2017 IL App (1st) 141227-U

SECOND DIVISION
March 7, 2017

No. 1-14-1227

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	10 CR 21942
	)	
LEO MONDY,	)	Honorable
	)	Noreen Valeria Love,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's constitutional challenges to the Illinois Sex Offender Registration Act (SORA) are rejected because the SORA is not punitive, does not constitute cruel or unusual punishment, and does not violate federal or state due process rights.

¶ 2 Following a bench trial defendant Leo Mondy was convicted of one count of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(2)(i) (West 2014)) and was sentenced to 24-months probation. As a result of his conviction, defendant was required to register as a sex offender for life (730 ILCS 150/2(E)(1) (West 2014). Defendant now appeals and argues that the Illinois Sex Offender Registry Act (SORA) is unconstitutionally disproportionate and constitutes cruel and unusual punishment as applied to him. He also argues that the SORA statutory scheme

violates federal and Illinois state constitutional due process rights by infringing on registrants' fundamental liberty interests without procedural or substantive due process. For the following reasons, we reject defendant's arguments.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with eight counts of aggravated criminal sexual abuse and eight counts of criminal sexual abuse for fondling, touching, and kissing then 12-year-old B.G. for purposes of sexual arousal or gratification. Prior to trial, the state dismissed all but four counts of aggravated criminal sexual abuse.

¶ 5 Before trial, defendant indicated that he would be asserting the affirmative defense that at the time of contact with B.G., he reasonably believed that she was 17-years-old. He also filed a motion to quash arrest and suppress his statements. After a hearing, the trial court granted defendant's motion to suppress statements.

¶ 6 At trial, B.G. testified that she met defendant in October of 2010, when she was 12-years-old and in 7th grade. Defendant was a passenger in a car that drove up to her as she walked to a friend's house. Defendant gave B.G. his number, which she called immediately so that he would also have her number. He texted her later, asking her name and age. B.G. told him that she was 14, and defendant responded that he was 21. B.G. saved defendant's phone number in her phone as "Leo." The two exchanged text messages and phone calls, and they began to discuss meeting to have sex. B.G. testified that she lied to defendant about her age so that he would talk to her, and that she wanted to be "hit on" by defendnat.

¶ 7 They texted back and forth and spoke on the phone for about a month about meeting up and having sex. On November 11, 2010, after speaking on the phone and texting, B.G. and defendant agreed to meet up. B.G. asked defendant if he had any condoms. B.G. later texted

that they wouldn't be having sex, but she still wanted to meet up. Defendant picked her up from her parents' home at 3:30 a.m., where she snuck out of her window to meet him. They parked in a hotel parking lot for about an hour, listening to music, talking, and kissing. B.G. testified that defendant touched her between her legs over her clothes, and touched her breasts under her clothes. After she refused his request for oral sex, defendant drove back toward B.G.'s house and parked. They sat there for about five or ten minutes and were getting ready to say goodnight when a police officer pulled up and shined his flashlight into the car.

¶ 8 The officer asked defendant some questions and asked B.G. for her name and age. B.G. told him her name and that she was 12-years-old. She admitted that defendant did not know her true age until that time. She lied to the officer when she told him that she was having a bad night and that defendant was a family friend that she was confiding in.

¶ 9 Hillside police officer Shane Mikicic testified that he pulled up to defendant's car because it was parked "kind of askew." He noted that the windows were fogged and two people were in the car. Officer Mikicic asked them for identification. Defendant produced a driver's license. B.G. did not have any identification so he asked for her name and age. She paused for a second and looked at defendant. After Officer Mikicic urged her to tell the truth, B.G. told the officer that she was 12. Officer Mikicic testified that he did not see any touching or other behavior in the car but thought it was inappropriate for a 12-year-old to be in a car at 4:25 a.m. with a 21-year-old. When a second officer arrived and spoke to B.G., B.G. told the officer about the inappropriate contact between her and defendant. Defendant was then placed in custody.

¶ 10 The State introduced a copy of B.G.'s birth certificate that showed her birthdate as February 18, 1998. They also introduced a copy of defendant's birth certificate showing that defendant was born on June 17, 1989. Both birth certificates were admitted into evidence.

