IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY RAY CUNNINGHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38847

FILED

MAR 17 2003

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

On September 24, 2001, Timothy Cunningham was arrested at Paradise County Park after being observed by a park police officer sitting naked in his vehicle. He was subsequently charged with indecent exposure, loitering about a school or public place where children congregate, and possession of drug paraphernalia.

On October 25, 2001, Cunningham, with his counsel present, entered a guilty plea pursuant to North Carolina v. Alford[1] to the indecent exposure charge. The other charges against Cunningham were dismissed and a pre-sentence report was waived in accordance with a plea agreement. The plea agreement contained a handwritten provision, initialed by Cunningham, which stated, "I understand that I will be required to register as a sex offender." Cunningham was sentenced to thirty-one days imprisonment with credit for time served and was required by the court to register as a sex offender.

On November 7, 2001, a judgment of conviction was filed. Thereafter, Cunningham filed a timely notice of appeal with this court. Cunningham claims, when applied to the facts of this case, that requiring him to register as a sex offender for the remainder of his life as a result of

[1]400 U.S. 25 (1970).

a misdemeanor conviction for indecent exposure violates the Eighth Amendment's prohibition against cruel and unusual punishment. He also contends that the statutes violate the Equal Protection Clause of the United States Constitution because the statutes are arbitrary and do not further a legitimate state interest when applied to misdemeanor convictions. He further claims that the statutes violate due process because the penalty for failing to register is more severe than the penalty for his original offense and because there are no procedures within the statute to allow Cunningham to challenge the registration requirement. Last, Cunningham asserts that the statutes are vague and overly broad when applied to the crime of indecent exposure.

Cunningham contends that a lifetime registration requirement is grossly disproportionate to the crime committed when applied to misdemeanors. The threshold inquiry concerns whether registration is a form of punishment, or merely a regulatory duty imposed upon the offender. This court recently addressed this concern in Nollette v. State.[2] There, the court found that sex offender registration and notification statutes were "not intended to impose a penal consequence but were instead implemented to protect the community and assist law enforcement in solving crimes."[3]

Nevertheless, Cunningham relies on a single phrase contained in Nollette to support his argument that the sex offender registration and notification provisions are, to some degree, punitive. "[T]he practical effects of the sex offender registration and notification provisions are, for

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[2]118 Nev. ___, 46 P.3d 87 (2002).

[3]Id. at ___, 46 P.3d at 90-91.

the most part, non-punitive."[4] Cunningham claims that if the statutes are, for the most part, non-punitive, then they must be, in at least some part, punitive. This claim is unpersuasive. This court considered possible punitive impact later in its decision when analyzing possible deterrent effects to sex offender registration. "[T]he mere possibility of a secondary, deterrent effect does not, without more, make the statute punitive in nature."[5]

Cunningham further argues that the length and type of registration involved constitutes cruel and unusual punishment for misdemeanor offenders. He contends that a lifetime registration requirement far exceeds any reasonable penalty for a misdemeanor offense. Moreover, he equates registration with a "scarlet letter" for a nonviolent, minor offense. This argument is also unpersuasive.

The sex offender registration requirements of NRS Chapter 179D do apply for life. There is, however, a provision that allows offenders to apply for release from its requirements fifteen years after release from custody or establishment of registration, whichever occurs later.[6] While still harsh, this statute provides limited relief from the lifetime registration requirement.

In further support of his cruel and unusual punishment argument, Cunningham cites numerous states that do not apply sex offender registration requirements to misdemeanor offenders. While this argument is persuasive, it certainly does not obligate Nevada to follow

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[4]Id. at ___, 46 P.3d at 91 (emphasis added).

[5]Id. at ___, 46 P.3d at 91.

[6]NRS 179D.490.

suit. The United States Supreme Court reinforced the position that states have discretion in criminal sentencing by stating "[t]hat a State is entitled to treat with stern disapproval an act that other States punish with the mildest of sanctions follows a fortiori from the undoubted fact that a State may criminalize an act that other States do not criminalize at all."[7] Thus, Cunningham's contention that Nevada's statute is unconstitutional because it is stricter than that of other states is without merit.

Because imposition of sex offender registration status is predominantly regulatory, not punitive, Nevada's sex offender registration and notification statutes do not violate the United States Constitution's Eighth Amendment protection against cruel and unusual punishment.

Cunningham next contends that his constitutional right to equal protection is offended by Nevada's sex offender registration and notification statutes because the assignment of identical classifications to both misdemeanor and felony sex offenders does not bear a rational relationship to a legitimate state interest.

