

No. 1-14-3258

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).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
)	Cook County
Plaintiff-Appellee,)	
)	
v.)	No. 14 CR 2430
)	
RAYMOND KURTZ,)	
)	Honorable
Defendant-Appellant.)	Clayton J. Crane,
)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court of Cook County is affirmed where (1) defense counsel was not ineffective for failing to raise a particular argument in regard to defendant's motion for a directed finding and (2) defendant's substantive and procedural due process rights were not violated by the Sex Offender Registration Act.

¶ 2 Following a bench trial in the circuit court of Cook County, defendant Raymond Kurtz was convicted of failing to register as a sex offender in accordance with the Sex Offender

Registration Act (SORA) (730 ILCS 150/1 *et seq.* (West 2014)) and sentenced to three-and-a-half years' imprisonment in the Illinois Department of Corrections (IDOC). Defendant appeals, arguing (1) his trial counsel was ineffective for failing to move for a directed finding on the grounds that the State failed to present any evidence that he did not register as a sex offender within three days of establishing a residence; and (2) that the SORA violates federal and Illinois constitutional due process rights by infringing on the registrants' fundamental liberty interests, where it places upon registrants severe restrictions, intrusive monitoring, and burdensome registration requirements without providing them with substantive or procedural due process. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On January 14, 2014, defendant was charged by indictment with the offense of violating the SORA (730 ILCS 150/3(a)(1) (West 2014)) in that he had previously been convicted of aggravated criminal sexual abuse under case number 04 CR 30285 and knowingly failed to register, in person, as a sex offender with the Chicago Police Department within three days of establishing a residence or temporary domicile in the City of Chicago.

¶ 5 At trial, the State produced one witness, Elizabeth Miller (Miller) a detective with the Chicago Police Department, who testified as follows. On January 14, 2014, she was assigned to investigate a charge of a violation of the SORA by defendant, who had been released from Dixon Penitentiary in July 2013, but had not registered as a sex offender. The same day, she interviewed defendant. After reading defendant his *Miranda* rights, defendant agreed to speak with her. According to Miller, defendant informed her that at the time he was residing on South Mozart Street in Chicago, and was occasionally working odd jobs. He explained to Miller the reason he did not register was because he had “no way to get to 35th and Michigan and he didn't

have the \$100 registration fee.” Miller advised defendant that if an offender is homeless he or she must register each week and that if an offender can establish they cannot afford the registration fee, the fee could be waived.

¶ 6 The State then proceeded by way of stipulations, which were ultimately admitted into evidence. The first stipulation was a SORA notification form that was signed by defendant on July 10, 2013, upon his release from the penitentiary. The second stipulation was a certified copy of defendant’s conviction in case no. 04 CR 30285 in which defendant was found guilty of aggravated criminal sexual abuse and required to register as a sex offender every 90 days for life. The third stipulation involved sex offender registration logs maintained by the Chicago Police Department, which demonstrated that defendant had not signed the logs. Lastly, the parties stipulated regarding the fact defendant was previously convicted under case no. 12 CR 1628 for failing to register.

¶ 7 Defendant then moved for a directed finding in which he argued that the evidence demonstrated that he had attempted to register, but could not register because he did not have the required registration fee and that the SORA notification form did not inform him that he was required to pay a \$100 registration fee. In response, the State argued that defendant did not register for six months despite working odd jobs. The trial court denied defendant’s motion.

¶ 8 Defendant then testified as follows. On July 10, 2013, he was released from Dixon Penitentiary and was provided only with the second page of the SORA notification form, which he signed. Upon being released, defendant “went to a friend’s house” and did not register with the Chicago police. Defendant further testified that he had attempted to register “a couple of days after” he was released, but was informed he could not register. According to defendant, “at some point,” he learned the registration fee was \$100.

¶ 9 On cross-examination, defendant testified that in July 2013, he was destitute despite having at one time acquired \$3,000 from a lawsuit. According to defendant, he resided with a friend at South Mozart Street in Chicago “all winter.” Defendant acknowledged that was the same address he had provided to Miller on January 14, 2014. Defendant further testified that although he worked odd jobs, he was paid in cigarettes and alcohol, not money.

