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No. 54067-3

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

STATE OF WASHINGTON,

Respondent,

v.

DARREN RONELL SMITH JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
WASHINGTON FOR THE COUNTY OF PIERCE

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Darren Smith was required to register as a sex offender for conduct that occurred when he was 14 years old, even though research shows the primary stated rationales for sex offender registration— preventing recidivism and public safety—do not apply to juveniles who commit sex offenses. The State fails to meaningfully address the *Mendoza-Martinez*¹ factors, which establish that for Mr. Smith, a low-risk registrant whose requirement to register was based on a juvenile conviction, the effects of sex offender registration are punitive and thus violate the ex post facto clause as applied to him.

In treating sex offender registration as merely a collateral consequence, the State misconstrues Mr. Smith's claim that he was deprived of the protections of juvenile court and subjected to the adult criminal laws without a hearing, in violation of his procedural and substantive due process rights

¹ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).

B. ARGUMENT IN REPLY

1. **Mr. Smith’s conviction for failure to register as a sex offender based on a juvenile offense violates the ex post facto clause.**
 - a. The question of whether sex offender registration based on a juvenile conviction is punishment that violates the ex post facto clause is a matter of first impression for this Court.

The State relies on *Ward*, *Doe I*, and *Boyd* to argue Mr. Smith’s claim “has already been rejected by Washington’s courts, as well as the United States Supreme Court.” Br. of Resp. at 1. This is wrong, because these decisions all involved registration based on an adult conviction, not a juvenile conviction at issue here. Br. of Resp. at 1, 5-9 (citing *State v. Ward*, 123 Wn.2d 488, 869 P.2d 1062 (1994); *Smith v. Doe I*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003); *State v. Enquist*, 163 Wn. App. 41, 256 P.3d 1277 (2011); *State v. Boyd*, 1 Wn. App. 2d 501, 408 P.3d 362 (2017)).

As other courts have recognized, the punitive effect of sex offender registration based on a juvenile conviction constitutes punishment even when it is not deemed punitive for an adult offense. In *Interest of T.H.*, 913 N.W.2d 578, 596 (Iowa 2018),

the Iowa Supreme Court applied the *Mendoza-Martinez* factors to conclude that “mandatory sex offender registration for juvenile offenders is sufficiently punitive to criminal punishment based on the unique restraint of his requirement juveniles.” *Id.* This determination was based on some of the same considerations of community re-integration, peer group interaction, the historic privacy provision afforded to juvenile offenders, and differing recidivism rates discussed by Mr. Smith in his opening brief. *Id.* at 588-97. Br. of App. at 9-33. The court’s decision in *T.H.* applied only to juvenile offenders. *State v. Aschbrenner*, 926 N.W.2d 240, 244 (Iowa 2019) (rejecting ex post facto challenge based on adult conviction).

Likewise, in *People in Interest of T.B.*, a Colorado Appeals Court determined “the weightiest *Mendoza-Martinez* factors . . . demonstrate that the punitive effects of . . . lifetime registration requirement as applied to juveniles override its stated nonpunitive purpose.” 16CA1289, 2019 WL 2528764, *9 (Colo. App. June 20, 2019), *reh'g denied* (Sept. 12, 2019), *cert. granted*, 2020 WL 529206 (Colo. Feb. 3, 2020). The Tenth Circuit recognized that analysis of the *Mendoza-Martinez* factors is

different for a juvenile conviction than for an adult conviction. *Millard v. Camper*, 971 F.3d 1174, 1184 n 11 (10th Cir. 2020) (“the Colorado Supreme Court's impending decision in *T.B.* is inapplicable to the present matter, as none of the Appellees is a juvenile offender with multiple juvenile sex offenses . . .”).

The State ignores how the application of the *Mendoza-Martinez* factors is different when sex offender registration is based on a juvenile conviction, instead arguing that case law interpreting the same provisions based on an adult conviction are “controlling.” Br. of Resp. at 12. This is wrong. As shown in Mr. Smith’s opening brief and as found by other courts that directly consider this question, application of the *Mendoza-Martinez* factors to Washington’s sex offender registration requirements based on a juvenile convictions yields a very different outcome than when applied to an adult conviction.

- b. The cases cited by the State as “controlling” do not address the punitive effects of registration for low-risk registrants like Mr. Smith, whose registration requirements are based on a juvenile, rather than an adult conviction.