"Equal protection is offended if the prohibition . . . is an unreasonable classification without basis in fact, and unrelated to the objective sought to be accomplished."[8] The court must first consider whether a classification consisting of both felony and misdemeanor sex offenders is unreasonable.

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[7]Harmelin v. Michigan, 501 U.S. 957, 989 (1991).

[8]Doubles Ltd. v. Gragson, 91 Nev. 301, 303, 535 P.2d 677, 679 (1975) (citing McDonald v. Board of Election, 394 U.S. 802 (1968)).

Other states classify misdemeanor offenders as sex offenders .[9] This classification has been challenged in various state courts with little success. The Arizona Court of Appeals, for example, noted that its legislature acted reasonably in crafting its registration statutes.

> "[W]e cannot say that registration of misdemeanants has no valid regulatory purpose. It would not have been irrational for the legislature to have believed that people who engage in public masturbation may engage in more serious sex crimes, and that knowledge of such activities might be useful to the police in solving those crimes."[10]

Further, the Supreme Court of South Dakota considered and rejected a defendant's argument that its sex offender registration statute violated the Equal Protection Clause because it applied identical registration requirements to all sex offenses without regard to the severity of the offense or risk of recidivism.[11] The South Dakota court exercised judicial restraint by noting:

> Although we might perceive a distinction in the need for registration and public notification between statutory rapists and other sex offenders, we are not free as judges to overrule legislative values. We pass only on the permissible scope of legislative regulation, not its wisdom. The view that judges function to fine tune legislative excess has long been discarded. Only when statutes are

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[9]See, e.g., W. VA. CODE § 15-12-2 (2001).

[10]State v. Cameron, 916 P.2d 1183, 1185 (Ct. App. Ariz. 1996).

[11]Meinders v. Weber, 604 N.W.2d 248 (S.D. 2000).

> plainly and unmistakably unconstitutional may we declare them void.[12]

In fact, Nevada's system is more equitable than those employed in South Dakota and other states because it employs a tier classification system to distinguish between offenders based on risk of recidivism.[13] This system provides three levels of community notification based on the sex offender's risk of committing future crimes.[14] Level one offenders are not subject to widespread community notification due to their low risk of future danger to the public.[15] Level three offenders, on the other hand, are subject to extensive community notification procedures to safeguard members of the public likely to encounter the sex offender.[16]

Persons classified as sex offenders are not deprived of any fundamental right by the imposition of a registration requirement. Moreover, sex offenders are not a suspect class. Absent the involvement of a suspect classification or a fundamental right, a classification is constitutional under the Equal Protection Clause if it bears a rational relationship to the legislative purpose of the statute or act involved.[17] Registration of sex offenders is rationally related to the public and law enforcement's interest in the prevention of sex related crimes, particularly

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[12]Id. at 260.

[13]See NRS 179D.640-60.

[14]NRS 179D.730.

[15]NRS 179D.730(1)(a).

[16]NRS 179D.730(1)(c).

[17]DeRosa v. First Judicial Court of State ex rel. Carson City, 115 Nev. 225, 236, 985 P.2d 157, 164 (1999).

those involving minors. For these reasons, Nevada's sex offender registration and notification statutes do not violate the Equal Protection Clause of the United States Constitution.

Cunningham next asserts that due process is violated when the sex offender registration and notification statutes are applied in his case because (1) there is no available procedure that allows him to challenge the registration requirement, (2) his liberty and privacy interests are negatively affected, and (3) the stigma associated with being considered a sex offender substantially outweighs the gravity of his misdemeanor offense.

Cunningham had an opportunity to contest registration prior to the entry of his plea. He had the opportunity to contest his indecent exposure charge at trial. He negotiated away two other charges in exchange for his plea of guilty on the indecent exposure count. Moreover, he entered the plea with full knowledge and consent that registration would be required. Thus, Cunningham's claim that due process was violated because there was no procedure to contest the registration portion of his sentence is without merit.

Cunningham further argues that his liberty interests are impermissibly damaged by imposing a registration requirement. He claims that liberty interests include good name, reputation, integrity, and the likelihood of stigma that would impair his employment opportunities.

"[R]eputation alone, apart from some more tangible interests such as employment, is [not] 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause."[18]

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[18]Paul v. Davis, 424 U.S. 693, 701 (1976).