¶ 10 After hearing closing arguments, the trial court found defendant guilty of the offense as charged. Defendant then moved for a new trial, which the court denied. A sentencing hearing was conducted immediately thereafter where the trial court sentenced defendant to three-and-a-half years’ imprisonment in the Illinois Department of Corrections. This appeal followed.

¶ 11 ANALYSIS

¶ 12 Defendant raises two contentions on appeal. First, that his trial counsel was ineffective for failing to move for a directed finding on the grounds that the State failed to present any evidence that he did not register as a sex offender within three days of establishing a residence. The second is that the SORA violates federal and Illinois constitutional substantive and procedural due process rights. We address each argument in turn.

¶ 13 Ineffective Assistance of Counsel

¶ 14 Defendant contends that he received ineffective assistance of trial counsel. To establish a claim of ineffective assistance of counsel, defendant must first demonstrate that counsel’s performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). Secondly, defendant must demonstrate that counsel’s deficient performance resulted in prejudice to the defense, *i.e.*, a reasonable probability that, but for counsel’s deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694; *Albanese*,

104 Ill. 2d at 525-26. Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 15 In this case, defendant maintains that trial counsel was ineffective for failing to argue in his motion for a directed finding that the State did not present evidence that defendant did not register as a sex offender within three days of establishing a residence. The decision whether to argue a motion for a directed finding is a matter of trial strategy (*People v. Nunez*, 263 Ill. App. 3d 740, 753 (1994)), and thus virtually unchallengeable (*People v. Fuller*, 205 Ill. 2d 308, 331 (2002)). Here, trial counsel could have reasonably presumed that the trial court knew the law and would apply it properly when ruling on his motion for a directed finding. See *People v. Howery*, 178 Ill. 2d 1, 32 (1997) (noting that “the trial court is presumed to know the law and apply it properly”). His failure to present the specific argument on the motion cannot, therefore, support a finding of ineffectiveness where the State has established that the defendant was living on Mozart Street from the time he left prison, was doing odd jobs, and did not register.

¶ 16 We further observe that “an election by the defendant to present evidence after a motion for directed verdict has been overruled waives any error in the trial court’s ruling on the motion [citation] except when the defendant renews the motion at the close of all the evidence [citation].” *People v. Barrow*, 133 Ill. 2d 226, 249 (1989); see *People v. Milton*, 354 Ill. App. 3d 283, 291 (2004) (applying this rule to a motion for a directed finding in a bench trial). Here, while defense counsel made similar arguments during closing argument as he did during the motion for a directed finding, defendant did not expressly renew his motion at the close of all the evidence. Accordingly, we find defendant has waived any error in the trial court’s ruling on the motion.

fact, do infringe on defendant's fundamental rights goes to the merits of his due-process claims, which should not affect his standing to bring them." *Id.* Accordingly, we also conclude defendant has standing to raise a due process challenge to the SORA Statutory Scheme. See *id.* ¶ 43. We now turn to consider the merits of defendant's constitutional arguments.

¶ 21 Defendant argues that the 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 contends that, applying the factors set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), the SORA Statutory Scheme has become punitive rather than regulatory, that the lifetime regulations imposed by the SORA Statutory Scheme violate a fundamental liberty interest without safeguards to ensure that only those who pose an actual risk of reoffending are subject to those restrictions, and that the burdens and restrictions the SORA Statutory Scheme places on registrants' fundamental rights do not survive strict scrutiny or, if strict scrutiny is not applicable, rational basis review.

¶ 22 The constitutionality of a statute is a question of law, which is reviewed *de novo*. *People v. Molnar*, 222 Ill. 2d 495, 508 (2006). Statutes are afforded a presumption of constitutionality, and this court has an obligation to construe a statute in a manner that would uphold its constitutionality if reasonably possible. *Id.* The burden is on the party challenging the validity of a statute to establish its constitutional infirmity. *Id.* at 509. The Illinois Supreme Court has previously upheld the constitutionality of earlier versions of the sex registration and notification statutes against constitutional challenges. See, e.g., *People v. Cornelius*, 213 Ill. 2d 178 (2004); *People v. Malchow*, 193 Ill. 2d 413 (2000); *People v. Adams*, 144 Ill. 2d 381 (1991).

