Michigan Supreme Court Agrees that 2011 Registration Cannot Be Applied Retroactively

written by Larry Neely | August 3, 2021

By Larry . . . The case of ***The People of the State of Michigan v. Paul Betts*** is an awesome win for our cause. The Michigan Supreme Court was asked to decide whether the retroactive application of Michigan's Sex Offenders Registration Act (SORA), MCL 28.721 et seq., as amended by 2011 PA 17 and 18 (the 2011 SORA), violates state and federal constitutional prohibitions on ex post facto laws. They held that it does.

In December 1993, Defendant Betts pleaded guilty to second-degree criminal sexual conduct (CSC-II). The trial court sentenced him to 5 to 15 years' imprisonment. Two years later, SORA took effect. After Betts successfully completed parole, he failed to comply with SORA regarding his requirements. Specifically, in 2012, he failed to report his change of residence, his e-mail address, and his purchase of a vehicle within 3 days. Betts was charged with violating SORA's registration requirements. He challenged the statute as being

unconstitutional as applied to him since his offense occurred prior to the existence of registration in Michigan.

Parallel Federal Litigation

Due to the fact that there were multiple challenges pending, some mistakenly thought that the matter had already been resolved by the ***Does v. Snyder*** case decided by the United States Court of Appeals in 2016. ***See Does #1-5 v. Snyder***, 834 F3d 696, 705-706 (2016). The Snyder case was initiated in 2012 by five plaintiffs required to register as Tier III offenders due to the 2011 SORA amendments. They sued Michigan's governor and the director of the Michigan State Police, arguing that the 2011 SORA was unconstitutional on several grounds. In a series of opinions, the federal district court partially ruled in the plaintiffs' favor, holding that the 2011 SORA's student-safety zone provisions were unconstitutionally vague, that certain in-person reporting provisions were unconstitutionally vague, that certain in-person reporting provisions violated the First Amendment, and that registrants [litigants] could not be held strictly liable for violating the 2011 SORA's requirements. However, the district court rejected the remainder of the claims, including their argument that the retroactive application of the 2011 SORA violated ex post facto protections. On appeal, the Sixth Circuit held that the various amendments imposed in 2006 and 2011 had tipped the legal analysis and that Michigan's SORA was unconstitutional as applied to the plaintiffs.

Michigan's First Registration Law

"Although Michigan's SORA as initially enacted was similar to the Alaska sex-offender registry at issue in the Smith, subsequent amendments have imposed additional requirements and prohibitions on registrants, warranting a fresh look at how the 2011 SORA fares under the constitutional ex post facto protections." ***Opinion*** at 15. The Michigan Supreme Court cited ***Doe v. State***, 189 P3d 999, 1017 (2008) wherein the Alaska

Supreme Court held that because of intervening amendments of its sex-offender registry that increased requirements and restrictions on registrants, the retroactive application of its sex-offender registry laws violated ex post facto protections. *Id* at 15. This first version of Michigan's SORA created a confidential database accessible only to law enforcement. It required persons convicted of certain sex offenses to register and notify law enforcement of address changes. Since then, the legislature has amended the act several times, altering both the nature of the registry and the requirements imposed by it.

Evolution Year by Year

Michigan's registry became accessible to the public in 1997 when the legislature required law enforcement to make the registry available for in-person public inspection during business hours. Shortly thereafter, in 1999, the legislature required computerization of the registry and granted law enforcement the authority to make the computerized database available to the public online. And in 2006, the legislature allowed for the registry to send e-mail alerts to any subscribing member of the public when an offender registers within or when a registrant moves into a specified zip code. As the registry became more accessible to the public, the information registrants were required to provide to law enforcement also expanded as well. In 2002, registrants were required to report whenever they enrolled, disenrolled, worked, or volunteered at an institution of higher education. Two years later, in 2004, the legislature directed registrants to provide an updated photograph for addition to the online database. In 2011, more personal information, including employment status, electronic mail addresses and instant message addresses, vehicle information, and travel schedules were added. Registrants were required to update law enforcement of these changes within three business days, a substantial shortening of the time frame from the initial 10-

day reporting window. The updates were also required to be made in person rather than by mail, telephone, or e-mail.

