

FILED

OCT 27 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 323935

**COURT OF APPEALS DIVISION III
IN AND FOR THE STATE OF WASHINGTON**

STATE OF WASHINGTON

Appellee.

v.

SCHNEIDER, Wallace Edward

Appellant(s)

REPLY BRIEF OF APPELLANT(S)

APPEAL FROM THE SUPERIOR COURT FOR
FERRY COUNTY

Hon. Allen Nielson
Cause No. 6227

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I. REPLY TO RESPONDENTS STATEMENT OF CASE

Contrary to inferences made by the State concerning the Appellant's confession, the Appellant was not convicted of burglary or any other crime other than rape. The statement that the victim's hips were broken was something the prosecutor had "heard" and sought to add to the complaint, but remains in the realm of inadmissable hearsay under ER 802 . No examination or doctor's report regarding the victim was ever submitted to the court, nor was testimony ever taken from her.¹

The Appellant participated in treatment at Western State Hospital after six months of treatment--not for initiating consensual sex (or "acting out") with another patient (who was physically larger than he) --but because there had also been recent escapes from the program by other participants. (VRP 31-33, Letter/Notice of Release from Western State, CP 17, 18) After being sent to prison for another 13.5 years, the Appellant was released 20 years early from a 35 year sentence, and became a functioning member of society, fulfilling all probation requirements. TheAppellant has gone on to live for 35 years without committing any other crimes of this type, went on to have a long term

¹ See *Information*, CP1-4, *Judgment and Sentence*, CP 17

marriage with a wife who passed away the month he filed *Petition for Relief from the Duty to Register*. The state concedes there have been no further convictions over 35 years.² The State concedes that, in fact, he is physically disabled from committing a crime of the nature that necessitates his registry if he had the propensity, which by all accounts of friends and relatives, as well as a licensed sexual deviancy therapist--he does not.

The Appellant's description of an event to Dr. Kirkpatrick during his evaluation was understandably likely inconsistent with a confession made 30 years prior. However, the State fails, as the Court did--to note that the contemporary confession was done under polygraph, whereas his original confession was elicited from a teenager by the Sheriff without a polygraph or the benefit of an attorney. The court's subsequent findings that the Appellant "lacked insight" or was being disingenuous are inconsistent with Kirkpatrick's evaluation and recommendation that he be taken off the registry.³

The registry statutes were additional restrictions passed after the Appellant's guilty plea, and therefore was ex post facto. They affected an

² The trial Court noted that the Appellant's sole deferred conviction for failure to register was likely a misunderstanding.

³ See "Sealed Medical & Health Information, CP 90-91.

bill of attainder for all of those convicted under a particular set of laws as opposed to all others. The the Appellant was eligible for the relief he sought and provided clear and convincing evidence of rehabilitation as required, but the Court failed to fairly evaluate the Appellant's circumstances and evidence under statutory criteria, and misconstrued expert opinion, facts and law, in an abuse of discretion that must be reversed by this court, in order that the statutory right to relief not be rendered illusory.

II. REPLY TO RESPONDENT'S ARGUMENT

A. "Regulation" that denies fundamental constitutional rights is punitive by any other name. Under the Appellant's facts, the sex offender Registration statute is indeed an ex post facto law, and also a bill of attainder in it's general application.

The U.S. and State Constitution stand as protections against the inherently coercive power of the state. The "Innocent until proven guilty" doctrine the State cites from *State v. Ward* misapplies this standard to governments. Now under dual restrictions under Nevada and Washington law, under threat of felony conviction for merely failing to register--a crime that did not exist at the time of the Appellant's offense--the quantum of the Appellant's punishment has clearly increased per

State v. Hennings, and is substantive, retrospective, and alters the standard of punishment. It is therefore an ex post facto law under a *Ward* ex post facto analysis

State jurisprudence does, at this juncture, hinge the definition of "punitive" as articulated by the punisher. However a skunk named Rose still smells like a skunk and not a rose. Subsequent Supreme Court cases of *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994); *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993); and *United States v. Ursery*, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996) deal with the same or related topics and are consistent with *Halper*, *Austin* and *Ursery* were both civil forfeiture cases arising from the Eighth Amendment prohibition against excessive fines. Thus, they arise in a different factual context and are analyzed under a completely separate and distinct constitutional clause. Nevertheless, each purports to discuss "punishment" *Austin* involved a civil forfeiture proceeding against a body shop and mobile home after its owner pleaded guilty to a drug offense. The government defended its action under the excessive fines clause, claiming the civil forfeiture was not "punishment" and thus could not be an excessive fine under the Eighth Amendment. Relying on

Halper "that civil proceedings may advance punitive and remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties," *Austin*, 509 U.S. at 610, 113 S.Ct. at 2806 (citing *Halper*, 490 U.S. at 447, 109 S.Ct. At 1901) Sanctions frequently serve more than one purpose. The Court need not not exclude the possibility that a the duty to register as a sex offender serves remedial purposes to conclude that it is subject to the limitations of Ex Post Facto and Attainder. It only need determine that it can only be explained as serving in part to punish." (See *Austin*, 509 U.S. at 610, 113 S.Ct. at 2806 applying the *Halper* double jeopardy analysis to the excessive fines clause.) The nature of the inquiry being whether the sanction is "simply" or "purely" remedial (in which case it is not a punishment) or whether it has any punitive characteristics (in which case it must be considered a punishment for the purpose of the Constitutional analysis).