¶ 23 Defendant's argument is based on what he refers to as the "2014 version of SORA," which includes substantive amendments to the SORA Statutory Scheme passed by the legislature

within the last several years. We agree with defendant's contention that the current version of the SORA Statutory Scheme has become "more onerous with regard to the amount of information a sex offender must disclose, the number of agencies to which the offender must disclose that information, and how often a sex offender must register." *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 51.

¶ 24 Defendant maintains that the additional burdens imposed by amendments to the SORA Statutory Scheme are so significant that the statutes are in fact punitive, under the factors set out in *Mendoza-Martinez*, regardless of the fact that the legislature's intent was not to create a punitive scheme. Defendant argues that although our supreme court examined whether the SORA Statutory Scheme was "punitive," it did not employ the *Mendoza-Martinez* test and urges us to do so here. Defendant asserts that the additional burdens created by recent amendments require a reexamination of whether imposing those burdens violates his right to substantive and procedural due process.

¶ 25 Under the *Mendoza-Martinez* test, we examine seven factors to determine whether a civil statute has a punitive effect despite its nonpunitive intent:

"(1) whether the sanction involves an affirmative disability or restraint; (2) whether the sanction has been historically regarded as punishment; (3) whether the sanction comes into play only on a finding of *scienter*; (4) whether operation of the sanction will promote retribution and deterrence; (5) whether the behavior to which the sanction applies is already a crime; (6) whether an alternative purpose to which the sanction may rationally be connected is assignable to it; and (7) whether the sanction appears excessive in relation to the alternative purpose assigned." *People v. Fredericks*, 2014 IL App (1st) 122122, ¶ 58 (citing *Malchow*, 193 Ill. 2d at 421 (citing *Mendoza-Martinez*, 372 U.S. at

168-69)).

In Illinois, the punitive effect of the challenged provisions must be demonstrated by “the clearest proof.” (Internal quotation marks omitted.) *Malchow*, 193 Ill. 2d at 421.

¶ 26 This court has already conducted such an analysis in *Fredericks* (involving the constitutionality of the 2013 SORA Statutory Scheme) and *In re A.C.*, 2016 IL App (1st) 153047 (involving the 2014 SORA Statutory Scheme) and concluded that under the *Mendoza-Martinez* test the amendment to SORA did not violate *ex post facto* protections or render the SORA punitive. See *Fredericks*, 2014 IL App (1st) 122122, ¶¶ 58-61; *A.C.*, 2016 IL App (1st) 153047, ¶¶ 72-77. Accordingly, based on the analysis in *Fredericks* and *A.C.*, we reject defendant’s contention that the current version of the SORA has transformed into a punitive regime.

¶ 27 Turning to defendant’s arguments that the SORA Statutory Scheme violates his substantive and procedural due process rights, we observe that this court in *Avila-Briones* rejected the same constitutional arguments that defendant asserts here. See *Avila-Briones*, 2015 IL App (1st) 132221, ¶¶ 71-93. These arguments have also been rejected by other divisions and districts of our appellate court. See *A.C.*, 2016 IL App (1st) 153047, ¶¶ 35-79 (rejecting due process and eighth amendment challenges to SORA as applied to a juvenile offender); *People v. Pollard*, 2016 IL App (5th) 130514, ¶ 23 (following the “persuasive reasoning” articulated in *Avila-Briones* and rejecting the defendant’s procedural and substantive due process claims and eighth amendment proportionate penalties challenges to the SORA); *People v. Parker*, 2016 IL App (1st) 141597, ¶ 77 (rejecting procedural and substantive due process challenges to the SORA Statutory Scheme). Having considered defendant’s arguments, we agree with the conclusions reached in these decisions.

