IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM ANDREW WOODS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57481

FILED

DEC 06 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a judgment of conviction, pursuant to a bench trial, of sex offender failure to notify appropriate agencies of change of address. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.[1]

*Conscious indifference*

Appellant William Andrew Woods contends that the district court abused its discretion by denying his pretrial petition for a writ of habeas corpus and/or motion to dismiss because the State acted with willful and conscious disregard of his procedural rights when it failed to oppose his motion to dismiss in the justice court. Woods also asserts that the State filed "procedurally improper fugitive documents" and did not advise the grand jury that the justice court previously dismissed the charge.

This court reviews the district court's denial of a motion to dismiss for an abuse of discretion, *Hill v. State*, 124 Nev. 546, 550, 188

[1]We previously entered an opinion reversing and remanding this case but subsequently granted the State's petition for rehearing and vacated the opinion.



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P.3d 51, 54 (2008), and the district court's determination regarding a pretrial petition for a writ of habeas corpus for substantial error, *Sheriff v. Shade*, 109 Nev. 826, 828, 858 P.2d 840, 841 (1993). The district court's determination regarding conscious indifference is a determination of fact, *State v. Lamb*, 97 Nev. 609, 611, 637 P.2d 1201, 1202 (1981), which will not be disturbed on appeal so long as substantial evidence in the record supports that determination, *Sheriff v. Roylance,* 110 Nev. 334, 337, 871 P.2d 359, 361 (1994).

Here, the district court determined that "[t]he State undeniably made a substantial error in failing to oppose the Motion to Dismiss" but did not exhibit conscious indifference to Woods' procedural rights. We agree. The State acted negligently by failing to oppose Woods' motion to dismiss and caused an unnecessary delay in his case. Nevertheless, Woods fails to identify any applicable procedural rule requiring the State to file an opposition. And in the absence of any requirement to file an opposition, we conclude Woods fails to demonstrate that the State's negligence, or any of its other actions, constituted willful or conscious indifference. *See, e.g., Lamb,* 97 Nev. at 610-11, 637 P.2d at 1202-03 (conscious indifference not exhibited where case dismissed due to prosecutor's failure to subpoena witness and discuss testimony prior to preliminary hearing); *Johnson v. State*, 89 Nev. 304, 305, 511 P.2d 1051, 1051-52 (1973) (finding no conscious indifference where prosecutor's failure to produce evidence corroborating accomplice testimony resulted in dismissal of criminal complaint); *see also Watson v. Sheriff*, 93 Nev. 236, 237-38, 562 P.2d 1133, 1133 (1977) (prosecutor demonstrated indifference where he engaged in outrageous behavior resulting in the delay of defendant's case). Accordingly he fails to demonstrate that the district court abused its discretion or erred by denying him relief on this ground.

*Expiration of registration period*

Woods asserts that the district court erred by denying his claim that he was not subject to registration requirements at the time he failed to update his address in 2009. It appears Woods challenges the district court's determination that, under the 2007 version of the statute, the 15-year registration period began on the date the Central Repository established his registration record in 1998 and was thus still in effect in 2009. *See* NRS 179D.490. He does not, however, support this claim with any cogent argument or citation to authority. Therefore, we decline to address it. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

*Constitutional challenges*

Woods and amicus assert that NRS 179D.470 and NRS 179D.550 are unconstitutional in violation of the Ex Post Facto, Due Process, Double Jeopardy, Cruel and Unusual Punishment, and Contracts Clauses.[2] This court reviews the constitutionality of a statute de novo. *Ford v. State*, 127 Nev. ___, ___, 262 P.3d 1123, 1126 (2011). The proponent of a constitutional challenge bears the burden of establishing a constitutional infirmity. *Id.*

Many of these constitutional challenges are based on the assertion—with which the State agrees—that Woods' 1989 conviction did not subject him to sex offender registration requirements in 1989. We note at the outset that the statutory scheme in effect at the time of Woods' offense in 1987 did, however, require all persons convicted of open or gross lewdness to register as sex offenders. *See* 1985 Nev. Stat., ch. 459, § 2(2),

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[2]Woods and amicus also challenge the constitutionality of NRS 179D.460. Woods may not challenge NRS 179D.460 in this appeal because he was not convicted of violating that statute.

at 1413 (defining a sex offender as any person convicted of violating NRS 201.210); 1983 Nev. Stat., ch. 55, § 2, at 206 (open or gross lewdness (201.210)); 1973 Nev. Stat., ch. 568, § 39, at 923 (requiring all sex offenders to register and notify the appropriate local law enforcement authorities of a change in address within 10 days).

