

October 6, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BRETT CHARLES HAMPTON,

Appellant.

No. 53197-6-II

UNPUBLISHED OPINION

GLASGOW, J.—In 1998, Brett Charles Hampton was convicted in federal court of one count of transporting a minor for prostitution and two counts of transporting an individual for prostitution. At the time Hampton was released from prison for those crimes, he was not required to register as a sex offender. In 2006, after the law changed to require people convicted of certain sex crimes to provide state governments with information such as their names and current addresses for inclusion on state and federal sex offender registries, Hampton registered as a sex offender. After over a decade of maintaining his registration, Hampton failed to register his address or transient status during a three-month period in 2018, and he was convicted following a bench trial for failing to register as a sex offender.

On appeal, Hampton argues for the first time that the application of the amended registration statute to him violates the ex post facto clauses of the state and federal constitutions, requiring reversal of his conviction and dismissal of the charge with prejudice. Hampton also argues that the trial court erred by imposing interest accrual on nonrestitution legal financial obligations, which the State concedes.

Application of the registration statute to Hampton does not violate the ex post facto clauses of the state and federal constitutions. We affirm Hampton's conviction. But we accept the State's concession regarding interest accrual, and we remand to the trial court to strike the interest accrual provision on nonrestitution legal financial obligations from Hampton's judgment and sentence.

FACTS

In 1998, Hampton was convicted in federal court of one count of transporting a minor for prostitution and two counts of transporting an individual for prostitution. At the time Hampton was released from prison for those crimes, he was not required to register as a sex offender. In 2005, following a change in the law, Hampton was notified that he was required to register. Specifically, former RCW 9A.44.130(1)(a) (2005) and former RCW 9A.44.140 (2002) required offenders who have been convicted of a "sex offense" to register as sex offenders. LAWS OF 2005, ch. 80, § 1; LAWS OF 2002, ch. 25, § 1. RCW 9A.44.128(10)(i) includes in the definition of a "sex offense," "[a]ny federal conviction classified as a sex offense under 42 U.S.C. [§] 16911." Hampton's crimes are classified as sex offenses under 42 U.S.C. § 16911.

In December 2017, Pierce County was unable to verify Hampton's address after five attempts to contact him. At the time, Hampton was registered at 2106 South M Street in Tacoma, Washington. According to the business records of a local shelter, Hampton stayed at the shelter from January 31 to February 1, 2018, and returned to stay from February 3 to March 2, 2018. On March 3, 2018, a police officer went to the shelter where he located Hampton and placed him under arrest. During an interview, Hampton told the officer he was aware he needed to register at a current address or under the registration requirements for people experiencing homelessness. But Hampton was frustrated with the system and felt he did not need to register any longer. According

to Pierce County Sheriff's Department records, Hampton made no attempts to register between January 5 and March 3, 2018.

Following a bench trial in December 2018, Hampton was convicted of one count of failure to register as a sex offender for failing to comply with the registration requirements between January and March 2018. Hampton appeals his conviction and sentence.

ANALYSIS

I. EX POST FACTO

Hampton argues that the application of the amended registration statute in his case violates the ex post facto clauses of the state and federal constitutions, requiring reversal of his conviction and dismissal of the charge with prejudice. We disagree.

We review constitutional issues de novo. *State v. Boyd*, 1 Wn. App. 2d 501, 507, 408 P.3d 362 (2017). "A statute is presumed constitutional and the party challenging it has the burden to prove beyond a reasonable doubt that the statute is unconstitutional."¹ *Id.*

A. Application of Ex Post Facto Clauses to Sex Offender Registration Statutes

A convicted sex offender is required to register with the county sheriff and provide a list of nine pieces of information including an accurate address or, if the person lacks a fixed residence, the place where he or she plans to stay. RCW 9A.44.130(2)(a). Transient sex offenders must register weekly, in person at their county sheriff's office. RCW 9A.44.130(6)(b).

Both the federal and state constitutions prohibit the State from enacting any law that imposes punishment for an act that was not punishable at the time it was committed or that

¹ As a preliminary matter, the State asserts that Hampton did not raise the ex post facto issue below. But the record shows that the issue was raised in the context of a motion to dismiss.

increases the amount of punishment in relation to the crime when it was committed. *Boyd*, 1 Wn. App. 2d at 507. ““A law violates the ex post facto clause if it: (1) is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it.”” *Id.* at 507 (emphasis omitted) (internal quotation marks omitted) (quoting *State v. Ward*, 123 Wn.2d 488, 498, 869 P.2d 1062 (1994)).