¶ 28 “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. In determining how much process is required, courts consider three factors: “(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.*

¶ 29 In contrast, “[s]ubstantive due process bars the government from arbitrarily exercising its power without the reasonable justification of serving a legitimate interest.” *Pollard*, 2016 IL App (5th) 130514, ¶ 31 (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). In determining whether a statute violates due process, we must first “ ‘determine the nature of the right purportedly infringed upon by the statute.’ ” *Id.* (quoting *In re J.W.*, 204 Ill. 2d 50, 66 (2003)). If a fundamental constitutional right is involved, we employ strict scrutiny analysis to determine if the statute serves a compelling government interest and is narrowly tailored to serve that interest. *Id.* ¶ 32 (citing *Cornelius*, 213 Ill. 2d at 204). If the statute does not impact a fundamental right, then we apply the rational-basis test to the statute. *Id.* at 203. Under the rational-basis test, the statute must simply bear a rational relationship to any legitimate government interest. *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 71 (citing *People v. Boeckmann*, 238 Ill. 2d 1, 7 (2010)).

¶ 30 In *Avila-Briones*, the court addressed the same issue defendant raises here, whether there is a fundamental right “to be free from a lifetime of burdensome, intrusive monitoring and restrictions” and whether the SORA Statutory Scheme infringes on that right. *Avila-Briones*, 2015 IL App (1st) 132221, ¶¶ 69-71. Upon analyzing the SORA Statutory Scheme, the court concluded that the provisions did not infringe on any fundamental right (*id.* ¶¶ 72-76) and

determined that it passes rational basis review because it serves the legitimate state interest of protecting the public from sex offenders and is rationally related to that interest despite the possibility that it may be over-inclusive (*id.* ¶¶ 82-84).

¶ 31 The reviewing court further rejected the argument defendant makes here, that the SORA Statutory Scheme violates procedural due process by failing to include a mechanism by which the state could evaluate his risk for reoffending. *Id.* ¶¶ 91-92. Relying on *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 4, 7-9 (2003), the *Avila-Briones* court noted that no such additional procedures would be necessary to satisfy due process because the SORA Statutory Scheme is based entirely upon the convicted offense, which the offender received a procedurally safeguarded opportunity to contest, and the offender's likelihood to reoffend is not relevant to determining whether he committed the charged crime. *Id.* ¶ 91. As observed by the *Avila-Briones* court, Illinois has adopted the rationale of *Connecticut Department of Public Safety* because "Illinois' system, like Connecticut's, is based entirely on the offense for which a sex offender has been convicted" and thus "a sex offender's likelihood to reoffend is not relevant to that assessment." *Id.* ¶ 92 (citing *People v. Stanley*, 369 Ill. App. 3d 441, 448-50; *In re J.R.*, 341 Ill. App. 3d 784, 795-96 (2003)).

¶ 32 In *A.C.*, a matter involving a juvenile, the respondent was adjudicated delinquent of aggravated criminal sexual abuse and ordered to register under the SORA. *A.C.*, 2016 IL App (1st) 153047, ¶ 1. On appeal, the respondent challenged the constitutionality of the 2014 SORA Statutory Scheme arguing in pertinent part that the SORA violated his substantive and procedural due process rights. *Id.* ¶¶ 35, 59. Relying on *J.W.*, 204 Ill. 2d 50 (2003), and *Avila-Briones*, the *A.C.* court first determined that the respondent's claim did not involve a fundamental right (*A.C.*, 2016 IL App (1st) 153047, ¶ 43) and rejected respondent's contention

that under the rational basis test the SORA Statutory Scheme violated substantive due process as it is “rationally related to the purpose of protection of the public from sexual offenders and constitute a reasonable means of accomplishing this goal.” (*id.* ¶ 57). With regards to the respondent’s procedural due process claim, the *A.C.* court observed that the SORA Statutory Scheme does not “implicate protected liberty or property rights” (*id.* ¶ 63) and concluded that it was appropriate to apply SORA to juveniles given its intent to protect the public and our supreme court’s decisions that the SORA affords respondents sufficient procedural safeguards (*id.* ¶ 66).

¶ 33 Accordingly, based on the well-established case law, we conclude that there is no basis for defendant’s argument that the SORA Statutory Scheme violates substantive or procedural due process. See *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 94; *A.C.*, 2016 IL App (1st) 153047, ¶¶ 57, 66); *Parker*, 2016 IL App (1st) 141597, ¶ 77; *Pollard*, 2016 IL App (5th) 130514, ¶¶ 44, 48.

¶ 34 CONCLUSION

¶ 35 For the reasons stated above, we affirm the judgment of the circuit court.

¶ 36 Affirmed.