Unable to Stop While Ahead

As with most state legislatures, Michigan's was not able to help itself, and they kept piling on more and more requirements and prohibitions. Specifically, amendments effective in 2006 created exclusion zones that prohibited most registrants from living, working, or loitering within 1,000 feet of a school. The legislature also added an annual registration fee of $50. In 2011, the legislature also enacted significant structural amendments of SORA. These amendments (designed to achieve AWA compliance) categorized registrants into three tiers on the basis of their offenses and based the length of registration on that tier designation. With this reclassification came lengthened registration periods, including a lifetime registration requirement for Tier III offenders. Registrants' tier classifications were also made available on the public database.

Proving Unconstitutionality

For evaluation of whether registration is civil and non-punitive, the United States Supreme Court has provided seven non-exhaustive factors are relevant to the inquiry. See***Kennedy v. Mendoza-Martinez***, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963). Those factors are:

1. Whether the sanction involves an affirmative disability or restraint.
2. Whether it has historically been regarded as a punishment.
3. Whether it comes into play only on a finding of scienter.
4. Whether its operation will promote the traditional aims of punishment—retribution and deterrence.
5. Whether the behavior to which it applies is already a

crime.
6. Whether an alternative purpose to which it may rationally be connected is assignable.
7. Whether it appears excessive in relation to the alternative purpose assigned

They went on to say, “Again, a challenging party must provide the clearest proof of the statutory scheme’s punitive character in order to [successfully] negate the State’s intention to deem it civil.” The Court continued, “In determining whether defendant has satisfied this burden, we do not examine individual provisions of SORA in isolation but instead assess SORA’s punitive effect in light of all the act’s provisions when viewed as a whole. We assess in turn each of the factors that the United States Supreme Court identified as relevant in ***Smith***.”

The Court found that, of the five factors it deemed relevant, four weighed in Betts’ favor. Two of the factors were deemed not relevant for the analysis.

NARSOL found it highly significant where, on page 28, the Court said, “Given the uncertainty of the 2011 SORA’s efficacy, the restraints it imposed were excessive. Over 40,000 registrants were subject to the 2011 SORA’s requirements without any individualized assessment of their risk of recidivism. The duration of an offender’s reporting requirement was based solely on the offender’s conviction and not the danger he individually posed to the community. Registrants remained subject to SORA—including the stigma of having been branded a potentially violent menace by the state—long after they had completed their sentence, probation, and any required treatment. All registrants were excluded from residing, working, and loitering within 1,000 feet of a school, even those whose offenses did not involve children and even though most sex offenses involving children are perpetrated by a person already known to the child. As described, this restriction placed significant burdens on

registrants' ability to find affordable housing, obtain employment, and participate as a member of the community…" ***Opinion*** at 28-29.

Disabilities & Restraints

In order for registration to be imposed retroactively, it cannot impose disabilities or restraints. See ***Smith v. Doe***, 538 U.S at 100. The court noted that, ". . . the 2011 SORA's student-safety zones excluded registrants from working, living, or loitering within 1,000 feet of school property. Unlike traditional banishment, these exclusion zones did not explicitly exile a registrant from the community. But they might have effectively banished a registrant from living within the community. For example, in urban areas that host several schools within their geographic borders, the 1,000-foot restriction emanating from each school might have eliminated access to affordable housing. Or, in rural areas with fewer schools but concentrated community areas, the 1,000-foot restriction might have eliminated a registrant's access to employment and resources within the town or city center. And available homeless shelters might have also been encompassed by the 1,000-foot residency restriction." ***Opinion*** at 18. Compare with ***Smith v. Doe***, 538 US at 101 noting that the 2003 Alaska sex-offender registry, which the United States Supreme Court held did not violate ex post facto protections, left registrants free to move where they wish[ed] and to live and work as other citizens. The Court also found, ". . . THE 2011 SORA also resembles the punishment of shaming. The breadth of information available to the public—far beyond a registrant's criminal history—as well as the option for subscription-based notification of the movement of registrants into a particular zip code, increased the likelihood of social ostracism based on registration. While the initial version of SORA might have been more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past

criminality…” ***Id*** at 18.

Conclusion of the Court

NARSOL is excited that the Court’s conclusion is unambiguous. “We hold that the 2011 SORA, when applied to registrants whose criminal acts predated the enactment of the 2011 SORA amendments, violates the constitutional prohibition on ex post facto laws. As applied to defendant Betts, because the crime subjecting him to registration occurred in 1993, we order that his instant conviction of failure to register as a sex offender be vacated.”