¶ 11 Defense counsel's motion for directed finding was denied. The defense rested. The trial court then found defendant guilty of one count of aggravated criminal sexual abuse and sentenced him to 24-months probation after stating, "I don't believe you should go to jail for this[.]" The court also stated that Mondy would be required to register as a sex offender. Defense counsel stated that he believed that defendant would only be required to register as a sex offender for 10 years, while the prosecutor noted that the probation officer informed her that it was a lifetime requirement. The court instructed defendant to talk to probation about whether it was a 10-year or lifetime requirement. It was subsequently discovered that defendant would have to register as a sex offender for life. It is from this judgment that defendant now appeals.

¶ 12 ANALYSIS

¶ 13 As a result of his conviction for aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(2)(i) (West 2014)), defendant was required to register as a sexual predator under SORA (730 ILCS 150/2(E)(1) (West 2014)) for the remainder of his lifetime. As a result, defendant challenges certain provision of SORA arguing that 2013 amendments to the statutory scheme rendered the amended version more onerous and punitive than the 1998 version. Defendant specifically challenges five sections of SORA. Section 3 requires sexual offenders to provide appropriate identification and proof of residence, as well as telephone numbers, e-mail addresses, and Internet communication identities when he or she registers with the chief of police in the municipality where he or she resides, and pay a registration fee. 730 ILCS 150/3(a)(1), (c)(5) (West 2014). If the sexual offender also attends a university, he must also register with the chief of police or sheriff where the school is located and the public safety or security director at the school. 730 ILCS 150/3(a)(i), (ii) (West 2014). Section 6 imposes a duty to report in person to the appropriate law enforcement agency every year, up to four times per year, and also requires a

sexual offender to report in person and register within the time period specified in section 3 (three days) if there is a change of address, employment, telephone number, or school. 730 ILCS 150/6 (West 2014). Section 7 requires that a sexual predator register for his or her natural life. 730 ILCS 150/7 (West 2014). Section 10 makes failure to comply with the SORA a Class 3 felony for a first offense, and a Class 2 felony for subsequent violations. 730 ILCS 150/10 (West 2014).

¶ 14 Here, defendant mounts numerous constitutional challenges to the SORA. He argues that the SORA is unconstitutionally disproportionate and constitutes cruel and unusual punishment when applied to the facts of this case. Mondy argues that the SORA statutory scheme, particularly the reporting requirements and restrictions, are unconstitutionally disproportionate to the severity of his crime and constitutes cruel and unusual punishment in violation of both the eight amendment of the United States Constitution (U.S. Const., amend. VIII) and article 1, section 11 of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). In addition, defendant asserts that SORA is facially unconstitutional because it violates the procedural and substantive due process rights guaranteed by both the fourteenth amendment to the United States Constitution (U.S. Const., amend. XIV) and article I, section 2 of the Illinois Constitution (Ill. Const. 1970, art. I, § 2). We consider each argument in turn.

¶ 15 A. Standing

¶ 16 The State argues that defendant lacks standing to challenge section 10 of the SORA (730 ILCS 150/10 (West 2014)), the penalty provision, because it has not yet been applied to him.

¶ 17 This court has recently considered the issue of standing in relation to section 10 of the SORA in *In re A.C.*, 2016 IL App (1st) 153047, ¶ 24, appeal denied 2016 IL 120932. In *A.C.*, the juvenile respondent challenged several provisions of SORA and the State argued that the

respondent lacked standing to challenge section 10 of SORA because he had not been charged with violating it. *Id*. This court held that the respondent lacked standing to challenge the penalty provision in section 10 of SORA "because he is not suffering or in immediate danger of suffering a direct injury as a result of enforcement of this provision." *Id*. ¶ 24. Rather, standing "first requires that respondent fail to abide by the registration requirements, and then he must be charged with a violation and convicted after a trial." *Id*.

¶ 18 We find, similar to *A.C.*, 2016 IL App (1st) 153047, ¶ 24, that because there is no indication that defendant has been charged with a felony for failure to comply with the SORA requirements, defendant lacks standing to challenge section 10 of SORA because "he is not suffering or in immediate danger of suffering a direct injury as a result of enforcement of this provision." *Id*. Our holding that defendant lacks standing applies only to his challenge to section 10 of SORA.

¶ 19 We note that this court has held in *People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶¶ 31-43, appeal denied, 2016 IL 120381, and *People v. Pollard*, 2016 IL App (5th) 130514, ¶ 26, that defendants had standing to challenge the registration requirements and other restrictions imposed by SORA, because those requirements and restrictions would automatically apply to defendant because he is considered a sexual predator under the SORA. Similar to the defendants in *Avila-Briones* and *Pollard*, defendant has standing to challenge sections of the SORA, other than section 10, because those sections automatically apply to him as a result of his conviction for aggravated criminal sexual abuse.