*Procedural due process*

Woods and amicus contend that Woods was denied his right to procedural due process under the state and federal constitutions because he had no opportunity to object to being labeled as a sex offender and subject to registration requirements in 1997. Because Woods failed to raise this claim in the district court, we review it for plain error.[3] *See, e.g., Maestas v. State*, 128 Nev. ___, ___, 275 P.3d 74, 89 (reviewing unobjected-to constitutional error for plain error), *cert. denied*, 568 U.S. ___, 133 S. Ct. 275 (2012).

Where a statute imposes a burden to register as a sex offender based solely on the fact of conviction, the offender is not entitled to any additional due process beyond that already provided in the proceedings surrounding the conviction. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003); *ACLU v. Masto*, 670 F.3d 1046, 1058-59 (9th Cir. 2012). The statutes in effect at the time of Woods' original conviction required registration based solely on the fact of his conviction. 1973 Nev. Stat., ch. 568, § 39(1), at 923 (all sex offenders required to register); 1985 Nev. Stat., ch. 459, § 2(2), at 1413 (defining "sex offender" to include any person convicted of violating NRS 201.210 (open or gross lewdness)). And Woods does not allege that the process surrounding his 1989 conviction was

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[3]Woods raised this claim in the justice court but did not pursue it in the district court.

deficient. Moreover, even assuming that the registration requirements were retroactively imposed in 1997, those statutes also required all sex offenders to register and update registration information based solely on the fact of conviction. 1997 Nev. Stat., ch. 451, §§ 52-53, at 1657-58; *see also* 1997 Nev. Stat., ch. 451, §§ 47-48, at 1654-55 (defining "sex offender" to include any person convicted of open or gross lewdness). Therefore, Woods fails to demonstrate that he was entitled to any additional due process in 1997.

Woods further seems to contend that he was deprived of procedural due process because a federal injunction and the Legislative Counsel Bureau's interpretation of that injunction rendered the state of the law confusing and he therefore had no notice that he was under the continuing obligation to update his address pursuant to NRS 179D.470. *See ACLU v. Masto*, 719 F. Supp. 2d 1258, 1260 (D. Nev. 2008), rev'd in part, 670 F.3d 1046 (9th Cir. 2012). Woods fails to demonstrate plain error because NRS 179D.470 was not subject to the injunction. *See id.* Moreover, Woods does not assert that he failed to update his address in reliance on the injunction or the Legislative Counsel Bureau's opinion.

Finally, Woods alleges that NRS 179D.470 and NRS 179D.550 are unconstitutionally vague because the effect of the federal injunction upon those statutes is unclear, leaving the laws regarding sex offender registration in "turmoil and confusion." Woods does not assert that the texts of the statutes themselves are unconstitutionally vague but implicitly asserts that an injunction can render an otherwise valid statute unconstitutionally vague. Woods fails to support this contention with any cogent argument or citation to authority. Accordingly, we conclude he fails to demonstrate plain error in this regard.

*Ex post facto*

Woods and amicus contend that the 1997 version of NRS 179D.470 was an ex post facto law that improperly imposed a new criminal punishment for his 1989 conviction. *See* U.S. Const. art. I, § 10; Nev. Const. art. 1, § 15. This ex post facto claim lacks merit because as discussed above, sex offender registration requirements were not retroactively imposed on Woods—he was subject to those requirements as the result of his original conviction. *See, e.g., Weaver v. Graham,* 450 U.S. 24, 28 (1981) (explaining that the prohibition against ex post facto laws forbids the passage of laws that impose punishments for acts that were not punishable at the time they were committed or impose punishments in addition to those prescribed at the time of the offense). Even if sex offender registration requirements were retroactively imposed on Woods in 1997, this ex post facto claim still fails because the 1997 version of the registration scheme did not impose a punishment. *See De Veau v. Braisted*, 363 U.S. 144, 160 (1960) (to be unconstitutional as an ex post facto law a statute must impose a punishment); *Nollette v. State*, 118 Nev. 341, 344-45, 46 P.3d 87, 89-90 (2002). And we conclude amicus' attempt to distinguish *Nollette* lacks merit.

