Impacts of Does v. Snyder reach to Tennessee

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By Larry . . . The case of ***Doe v. Rausch*** contains a very thorough analysis regarding the history of sex offender registration in Tennessee and the developing body of case law in the Sixth Circuit which resulted in a favorable outcome for Doe. Due to the limited scope of the court's ruling, I think that the chances of an appeal to the Sixth Circuit are less than the odds in the recent Pennsylvania case of ***T. S. v. Pennsylvania State Police*** decided by the Commonwealth Court of Pennsylvania and the case of ***Grabarczyk v. Stein*** decided by the United States District Court for the Eastern District of North Carolina.

This analysis is intended to focus on some important aspects of future litigation challenging the constitutionality of sex offender registration. It is critically important that those of us involved in advocacy recognize that all recent victories have come because litigants focused on the:

- Ever-expanding reach of registration to additional

offenses;
- Increased periods of registration and frequency of in-person reporting to law enforcement;
- Continuous expansion of exclusion zones through residency and proximity restrictions;
- Favorable decisions from state and federal courts across the United states.

The Supreme Court decided the most cited registration case almost seventeen years ago. See ***Smith v. Doe***, 538 U.S. 84 (2003). Smith was decided when most registration schemes were relatively benign compared to today's registries. There was no in-person reporting, and people were free to live and work wherever they chose without interference from anyone. The Supreme Court did not say that states could impose any and all requirements they could imagine. In fact, they said just the opposite. The Court correctly pointed out that Alaska's sex offender registration ***did not*** impose any restraint. Quoting from the court, "The Act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." And the Court also observed that the Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences. ***Smith v. Doe,*** 538 U.S. at 100.

HISTORY OF REGISTRATION IN TENNESSEE

Prior to SORVTA (Tennessee Sexual Offender and Violent Sexual Offender Registration and Tracking Act of 2004), Tennessee's registration requirement was known as the Sexual Offender Registration and Monitoring Act of 1994 (SORMA). SORMA was frequently amended, expanding SORMA's scope and requirements and limiting registrants' level of confidentiality. See ***Doe v. Haslam***, No. 3:16-CV-02862, listing amendments to SORMA. Notably, SORMA was amended in 2000 to require lifetime registration for those convicted of actual or attempted aggravated rape, rape, aggravated sexual battery, or rape of a child.

On June 8, 2004, SORMA was repealed and SORVTA was enacted. SORVTA replaced the framework for sex offender registration and restrictions in Tennessee. While much of the former system continued, SORVTA created a new classification of registrants and a new series of requirements, depending on a registrant's classification. In 2014, the General Assembly of Tennessee again amended SORVTA to create a new offender classification: offender against children. Registrants whose victims were twelve years or younger at the time of the offense became subject to lifetime registration, regardless of whether or not the underlying offense was categorized as "violent." According to the court, "By the Court's estimation, at least two dozen amendments to SORVTA have been passed by the General Assembly since its enactment.) See Opinion at 6.

DETAILS ABOUT THE PLAINTIFF

In 1999, Doe pled guilty to seven counts of attempted aggravated sexual battery involving three minor victims in Anderson County, Tennessee. Prior to completion of his sentence, SORMA was repealed and replaced with SORVTA. Under SORVTA's list of enumerated offenses, Doe qualified as a "violent sexual offender." According to SORVTA's original language, this obligated Doe to comply with the registration, verification, and tracking requirements for life. In 2017, Doe was arrested and charged with violating SORVTA's reporting requirements and perjury for failing to report a Facebook account that he had opened in 2009. Though adamant that he had reported the account, Doe pleaded guilty to attempted violation of SORVTA and attempted perjury, both misdemeanor offenses, avoiding a prospective twelve-year felony sentence. At that point, Doe had finally had enough. On November 22, 2017, he filed this case pursuant to 42 U.S.C. § 1983, claiming that SORVTA's retroactive lifetime registration requirements violate the Ex Post Facto Clause and that portions of SORVTA violate the Due Process Clause of the Fourteenth Amendment, as well as the First Amendment. Doe

sought declaratory and injunctive relief through a constitutional challenge to SORVTA.

THE DOWNSIDE OF SUMMARY JUDGMENT

This case was decided without a trial, utilizing a process known as "summary judgment." The most significant downside when cases are decided in this manner is that the evidentiary record can sometimes be sparse, and the court is bound by longstanding precedent in terms of conclusions it can make. Both parties filed motions for summary judgment in May, 2019. Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is proper ". . . if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The moving party bears the burden of establishing that no genuine issues of material fact exist. All facts and all inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party.

The Court's function at the point of summary judgment is limited to determining whether sufficient evidence has been presented to make the issue of fact a proper question for the fact-finder. The Court does not weigh the evidence or determine the truth of the matter. Nor does the Court search the record ". . . to establish that it is bereft of a genuine issue of material fact." ***Street v. J.C. Bradford & Co***., 886 F.2d 1472, 1479- 80 (6th Cir. 1989). Thus, "The inquiry performed is the threshold inquiry of determining whether there is a need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." ***Anderson***, 477 U.S. at 250.