¶ 20 We now turn to the merits of defendant's constitutional challenges. We review a challenge to the constitutionally of a statute *de novo. People v. Molnar,* 222 Ill. 2d 495, 508 (2006). Because statutes are presumed to be constitutional, the defendant, as the party

challenging the validity of the statute, has the burden of rebutting that presumption of constitutionality and showing a clear constitutional violation. *People v. Alcozer*, 241 Ill. 2d 248, 259 (2011).

¶ 21 B. Eighth Amendment/Disproportionate penalties

¶ 22 Defendant argues that the SORA statutory scheme violates the eight amendment and the proportionate penalties clause of the Illinois Constitution as applied to him because it is punitive in nature and the registration requirements impose lifelong affirmative disabilities and restraints with no consideration of his rehabilitative potential or his restoration to useful citizenship.

¶ 23 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The Illinois' Constitution requires that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. Art. I, §11. The proportionate penalties clause in Illinois' constitution similarly requires all penalties to be "determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const.1970, art. I, § 11. We interpret our proportionate penalties clause in a coextensive manner with the eighth amendment. *People v. Patterson*, 2014 IL 115102, ¶ 106; *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 55.

¶ 24 Defendant urges this court to consider the current 2013 SORA statutory scheme under the factors outlined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). However, defendant's argument ignores that our supreme court has already determined that a previous version of the SORA does not constitute punishment. See *People v. Adams*, 144 Ill. 2d 381, 386-90 (1991); (registration requirement did not impose punishment and even if it did, it was not cruel or unusual); *People v. Malchow*, 193 Ill. 2d 413, 421-24 (2000) (in defendant's *ex post facto*

challenge, the court found the community notification provisions were not punitive under the *Mendoza–Martinez* test); *In re J.W.*, 204 Ill. 2d 50, 75 (2003) (holding that the SORA is not punitive as applied to juveniles and does not constitute cruel and unusual punishment); *People v. Cornelius*, 213 Ill. 2d 178, 206-07 (2004) (in the defendant's *ex post facto* challenge to the SORA provision providing for dissemination of offenders' information on the Internet, the court held this provision was not punitive under *Mendoza–Martinez* test); *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 207 (2009) (registration requirement did not constitute punishment for purposes of proportionate penalties clause, eighth amendment protection against cruel and unusual punishment, and amendments to the SORA reclassifying the respondent as a "sexual predator" and increasing the length of the period of registration did not violate ex post facto protections); *People v. Cardona*, 2013 IL 114076, ¶ 24 (observing that sex offender registration requirement was not punishment).

¶ 25 Analyzing the current 2013 version of the SORA under the *Mendoza-Martinez* test, this court has held in *People v. Fredericks*, 2014 IL App (1st) 122122, ¶¶ 58-61, that in the context of an *ex post facto* challenge to an amendment retroactively requiring lifetime registration under the SORA, the amendments to the prior version of the SORA did not violate *ex post facto* principles or render the SORA punitive. More recently, in *A.C.*, 2016, IL App (1st) 153047, ¶ 72, this court discussed the 2013 amendments to the SORA and found that similar to the prior version of SORA, "reflect[ed] social changes and [did] not manifest a punitive bent."

¶ 26 Notwithstanding this finding that the 2013 version of the SORA is not punitive in nature, defendant argues that the current version of the SORA is more onerous than the previous version and is similar to, but more punitive than, probation and mandatory supervised release, and is disproportionate in his case. We reject defendant's argument.

¶ 27 In *A.C.*, 2016 IL App (1st) 153047, ¶ 77, this court held that the 2013 version of the SORA is not punitive in nature and therefore does not violate the eighth amendment and the prohibition on disproportionate penalties. Relying on our supreme court's determination in *Malchow*, 193 Ill. 2d at 421-24 and *Cornelius*, 213 Ill. 2d at 207-09, that the 1998 version of the SORA was nonpunitive, the *A.C.* court held that it was:

> "bound by our supreme court's decisions in *Malchow* and *Cornelius* and we do not find a punitive intent behind the challenged provisions in SORA and the Notification Law. * * * Although he contends that SORA and the Notification Law have evolved to become more punitive, these changes reflect social changes and do not manifest a punitive bent. We acknowledge that the scope of who must register has expanded to include those who commit certain 'precursor' crimes and the time period for registration was shortened. However, these changes reflect an awareness that such crimes demonstrate a heightened danger of future harm and the shortened time period reflects an individual's increased mobility, both of which are rationally related to protecting the public by closely monitoring convicted sex offenders." *Id*. ¶77-78.