The State cites to *Ward*’s analysis of the *Mendoza-Martinez* factors as controlling in Mr. Smith’s case. Br. of Resp.

at 6-7. First, *Ward's* analysis is outdated because it did not involve the public, on-line registries at issue here. Laws of 2003, ch. 217, § 1(5)(a); Laws of 2008, ch. 98, § (5)(a) (creating public, on-line registries that include low-risk, level I offenders if they miss a single in-person check-in). As argued in Mr. Smith's opening brief, it is no longer true, as was the case in *Ward*, that both the registrant information and the fact of registration remain "confidential" and that the statute allowing for disclosure of an offender's status was based on evidence that he "poses a threat to the community." *Ward*, 123 Wn.2d at 502-03.

Now on-line registries will include low-risk registrants like Mr. Smith, who because of they are homeless, struggle to comply with the rigors of weekly reporting. Br. of App. at 14-15. Unlike in *Ward*, this public disclosure is based on non-compliance, rather than risk to reoffend, thus running afoul of *Ward's* observation that "[a]bsent evidence of such a threat, disclosure would serve no legitimate purpose." *Ward*, 123 Wn.2d at 503.

As argued in Mr. Smith's opening brief, this is all the more untenable when this onerous reporting requirement and

publicity for failure to meet these reporting requirements is based on a juvenile conviction. Br. of App. at 9-33. It does not matter, as argued by the State, that Mr. Smith's juvenile conviction is a matter of public record. Br. of Resp. at 9. Though a child's class A sex offense is subject to public disclosure under RCW 13.50.050(2), this is limited to the "official juvenile court file;" all other records remain confidential, subject to RCW 4.24.550(5)(a)(ii)'s on-line registration requirement for Level I registrants at issue here. RCW 13.50.050(3). There is a vast distinction between a juvenile court file that is potentially "open to public inspection" as provided for by RCW 13.50.050(2)) versus posting personal information in an on-line, public searchable database on the world-wide web. Laws of 2001, ch. 169, § 6(b); *see, e.g., Doe v. State*, 189 P.3d 999, 1011 (Alaska 2008) ("there is a significant distinction between retaining public paper records of a conviction in a state file drawers and posting the same information on a state-sponsored website.").

The State's reliance on *Doe I*, which did address public on-line registries is equally unpersuasive. Br. of Resp. at 8-9. First, as in *Ward* and subsequently in *Enquist* and *Boyd, Doe I*

does not involve public disclosure based on a juvenile offense. It is also notable that the Alaska State Supreme court rejected *Doe's* conclusion when it applied the “federal test to our state law.” 189 P.3d at 1007. The Alaska State Court’s “disagree[d], respectfully but firmly, with the Supreme Court's analysis and its ultimate conclusion that ASORA² is not penal.” *Id.* at 1018.

This Court should similarly reject the Supreme Court’s rationale in *Doe I*, which failed to apprehend the reality of the internet age, comparing access to an on-line public registry “to a visit to an official archive of criminal records” rather than “a scheme forcing an offender to appear in public with some visible badge of past criminality.” 538 U.S. at 99.

The State points out that *Ward* and subsequently *Boyd* and *Enquist* considered the increasing demands of sex offender registration because “the risk of recidivism posed by sex offenders is ‘frighteningly high.’” Br. of Resp. at 11 (citing *Smith v. Doe I*, 538 U.S. at 103). This is simply not the case for juveniles convicted of sex offenses. Br. of App. at 27-28; *United*

² Alaska Sex Offender Registration Act.

States v. Juvenile Male, 590 F.3d 924, 940 (9th Cir. 2010) (“there is no evidence, however, that the “high rate of recidivism” at issue in *Doe* is shared by juvenile offenders”), vacated as moot, 131 S. Ct. 2860, 180 L. Ed. 2d 811 (2011); *T.H.*, 913 N.W. 2d at 596 (“*Smith’s* premise that the ‘frightening and high’ rates of recidivism justify the harsh impositions of the sex offender regime has proven untrue in the context of juveniles.”). The State simply fails to address what researchers have identified as the critical distinction between juvenile and adult sex offending, including low juvenile recidivism rates, and the particular harm of the public exposure on a sex offender registry poses for young people. Br. of App. at 28-32.

Finally, it is immaterial that Washington statutes provide a possibility for relief from the registry if certain conditions are met. Br. of Resp. at 12-13. This does not change the fact that Mr. Smith is restrained by the registration requirements. The Iowa Supreme Court determined mandatory sex offender registration based on a juvenile offense was punishment even though it was also true that that juvenile court was “able to relieve a juvenile

sex offender from the registration requirements when rehabilitation under a dispositional order is achieved prior to expiration.” *T.H.*, 913 N.W.2d at 584. *T.H.*’s analysis focused on the fact that “once registration occurs, numerous restrictions and requirements are imposed,” and during the time of the registration period, the registrant must abide by the requirements of the registration statute *Id.* The fact that the former juvenile offender was able to remove himself from the registry did not change the fact that while on the registry, registration constituted punishment under the *Mendoza-Martinez* factors. *Id.* at 587-96.