The State does not argue that the sex offender registration statute is procedural, rather than substantive, or prospective, rather than retroactive. Thus, we focus on the third factor. To determine whether a law disadvantages the person affected by it, we look first to whether the legislature intended the statute to be regulatory or punitive. *Ward*, 123 Wn.2d at 499; *see also Smith v. Doe*, 538 U.S. 84, 92-93, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). Even if the legislature’s intent was to regulate, we must also consider whether “the actual effect of the statute is so punitive as to negate the Legislature’s regulatory intent.” *Ward*, 123 Wn.2d at 499 (emphasis omitted); *see also Smith*, 538 U.S. at 92. To do so, we evaluate the following relevant factors identified by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963): (1) whether the statute involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether its operation would promote traditional aims of punishment—retribution and deterrence, and (4) whether it has a rational connection to a nonpunitive purpose or is excessive in relation to a nonpunitive purpose. *Smith*, 538 U.S. at 97; *Boyd*, 1 Wn. App. 2d at 511.

Washington courts have addressed ex post facto challenges to the sex offender registration statutes several times. In *Ward*, the Washington Supreme Court considered and rejected the

argument that the sex offender registration requirements violated the ex post facto clause. 123

Wn.2d at 498-511. Applying the *Mendoza-Martinez* factors, the court concluded:

[T]he requirement to register as a sex offender under RCW 9A.44.130 does not constitute punishment. The Legislature's purpose was regulatory, not punitive; registration does not affirmatively inhibit or restrain an offender's movement or activities; registration per se is not traditionally deemed punishment; nor does registration of sex offenders necessarily promote the traditional deterrent function of punishment. Although a registrant may be burdened by registration, such burdens are an incident of the underlying conviction and are not punitive for purposes of ex post facto analysis. We hold, therefore, that the Community Protection Act's requirement for registration of sex offenders, retroactively applied to Ward and Doe, is not punishment. Thus, it does not violate ex post facto prohibitions under the federal and state constitutions.

Id. at 510-11.

After *Ward*, the legislature added registration requirements for sex offenders who are required to register but are experiencing homelessness. RCW 9A.44.130(6)(b). Washington appellate courts have twice addressed ex post facto challenges to the additional, in-person transient registration requirements under RCW 9A.44.130(6)(b), each time rejecting the challenge. *Boyd*, 1 Wn. App. 2d at 513; *State v. Enquist*, 163 Wn. App. 41, 49, 256 P.3d 1277 (2011). In *Enquist*, we held—without expressly applying the *Mendoza-Martinez* factors—that *Enquist* failed to prove that the additional transient registration requirements violated the ex post facto clause. 163 Wn. App. at 49. We noted that the weekly reporting was inconvenient but concluded that inconvenience alone does not make the statute punitive for purposes of ex post facto analysis. *Id.*

Most recently in *Boyd*, Division One applied the *Mendoza-Martinez* factors and came to the same conclusion as *Enquist*. 1 Wn. App. 2d at 513. One judge dissented, reasoning that the reporting requirements for people experiencing homelessness, in particular the weekly in-person

reporting requirement, had become so onerous that they were punitive. *Id.* at 526 (Becker, J., dissenting). The Supreme Court denied review of both *Enquist* and *Boyd*.

B. Hampton's Conviction Did Not Violate the Ex Post Facto Clause

Hampton's argument here is identical to that in *Boyd*. As in *Ward* and *Boyd*, the registration requirements are being applied to Hampton retroactively. And as in *Ward* and *Boyd*, we assume that the sex offender registration requirements for people experiencing homelessness are substantive, not procedural. *Ward*, 123 Wn.2d at 498; *Boyd*, 1 Wn. App. 2d at 510. Our primary inquiry is whether the registration requirements for transient sex offenders are punitive for purposes of ex post facto analysis. We agree with the majority in *Boyd* and hold that they are not.

We begin with the legislature's stated intent, which has not changed since *Ward* or *Boyd*. "[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.'" *Boyd*, 1 Wn. App. 2d at 511 (emphasis omitted) (quoting *Ward*, 123 Wn.2d at 499 (quoting LAWS OF 1990, ch. 3, § 401)).

Next, we turn to the relevant *Mendoza-Martinez* factors to determine whether the "actual effect of the statute is so punitive as to negate the Legislature's regulatory intent." *Ward*, 123 Wn.2d at 499 (emphasis omitted). The first factor asks whether the registration requirements involve an affirmative disability or restraint. "The paradigmatic affirmative disability or restraint is imprisonment." *Boyd*, 1 Wn. App. 2d at 511.