So, while careful to distinguish the sex offender registry from all other types of sanctions, a particular sanction "cannot fairly be said solely to serve a remedial purpose" *Kurth Ranch* is the United States Supreme Court's last word on the subject . The issue in *Kurth* was whether or not the tax "has punitive characteristics that subject it to the constraints of the

Double Jeopardy Clause." *Kurth*, 511 U.S. at 778-79, 114 S.Ct. at 1945 (emphasis added). The Court found it did and applied double jeopardy to bar the parallel criminal charges.

As in *Kurth*, the like question here is whether the requirement to register has any punitive characteristics. If so it is punishment for double jeopardy purposes, and thus also for our purposes, in keeping with the argument the State makes here. Even if there are also nonpunitive aspects, constitutional constraints against Ex Post Facto and Bills of Attainder still apply.

B. The Trial Court abused the discretion it had in denying the Appellant relief in the face of clear and convincing evidence of rehabilitation/future non-recidivism.

The State relies once again on *State v. McMillan* 152 Wn.App. 423 (2009) to support its assertion that the denial of the Appellant's petition was within the discretion of the trial court. However, differing statutory language aside, the untenable relationship between evidence and ruling-- the lack of consistency in outcomes--in the same court-- among other factors, mean that there is not assurance of equal protection under the Statute. In *McMillan*, the trial court relieved a sex offender who had

multiple victims of his duty to register, after being in the community for over 10 years without being convicted of any new offenses, finding that his likelihood to reoffend was low in reliance on a declaration of a clinical psychologist that Mr. McMillan did not pose "any significant risk of sexual re-offending." (*McMillan*, Page 426). How can the Court possibly negatively distinguish this from an intensive examination of a 60 year old disabled man with single victim who was evaluated under polygraph by a licensed sex offender treatment provider and who poses "less than 1% risk" of re-offense? Contrary to what the State asserts, the Appellant has complied with all supervision conditions and has done his time, in keeping with the deal the State of Washington made with him upon his guilty plea--a deal that the State sees fit to to renege on. He has been financially stable, and a loving husband for 22 years prior to being widowed. Aside from a failure to register conviction which the Court conceded was likely a mixup,⁴ Mr. Schnieder has spent three times as long in the community with no criminal offenses and has done what he can to atone, yet still must still wear the mantle of a sex offender. As the state concedes, the report satisfied the prosecuting attorney. These facts make it impossible that the Court could rationally come to the conclusion

⁴ VRP at 15-16

that he still poses any threat to the community whatsoever, and that any legitimate interest remains in requiring him to register.

"[N]umber one, I have ten years of a clean bill of health. Two, I have, on the other hand, Mr. Turplesmith saying well judge, there's always a possibility. And he's right when he says that. But on the other hand, I have an expert who works with sex offenders saying no. That there's no risk here.

"The judge stated, " as a matter of policy if I don't grant it in this situation, a petition to drop the registration requirement, then when do I? In other words, if you don't reward a probationer for having successfully done something ordered by the court, then the whole process becomes illusory." (Judge Allen Nielson in *McMillan*, Page 427-428)

...Indeed!

* * *

CONCLUSION

RCW 9A.44.130 et seq. constitutes a post fact bill of attainder vis-a-vis the Appellant, and should be found as void and/or unenforceable in this case. Inasmuch as the registry statutes were passed after the Appellant's guilty plea, absent any trial or notification--and are indeed substantively and subjectively punitive, it is therefore an invalid ex post facto law with regard to him. That these statutes affect a bill of attainder that creates an additional affirmative duty among a tainted

class of individuals, the court must enforce the Appellant's right to be free of such a lifetime infringement on fundamental rights.

The Appellant was more than eligible for the relief he sought, and provided clear and convincing evidence of rehabilitation as required, but the Court failed to fairly evaluate the Appellant's circumstances and evidence under statutory criteria, and misconstrued expert opinion, facts and law, in an abuse of discretion that must be reversed by this court, in order that the statutory right to relief not be rendered illusory.

Respectfully submitted this 26th day of October, 2015

A handwritten signature in black ink, appearing to read "C. Olivia Wood", written over a horizontal line.

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IN THE COURT OF APPEALS of THE STATE OF WASHINGTON
DIVISION III

State of Washington
Plaintiff

v.
Wallace Edward Schneider
Defendant.

CASE NO. 323935

CERTIFICATE OF SERVICE

I, Christal Olivia Wood, J.D., am over the age of 18 years, competent to testify to the matters stated herein, declare that on the 26th day of October, 2015, I served copies of Appellants' Reply Brief upon this Court and to: Kathryn Burke, Ferry County Prosecutor's Office, 350 E. Delaware, Stop 11, Republic, WA 99166, by first class mail.

Respectfully submitted this 26th day of October, 2015

By



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