Likewise, the Maryland Court of Special Appeals rejected the idea that potential relief from sex offender registration for a former juvenile offender means that registry is not an “[a]ffirmative disability or restraint” when the person is subject to it. *In re Nick H.*, 224 Md. App. 668, 692-93, 123 A.3d 229 (2015) (internal citation omitted).

The appellate court in *Nick H.* emphasized, just as courts of other states have, that it is the *mandatory* requirement of registration that is central to a court’s determination that a

registration requirement based on a juvenile conviction is punitive, rather than any potential to be removed from the registry: “when a restriction is imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones.” *Id.* at 703–04 (citing *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky.2009)).

In the end, the court in *Nick H.* determined that “although the requirement of registration imposes an affirmative disability on appellant, has been regarded historically as punishment, carries the element of *scienter*, and applies to behavior that is criminal in nature,” these disadvantages are outweighed by the public safety purpose of the statute and the fact that registration based on a juvenile offense was not mandatory. *Nick H.*, 224 Md. App. at 705. Because registration required a “court finding, based upon clear and convincing evidence adduced at a hearing, of a significant risk of re-offending.” it was not punishment that violated the ex post facto clause. *Id.* at 705-06.

Mandatory registration is so onerous and potentially devastating that the mere specter of removal from the registry does not undo this harm. Br. of Resp. at 12-13. For all of the reasons cited in Mr. Smith's opening brief, the demands of sex offender registration, especially when imposed on a juvenile, create a cycle of exclusion from society and repeat failures to register that makes any potential for removal from the duty to register unavailable, and thus is not a basis for determining the mandatory requirements of sex offender registration are not punitive. Br. of App. at 30-32.

The State relies on the authority and logic of court decisions that do not consider the particularly punitive nature of mandatory sex offender registration when based on a juvenile offense. In Mr. Smith's case, this violates the ex post facto clause and requires reversal of his conviction for failure to register as a sex offender.

- 2. It violates due process to subject a juvenile adjudicated in juvenile court to mandatory sex offender registration without judicial assessment.**

The State misunderstands Mr. Smith's due process claim to be one of notice of collateral consequences. Br. of Resp. at 13-

14. This is not the issue. The issue is that children committed of a sex offense in juvenile court are subjected to mandatory sex offender registration without judicial assessment of whether their juvenile offense should subject them to the adult criminal laws.

This is not, as described by the State, an “ambiguous due process argument.” Br. of Resp. at 1. Mr. Smith’s claim is that mandatory sex offender registration based on a juvenile offense violates the well-established principle that children may not be deprived of the “special rights and immunities” conferred by juvenile court jurisdiction without the minimal guaranties of due process. *Kent v. United States*, 383 U.S. 541, 556, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). The State simply does not address this substantive and procedural due process claim. Br. of Resp. at 13-15.

The State’s reliance on statutes that provide potential relief from sex offender registration is misplaced because they do not a cure the due process problem at issue here. Br. of Resp. at 14-15. As discussed in Mr. Smith’s opening brief, juveniles are subject to mandatory sex offender registration based on a

conviction that is obtained with fewer trial protections than adults receive. Br. of App. at 39-44. Children convicted of sex offenses pose no specific and broadly applicable risk of sexual recidivism. Br. of App. at 44-48. The specific harm of social exclusion and the public exposure for juveniles subject to mandatory sex offender registration requirements is substantial and contrary to the rehabilitative principles that protect children in juvenile court. Due process requires that children be afforded a hearing and judicial determination before being subjected to the registration requirements under RCW 9A.44.130(1) based on a juvenile conviction.

C. CONCLUSION

Because Mr. Smith was subject to mandatory sex offender registration based on a juvenile conviction, his conviction for failure to register violates the ex post facto clause, requiring reversal of his conviction. His conviction must be reversed for the separate and independent reason that this mandatory requirement to register based on a juvenile conviction under RCW 9A.44.130(1) violates due process.

DATED this 30th day of September, 2020.

Respectfully submitted,

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DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 54067-3-II
v.)	
)	
DARREN SMITH,)	
)	
Appellant.)	

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