The standards upon which a court evaluates motions for summary judgment do not change when, as here, both parties seek to resolve the case through the vehicle of cross-motions for summary judgment. "The fact that both parties have moved for

summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts." ***Taft Broad. Co. v. United States***, 929 F.2d 240, 248 (6th Cir. 1999). Instead, ". . . the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." ***Id.***

SORVTA HAS EXPANDED

The Court acknowledged that the Supreme Court upheld the retroactive application of sex offender registries. ***Smith v. Doe***, 538 U.S. 84 (2003)[1]. Likewise, the court also acknowledged that the Sixth Circuit previously upheld Tennessee's sex offender registry laws against similar challenges. The Court also noted that two key changes have occurred. First, SORVTA had grown in layers as the Tennessee General Assembly expanded the scope of its restrictions and the content of its reporting requirements. Second, the contours of Sixth Circuit precedent had changed in the intervening years.

Though the Sixth Circuit had upheld Tennessee's sex offender registry laws in the past, including the 2004 enactment of SORVTA, the Tennessee General Assembly continued to tinker with SORVTA, minimizing its resemblance to the statutes that were before Sixth Circuit at the time. Although the Sixth Circuit upheld SORVTA and its predecessor in the face of similar constitutional challenges, it has since found Michigan's parallel scheme to be unconstitutional as applied to a select group of plaintiffs, therein clarifying the analysis that must be employed when addressing these types of claims. See ***Does v. Snyder***, 834 F.3d 696, 699 (6th Cir. 2016), ***cert. denied***, 138 S.Ct. 55 (2017). Despite the state's argument to the contrary, the Court considered ***Snyder*** to be binding precedent. The Court noted, "In sum, SORVTA, in its current form, is no longer of the same character of the

iterations that were upheld by the Sixth Circuit. Likewise, Sixth Circuit precedent since ***Cutshall v. Sundquist***, 193 F.3d 466, 474 (6th Cir. 1999) and ***Doe v. Bredesen***, 507 F.3d 998, 1001 (6th Cir. 2007) has clarified the analysis this Court must apply in the present case." See Opinion at 11.

THE COURT'S DECISION

The Court began its analysis with the Supreme Court's decision in ***Smith v. Doe***, (2003). In ***Smith***, the Court established an "intents-effects" test when weighing challenges to sex offender registry laws under the Ex Post Facto Clause. 538 U.S. at 89. Under the "intents-effects" test, the Court asks: (1) did the legislature intend to impose punishment; and (2) if not, is the statutory scheme "so punitive in either purpose or effect as to negate [the State's] intention to deem it civil."

The Court correctly used the framework of ***Kennedy v. Mendoza-Martinez*** (372 U.S. 144 (1963)) to determine if SORVTA violates the constitution. There are seven factors to be considered. Courts have consistently concluded that one or more of the seven factors are not relevant when examining sex offender registration schemes.

The factors the Court considered are:

(1) Does the law inflict what has been regarded in our history and traditions as punishment?

(2) Does it impose an affirmative disability or restraint?

(3) Does it promote the traditional aims of punishment?

(4) Does it have a rational connection to a non-punitive purpose?

(5) Is it excessive with respect to this purpose?

The Court concluded that retroactive application of SORVTA is

unconstitutional as applied to Doe. By doing that, the Court dodged the question of whether or not SORVTA is facially unconstitutional in terms of how it chills free speech due to the requirement that internet identifiers be disclosed. Generally, a statute is facially unconstitutional if ". . . no set of circumstances exists under which the Act would be valid." However, due to the unique nature of free speech rights, the Constitution gives significant protection from over-broad laws that chill speech within the First Amendment's vast and privileged sphere." ***Ashcroft v. Free Speech Coal***., 535 U.S. 234, 244 (2002).

NARSOL is excited about this case because it is another step in building the body of case law which will help us in our long-term goal of elimination of the nightmare of public registration. It is worthwhile to note that the court mentioned that the Tennessee Supreme Court had fired a warning shot several years ago which the legislature chose to ignore. The court stated, ". . . the possibility that an amendment to the registration act imposing further restrictions may be subject to review on the grounds that the additional requirements render the effect of the act punitive." ***Ward v. State***, 315 S.W.3d 461, 475. The lesson for lawmakers would be to stop while you are ahead. Unfortunately, we do not expect that to happen because the political pressure is significant due to widespread public support of registries. Our most significant challenge is to change public opinion.

[1] It is noteworthy that Smith was decided at the trial court on "motion for summary judgement" which was discussed in detail above, which meant that the Supreme Court did not find the frightening and high recidivism which causes so much consternation.