Woods also appears to contend that the version of NRS 179D.550 in effect at the time of his offense was an unconstitutional ex post facto law. This contention lacks merit because this statute punishes only prospective failures to comply with the relevant registration requirements. NRS 179D.550 neither imposes a punishment for an act that was innocent at the time it was committed, nor imposes an additional punishment for a prior offense. *See Smith v. Doe*, 538 U.S. 84, 101-02 (2003) (prosecution for failure to comply with reporting requirements is separate proceeding from original offense); *Dixon v. State*, 103 Nev. 272,

274, 737 P.2d 1162, 1164 (1987) (statute not ex post facto where reference to the statute on the day of the offense would have shown the penalty risked). We conclude Woods fails to demonstrate that the district court erred or abused its discretion by denying this claim.

*Double jeopardy*

Woods and amicus assert that the 1997 versions of NRS 179D.470 and NRS 179D.550 violate the Double Jeopardy Clauses of the United States and Nevada Constitutions because the addition of sex offender registration requirements years after Woods' case concluded constituted an additional punishment for his original offense. The parties also contend that the "redefinition" of Woods' offense in 2007 to a "sexual offense" constituted a second punishment. Because Woods did not make a double jeopardy claim in the district court, we review for plain error.[4] *See Maestas*, 128 Nev. at ___, 275 P.3d at 89.

The Double Jeopardy Clause prohibits a criminal defendant from receiving multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith,* 490 U.S. 794 (1989); *Garcia v. State,* 121 Nev. 327, 342, 113 P.3d 836, 845 (2005), *modified on other grounds by Mendoza v. State,* 122 Nev. 267, 274, 130 P.3d 176, 180 (2006). Because Woods was already subject to sex offender registration as the result of his 1989 conviction, the 1997 statutory scheme did not result in the imposition of any additional sanction. Further, the 1997 version of Nevada's sex offender registration scheme does not constitute a punishment. *Nollette*, 118 Nev. at 347, 46 P.3d at 91. Therefore, even if he was not subject to sex offender

[4]Woods raised this claim in the justice court but did not pursue it in the district court.

registration as a result of his 1989 conviction, Woods' contention that the 1997 statutory scheme subjected him to additional punishment lacks merit. And Woods' claim that misdemeanor open or gross lewdness was "redefined" as a "sexual offense" in 2007 lacks merit because open or gross lewdness has been defined as a sexual offense for purposes of sex offender registration since 1997.[5] 1997 Nev. Stat., ch. 451, § 48(9), at 1655. To the extent Woods also asserts that his conviction and sentence for violating NRS 179D.470 (failing to update his address) imposed an additional punishment for his original open or gross lewdness conviction, this contention patently lacks merit because the punishment imposed for Woods' violation of NRS 179D.470 was not an additional punishment for his original open or gross lewdness conviction. *Cf. Dixon*, 103 Nev. at 274, 737 P.2d at 1164 (explaining that a statute providing for an increased sentence where defendant had previously been convicted of a similar crime is not an ex post facto law simply because the prior conviction predated the statute's enactment). Woods fails to demonstrate plain error.

*Contracts Clauses*

Woods and amicus contend that retroactive application of the 1997 versions of NRS 179D.470 and NRS 179D.550 violates the Contracts Clauses of the United States and Nevada Constitutions. U.S. Const. art.

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[5]Gross misdemeanor open or gross lewdness was redefined as a sexual offense for purposes of *community notification* in 2007. *Compare* 2003 Nev. Stat., ch. 261, § 20, at 1390-91 (defining felony open or gross lewdness as a sexual offense for purposes of community notification), *with* NRS 179D.095; 179D.097; NRS 179D.475 (together defining open or gross lewdness as a sexual offense for purposes of community notification). However, Woods' argument is focused solely on sex offender registration requirements and he makes no argument relating to community notification.

1, § 10, cl. 1; Nev. Const. art. 1, § 15. They allege that Woods entered a contract with the State and the contract was executed, but the State later imposed the additional requirements of sex offender registration. Woods did not raise this contention in the district court and we therefore review for plain error. *See Maestas*, 128 Nev. at ___, 275 P.3d at 89.

Woods and amicus fail to demonstrate that guilty plea agreements fall within the ambit of the Contracts Clauses. Moreover, a proper Contracts Clause analysis involves two distinct considerations: (1) whether a law actually impairs a contract and (2) whether that impairment is prohibited by the Constitution. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 21, 25 (1977). Woods and amicus assert that the addition of sex offender registration requirements in 1997 altered the terms of Woods' "contract" with the State but do not even allege, let alone demonstrate, that such impairment is prohibited by the Contracts Clauses. Accordingly, Woods fails to demonstrate plain error.