¶ 28 We similarly find that the 2013 version of SORA is not a system of punishment nor are the lifetime reporting requirements grossly disproportionate to the defendant's offense. See *People v. Parker*, 2016 IL 2016 (1st) 141594, ¶ 74.

¶ 29 C. Procedural Due Process

¶ 30 Defendant asserts that the current SORA statutory scheme violates the due process clauses of the United States and Illinois Constitutions. U.S. Const. amend. XIV; Ill. Const.1970, art. I, § 2. He first contends that the SORA violates his right to procedural due process because it infringes on a fundamental liberty interest without providing procedural safeguards.

¶ 31 "The procedural due process clause entitles individuals to certain procedures before the State may deprive them of a life, liberty, or property interest." *Avila–Briones*, 2015 IL App (1st) 132221, ¶ 88. Courts look at three factors in determining how much process is required: "(1) the private interest that will be affected by the government action; (2) the risk of an erroneous deprivation of that private interest through the procedures used and the probable value of additional procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional procedures would entail." *Id.*

¶ 32 Illinois has not recognized the right to be free from sex offender registration as a fundamental right, which defendant acknowledges. However, he relies on cases from other jurisdictions (*State v. Guidry*, 105 Haw. 222, 229 (Hawaii 2004); *Doe v. Attorney Gen.*, 686 N.E. 2d 1007, 2016 (Mass. 1997)) to support his argument that he is automatically subjected to the SORA statutory scheme with no evaluation of his future danger as a sex offender and with no chance of reprieve.

¶ 33 The United States Supreme Court has rejected the argument that due process requires an assessment of the risk of re-offending before subjecting an offender to the restrictions and requirements of sexual offender registration laws, as we noted in *Avila-Briones*. *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 89 (citing *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003)). We explained that in *Doe*:

> "the Court held that Connecticut was not required to hold a 'hearing to determine whether [sex offenders] are likely to be currently dangerous' before requiring them to register. *Id.* at 4. The Court noted that Connecticut's sex-offender registration system 'turn[ed] on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest.' *Id.* at 7. Because the defendant's current

dangerousness was 'of no consequence' under Connecticut law, individuals were not entitled to a hearing to prove something that had no relevance to their registration. *Id*. The Court concluded, 'Unless respondent can show that [Connecticut's] substantive rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise.' (Emphasis in original.) *Id*. at 7-8." *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 91.

¶ 34 Consistent with the holding in *Doe*, this court found "defendant had no right to a procedure where he could prove a fact that had no relevance to his registration" because "a sex offender's likelihood to reoffend is not relevant to [the] assessment" where the Illinois SORA is based on the offense for which a sex offender has been convicted. *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 92. Similarly in *A.C.*, 2016 IL App (1st) 153047, ¶¶ 59-66, this court found that "SORA and the Notification Law do not implicate protected liberty or property interests" and imposing registration requirements without an individualized assessment of risk did not violate a protected liberty interest or a minor's procedural due process rights. See also *Pollard*, 2016 IL App (5th) 130514, ¶¶ 46-48 (relying on *Avila-Briones* in finding the defendant's procedural due process rights were not violated as the defendant enjoyed several procedural safeguards associated with his criminal proceedings and the registration obligations were "not sufficiently burdensome to mandate the additional procedural protection of a mechanism to determine his risk of recidivism.")

¶ 35 As with the holdings in *Avila-Briones* and *A.C.*, the issue of whether the current SORA regime deprives defendant of a fundamental liberty interest need not be resolved because "even if we were to assume that these laws affect defendant's liberty or property interests, no additional procedures would be necessary to satisfy due process." *Avila-Briones*, 2015 IL App (1st)

132221, ¶ 89. See also Parker, 2016 IL 2016 (1st) 141594, ¶ 77.

¶ 36 D. Substantive Due Process

¶ 37 Finally, defendant argues that the SORA violates his substantive due process. Defendant argues that because the SORA requires all individuals convicted of a sex offense to register with no consideration of their danger of reoffending and imposes arbitrary residency restrictions and restrictions on contact with children regardless of whether the children were the targets of the individual's offenses, it does fails under strict scrutiny analysis. Alternatively, defendant argues that even if this court declines to consider the SORA statutory scheme using the strict scrutiny analysis, the rational basis review does not support the scheme's constitutionality.

