact relating to appellant's residence and registration status did not resolve the question of whether or not appellant was "homeless." Appellant had a duty to register as a sex offender between January 5, 2018 and March 3, 2018. Finding of Fact III, CP 100. Appellant's last registration before the relevant charging period was April 15, 2018. Finding of Fact IV, *Id.* The address registered was 2106 S. M St., Tacoma, Washington. *Id.* Appellant did not reside at the residence stated in that registration during the relevant charging period. Finding of

Fact X, CP 101. Appellant did not register within three business days of moving from that address. Finding of Fact V, CP 100. Appellant was not in custody during that time period. Finding of Fact VII, CP 101. Those facts were sufficient to support the finding of guilt. The trial court had no need to resolve the existence or extent of appellant's homelessness.

On appeal, the question of whether appellant was actually homeless (or the extent to which he was homeless) remains an open factual question. Appellant acknowledges the uncertainty: "Mr. Hampton, if homeless as the State contends, is subject to supervision, as he must report in person every week or face criminal prosecution." Appellant's Brief at 16. The problem with this unsteady argument is that appellant has the burden of proving the challenged statute unconstitutional beyond a reasonable doubt. *State v. Boyd, supra*.

This Court sits as a court of review. *Wagner v. Northern Life Insurance Co.*, 70 Wn. 210, 216, 126 P. 434 (1912). It "can do no more than review the judgment which has been brought before us by the appeal." *Id.* "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756, 761 (2009) (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)); RAP 2.5(a).

Petitioner's Ex Post Facto Clause as applied claim does not present manifest constitutional error and should be denied for that alternative reason.

C. Alternatively, appellant has not demonstrated that the sex offender registration statute is unconstitutional beyond a reasonable doubt.

State v. Ward, supra, and *Smith v. Doe*,¹⁷ *supra* provide the appropriate framework for the application of the *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963) test in this case.

a. The physical act of registration creates no affirmative disability or restraint.

The physical act of registration creates no affirmative disability or restraint. *State v. Ward*, 123 Wn.2d at 500-01. Appellant's assertion of homelessness (and its registration consequences) is unproven¹⁸ and irrelevant. *State v. Boyd, supra*.

b. Sex offender registration has historically been regarded as punishment.

"Registration has not traditionally or historically been regarded as punishment." *State v. Ward*, 123 Wn.2d at 507. See also *Smith v. Doe*, 538

¹⁷ The Supreme Court in *Smith v. Doe* has provided a framework for determining whether "a sex offender registration law constitutes retroactive punishment forbidden by the Ex Post Facto Clause." *United States v. Young*, 585 F.3d at 204. Respondent agrees with appellant that the State and Federal Ex Post Facto Clause provisions are coextensive.

¹⁸ This argument is addressed in the preceding section.

U.S. at 101-02;¹⁹ *State v. Boyd*, 1 Wn.App. 2d at 511-12 (a case involving a transient person). Appellant’s assertion of homelessness (and its registration consequences) is unproven.²⁰

- c. The registration statute does not promote the traditional aim of punishment.

This issue was resolved in *State v. Ward*: “Even if a secondary effect of registration is to deter future crimes in our communities, we decline to hold that such positive effects are punitive in nature.” *State v. Ward*, 123 Wn.2d at 508.

- d. The registration statute is not excessive in relation to a non-punitive purpose.

The sex offender registration statute is regulatory and does not constitute additional punishment in violation of ex post facto prohibitions. *State v. Ward*, 123 Wn.2d at 510. Appellant’s assertion of homelessness (and its registration consequences) is unproven²¹ and irrelevant. *State v. Boyd, supra*.

¹⁹ Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the [Alaska Sex Offender Registration] Act’s registration and dissemination provisions, but from the fact of conviction, already a matter of public record. The State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant. *Smith v. Doe*, 538 U.S. at 101.

²⁰ This argument is addressed in the preceding section.