*Cruel and unusual punishment*

Woods asserts that sex offender registration requirements constitute cruel and unusual punishment under the federal constitution. U.S. Const. amend. VIII. Woods was subject to registration requirements as the result of his 1989 conviction. Because he could have, but did not raise this contention on direct appeal from that conviction, it is deemed waived. *See Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). Moreover, the claim lacks merit because, as noted above, the 1997 version of the sex offender registration scheme does not constitute punishment, *Nollette*, 118 Nev. at 347, 46 P.3d at 91, and a statute does not impose a cruel and unusual punishment where it does not

impose a punishment at all, *e.g.*, *Cutshall v. Sundquist*, 193 F.3d 466, 477 (6th Cir. 1999).

*Breach of the plea agreement*

Woods contends that the State breached the guilty plea agreement in his 1989 open or gross lewdness conviction by retroactively imposing sex offender registration requirements after he fulfilled his part of the bargain by pleading guilty and serving his jail sentence. Woods fails to support this contention with cogent argument. Therefore, we decline to address it. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Moreover, we note that this contention relies on the incorrect assumption that registration requirements were retroactively imposed on Woods.[6]

*Constitutionality of NRS 174.035(3)*

Lastly, Woods asserts that NRS 174.035(3) is unconstitutional in violation of the Fifth Amendment to the United States Constitution because the requirement that the prosecutor consent before a defendant may enter a conditional guilty plea infringes upon his "right to enter a plea of guilty." We decline to address this contention because Woods again fails to support it with cogent argument or citation to authority. *See id.*

Woods also asserts that this court should impose a requirement that the State only be permitted to exercise its discretion not to accept a conditional guilty plea pursuant to NRS 174.035(3) upon a showing of good cause. While we agree with Woods that the State's reasons for refusing to agree to a conditional guilty plea in this case were

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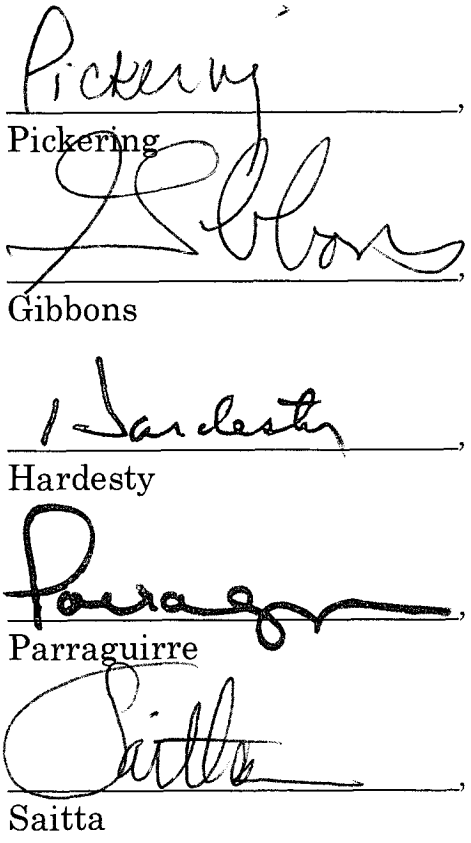
[6]To the extent Woods contends that the district court erred by determining that his 1988 guilty plea was not invalid because he was not informed of the sex offender registration requirement before entering the plea, we conclude he fails to demonstrate an abuse of discretion. *Johnson v. State*, 123 Nev. 139, 144, 159 P.3d 1096, 1098 (2007).

weak, the plain language of the statute does not require the State to demonstrate good cause and we decline to impose such a requirement at this time.

Having considered Woods' contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.



_____, C.J.
Pickering

_____, J.
Gibbons

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Saitta

CHERRY, J., with whom DOUGLAS, J., agrees, dissenting:

I respectfully disagree with the majority's conclusion that the State did not act with conscious indifference towards Woods' procedural rights. The parties specifically agreed to continue the preliminary hearing so that the State could file an opposition to the motion to dismiss. Due to its own negligence, the State failed to file an opposition or respond in any other way to the motion. This inaction on the part of the State directly contributed to an unnecessary delay in Woods' case. Under these

circumstances, I conclude that the State acted with conscious indifference and would order the judgment of conviction reversed on that basis. *See Lamb v. State*, 97 Nev. 609, 611, 637 P.2d 1201, 1202 (1981) (to demonstrate conscious indifference, a defendant need not show that the prosecution acted intentionally or with "calculated bad faith"). I agree with the majority's analysis in all other respects.

Cherry, J.

Cherry

I concur:

Douglas, J.

Douglas

cc: Hon. Connie J. Steinheimer, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Special Public Defender
Washoe District Court Clerk