¶ 38 The State correctly argues that our supreme court has repeatedly rejected the argument that the SORA implicates fundamental rights which would trigger strict scrutiny analysis. See *Cornelius*, 213 Ill. 2d at 204; *J.W.*, 204 Ill. 2d at 67; *Adams*, 144 Ill. 2d at 390; *Malchow*, 193 Ill. 2d at 425-26. Additionally, this court has also rejected this argument. *See J.R.*, 341 Ill. App. 3d at 792 (analyzing substantive due process challenge to the SORA and Notification Law under rational basis); *T.C.*, 384 Ill. App. 3d at 874-75 (finding that the SORA registration requirements and restrictions did not deprive the respondent of a protected liberty interest); *A.C.*, 2016 IL App (1st) 153047, ¶¶ 38, 43 (the SORA and the Notification Law do not implicate fundamental rights); *Fredericks*, 2014 IL App (1st) 122122, ¶ 40 (lifetime sex offender registration is not a constraint on liberty); *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 74 ("the weight of authority shows that laws similar to the Statutory Scheme do not affect fundamental rights. Our supreme court has stated that SORA does not affect fundamental rights"). See also *Pollard*, 2016 IL App (5th) 130514, ¶ 35 (the category of "fundamental rights" is a narrow one, and "[o]ur supreme court has held that sex offender registration provisions do not affect fundamental rights.").

¶ 39 As the SORA does not implicate a fundamental right, we analyze defendant's claim under the rational basis test. The rational basis test requires an examination of, "(1) whether there is a legitimate state interest behind the statutes; and, if so, (2) whether the statutes are rationally related to that legitimate state interest." *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 81.

¶ 40 Defendant argues that because the SORA statutory scheme is over-inclusive, ensnaring registrants who pose little danger of reoffending, it does not bear a rational relationship to the goal of protecting the public from sex offenders. We considered and rejected a similar argument in *Avila-Briones*. There, we acknowledged that the scheme "may be over-inclusive" and burden "individuals who pose no threat to the public because they will not reoffend." *Avila-Briones,* 2015 IL App (1st) 132221, ¶ 84. Nevertheless, we concluded that the SORA "still has a rational relationship to protecting the public." *Id.*

> "As our supreme court has held, SORA and the Notification Law help law enforcement and private individuals keep track of sex offenders by providing information about their presence and offenses. *Cornelius*, 213 Ill. 2d at 205; *J.W.*, 204 Ill. 2d at 67-68. Similarly, by keeping sex offenders who have committed offenses against children away from areas where children are present (e.g., school property and parks) and out of professions where they could come in contact with children (e.g., driving an ice cream truck, being a shopping-mall Santa Claus) or vulnerable people (e.g., driving an emergency services vehicle), the legislature could have rationally sought to avoid giving certain offenders the opportunity to reoffend. Whether or not the Statutory Scheme is a finely-tuned response to the threat of sex-offender recidivism is not a question for rational-basis review; that is a question for the legislature." *Id.* ¶ 84.

¶ 41 Most recently, in *Pollard*, 2016 IL App (5th) 130514, ¶ 39, we observed that even though "the SORA Statutory Scheme may be overinclusive, thereby imposing burdens on offenders who pose no threat to the public because they will not reoffend, there is a rational relationship between the registration, notification, and restrictions of sex offenders and the protection of the public from such offenders." *Id.* ¶ 42. We held that the SORA scheme "advance[ed] the government's legitimate goal to protect children from sexual predators." *Id.* ¶ 43 (citing *Cornelius*, 213 Ill. 2d at 205; *J.W.*, 204 Ill. 2d at 67-68). In accordance with *Avila-Briones* and *Pollard*, we find that defendant's claim fails under rational basis review as the current version of the SORA is rationally related to the legitimate government interest of protecting children from sex offenders by regulating sex offender's movements and monitoring their whereabouts. See *Parker*, 2016 IL 2016 (1st) 141594, ¶ 78.

¶ 42 The policy considerations reflected in the SORA are matters for the legislature to consider and address. To the extent an argument can be advanced that the SORA is too broad or that it does not provide a mechanism for being relieved of its requirements, that argument is one to present to the legislature and not for the court to enact.

¶ 43 CONCLUSION

¶ 44 Based on the foregoing, we reject defendant's constitutional challenges to the SORA.

¶ 45 Affirmed.