Hampton contends that the frequency of the in-person registration requirements for offenders experiencing homelessness should be dispositive. But Hampton presents no evidence that the registration requirements interfered with his ability to get a job, find housing, or travel.

See id. There is no doubt that the weekly registration requirements are burdensome and likely pose an inconvenience for Hampton. Nonetheless, we agree with the court’s reasoning in *Boyd* and *Enquist*: inconvenience alone does not make a statute punitive. *Id.*; *Enquist*, 163 Wn. App. at 49.

The second factor asks whether the registration requirements historically have been regarded as a punishment. Hampton contends that the registration requirements are akin to the traditional punishments of parole and probation. The Supreme Court has held that registration “has not traditionally or historically been regarded as punishment.” *Ward*, 123 Wn.2d at 507. The registration requirements addressed in *Ward* were less onerous than the requirement for transient offenders to report to the sheriff’s office in person every week. We acknowledge that such a duty more closely resembles the requirement to meet periodically with a probation or parole officer. Nonetheless, sex offenders experiencing homelessness are “free to move where they wish and to live and work as other citizens, with no supervision,” distinguishing their in-person reporting requirements from community custody or probation, both of which are more restrictive. *See Smith*, 538 U.S. at 101.

The third factor asks whether the registration requirements promote deterrence and retribution, the traditional aims of punishment. The *Ward* court acknowledged that registration requirements may have the secondary effect of deterring future crimes, but declined to hold that such an effect would be punitive in nature. 123 Wn.2d at 508. Hampton makes no argument that we should deviate from that reasoning here, and we do not.

Finally, the fourth factor asks whether the transient sex offender registration requirements are rationally connected to a nonpunitive purpose or excessive in relation to a nonpunitive purpose. *Smith*, 538 U.S. at 97; *Boyd*, 1 Wn. App. 2d at 512. As the Supreme Court held in *Ward*, “the

Legislature has spoken clearly that public interest demands that law enforcement agencies have relevant and necessary information about sex offenders residing in their communities.” 123 Wn.2d at 509. Article I, section 1 of the Washington Constitution gives the legislature the power to “enact laws to promote the health, peace, safety, and general welfare of Washington’s citizens.” *Boyd*, 1 Wn. App. 2d at 512. The legislature has identified community safety as a nonpunitive purpose of sex offender registration and, upon review, we defer to the broad discretion of the legislature to determine the demands of public interest and the necessary measures to secure and protect them. *Ward*, 123 Wn.2d at 509.

Hampton argues that the *Ward* court’s reasoning is no longer applicable in light of the more onerous registration obligations for sex offenders experiencing homelessness. But the legislature’s intent did not change with the addition of reporting requirements for transient sex offenders. In *Boyd*, Division One relied on the Supreme Court’s reasoning in *Ward* and held that the registration requirements for transient sex offenders were not excessive in relation to a nonpunitive purpose. We agree. Hampton has not shown that a weekly, in-person report to law enforcement has limited his freedom to live and travel within the community, and thus, the requirement is not excessive in light of the legislature’s purpose of protecting the community.

Hampton fails to prove that Washington’s sex offender registration requirements are punitive either on their face or as applied to him for purposes of an ex post facto analysis. Accordingly, his ex post facto challenge fails.

II. INTEREST ACCRUAL

Hampton also argues, and the State concedes, that the trial court erred by imposing the accrual of interest on nonrestitution legal financial obligations. We accept the State's concession. RCW 10.82.090 now prohibits interest from accruing on nonrestitution legal financial obligations.

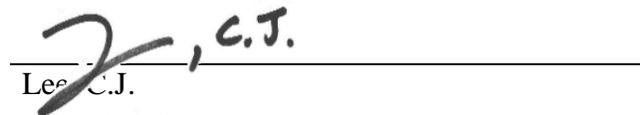
CONCLUSION

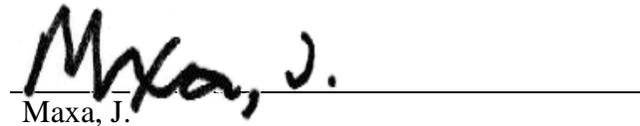
We affirm Hampton's conviction but remand to the sentencing court to strike the interest accrual provision on nonrestitution legal financial obligations from Hampton's judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Glasgow, J.

We concur:


Lee, C.J.


Maxa, J.