²¹ This argument is addressed in the preceding section.

- e. The registration statute is rationally connected to a nonpunitive purpose.

This is the most significant factor. *Smith v. Doe*, 538 U.S. at 102. This statute was not presented by the appellants in *State v. Ward*,²² but the Supreme Court held that the registration statute satisfied the Due Process rational basis test. *State v. Ward*, 123 Wn.2d at 515-17. Appellant argues that the relationship between the non-punitive goals and the method selected by the legislature is not rational.” Appellant’s Brief at 18. This argument was rejected in *Smith v. Doe*:

They contend, however, that the Act lacks the necessary regulatory connection because it is not narrowly drawn to accomplish the stated purpose. A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance. The imprecision respondents rely upon does not suggest that the Act's nonpunitive purpose is a sham or mere pretext.

Smith v. Doe, 538 U.S. at 103.

- f. The remaining *Mendoza-Martinez* factors are insignificant.

The two remaining *Mendoza-Martinez* factors—whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime—are of little weight in this case. The regulatory scheme applies only to past conduct, which was, and is, a crime. This is a necessary beginning point, for recidivism is the statutory concern. The obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation.

²² *State v. Ward* only examined the *Mendoza-Martinez* factors implicated by the appellant’s arguments. *State v. Ward*, 123 Wn.2d at 500.

(internal quotation and citations omitted) *Smith v. Doe*, 538 U.S. at 105.

g. Conclusion

As *Smith v. Doe, supra*, *State v. Ward, supra*, and all the Federal Circuit Courts of Appeal have held, sex offender registration statutes do not violate the Ex Post Facto Clause. Petitioner has presented no new facts which materially distinguishes his case from *State v. Ward*. Even if petitioner did prove his homelessness beyond a reasonable doubt, petitioner's claim would still be foreclosed by *State v. Boyd, supra* and *State v. Enquist, supra*.

D. This Court should remand for the trial court to strike the interest accrual provision from the judgment and sentence.

The State concedes this Court should remand for the trial court to strike the interest accrual provision from appellant's judgment and sentence in light of *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). Recent legislative amendments to the legal financial obligation (LFO) statutes prohibit sentencing courts from imposing interest accrual on the nonrestitution portions of LFOs. RCW 10.82.090(2)(a); *Ramirez*, 191 Wn.2d at 746-47. The judgment and sentence in this case contains the provision "INTEREST: The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the

rate applicable to civil judgments. RCW 10.82.090.” CP 107. The court imposed \$600 in non-restitution legal financial obligations. CP 106. No restitution obligations were imposed. CP 104-117. Interest cannot accrue on the non-restitution legal financial obligations. RCW 10.82.090.

This court should direct the trial court to strike the following language from the judgment and sentence: “INTEREST: The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.”

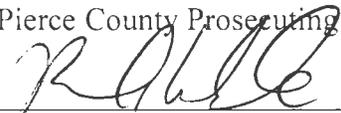
V. CONCLUSION

Appellant’s Ex Post Facto Clause claim is foreclosed by both Washington Supreme Court and United States Supreme Court precedent. Petitioner’s attempt to distinguish that precedent with an unproven assertion of homelessness should be rejected. Even if petitioner could present a sufficient argument relating to homelessness, it would be foreclosed by *State v. Boyd, supra* and *State v. Enquist, supra*. Petitioner has not presented manifest constitutional error to this court.

Petitioner's challenge to the interest accrual provision in the judgment and sentence is well taken. This Court should direct that the interest accrual language should be deleted from the judgment and sentence.

RESPECTFULLY SUBMITTED this 5th day of November, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

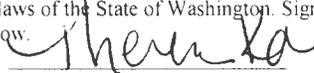


Mark von Wahlde WSB# 18373
Deputy Prosecuting Attorney

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The undersigned certifies that on this day she delivered by E-File or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

11-05-19
Date



Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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