Cunningham claims that the registration requirement will adversely impact his ability to secure and maintain employment. This argument is somewhat disingenuous. Regardless of whether Cunningham is required to register as a sex offender, his criminal record will have the predominant impact on his future employment, not his obligation to register.

Cunningham also asserts that the stigma of being labeled a "sex offender" and the imposition of the registration requirement irreparably damages his reputation. Damage to one's reputation resulting from disclosure of negative, but true, information does not, by itself, give rise to a constitutional claim. Numerous courts have held that "mere injury to a sex offender's reputation is [in]sufficient to implicate a legitimate liberty interest."[19]

Moreover, the registration laws place no affirmative disability or restraint on a sex offender.[20] Offenders subject to registration are entitled to live in the place of their choosing and may travel freely.[21]

Cunningham chose not to avail himself of the trial process by pleading guilty with full knowledge of the registration requirements. No protected liberty or privacy interest is violated by application of the registration statutes to Cunningham. For these reasons, due process was

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[19]Hellman v. State, 784 A.2d 1058, 1072 (Del. 2001). See also Russell v. Gregoire, 124 F.3d 1079, 1094 (9th Cir. 1997) (holding that in the case of sex offender registration laws, the information at issue is available in the public record and therefore not constitutionally protected); Cutshall v. Sundquist, 193 F.3d 466, 479 (6th Cir. 1999); E.B. v. Verniero, 119 F.3d 1077, 1102-04 (3d Cir. 1997).

[20]Nollette, 118 Nev. at ___, 46 P.3d at 91.

[21]Id.

not violated in the imposition of the registration requirement in the present case.

Last, Cunningham claims that Nevada's sex offender registration and notification statutes are vague and overbroad when applied to the misdemeanor offense of indecent exposure. In support of this claim Cunningham cites this court's decision in Barnes v. Eighth Judicial District Court.[22] There, the court found NRS 12.015(1) to be unconstitutional because it was arbitrary, overbroad, and violative of equal protection.[23] In Barnes, the court held that legal classifications must apply uniformly to all who are similarly situated.[24] Cunningham contends that misdemeanor indecent exposure offenders are not similarly situated to those sex offenders convicted of felonies; thus, the registration and notification statutes are overly broad and vague.

"In a facial challenge to the overbreadth and vagueness of a law, the court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct."[25] "If it does not then the overbreadth challenge must fail."[26] Here, there is little doubt that indecent exposure is not constitutionally protected conduct. As discussed earlier, collateral claims that registration affects a protected

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[22]103 Nev. 679, 748 P.2d 483 (1987).

[23]Id. at 684, 748 P.2d at 487.

[24]Id. at 683, 748 P.2d at 486-87.

[25]Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982).

[26]Id.

liberty or property interest are unpersuasive. Thus, the overbreadth challenge fails.

If the overbreadth challenge fails, the court then must consider facial challenges based on vagueness of a statute.[27] The court should uphold challenges based on vagueness only if the statute is impermissibly vague in all of its applications.[28] If the challenged statute is reasonable in its application against the person bringing the challenge, it should not be stricken for vagueness.[29] "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."[30] Here, Cunningham pleaded guilty to indecent exposure with full awareness that such a plea triggered the sex offender registration and notification statutes. The statutes clearly apply to Cunningham's conduct; therefore, Cunningham may not successfully challenge for vagueness.

Nevertheless, Cunningham correctly identifies that the statutes, as written, would result in sex offender status being applied to persons convicted of "streaking, mooning, or skinny dipping." He suggests that implication of the notification and registration provisions against a person convicted of "going to the bathroom on the side of the road" implies that the statute is overbroad and vague.

Cunningham's point is well taken. The legislature likely did not contemplate that the language of NRS 179D.10 et seq. would lead to

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[27]Id. at 494-95.

[28]Id. at 495.

[29]Id. at 495.

[30]Parker v. Levy, 417 U.S. 733, 756 (1974).

such absurd results. However, such absurdity can be avoided by the State in its decisions regarding the charging of such offenders. Defense counsel may argue the severity of the imposition of registration requirements at trial. Ultimately, the duty to remedy the shortcomings of a statute lies with the legislature, not this court.

Moreover, this court is charged with evaluating the application of the statutes in the real world of this case, not the pantheon of hypotheticals offered by the defense. A court reviewing a statute for vagueness should not "entertain countless hypothetical situations in which the statute might be considered vague, but [instead] . . . apply[] the enactment to the facts at hand."[31]

Cunningham's claims that Nevada's sex offender registration and notification statutes are unconstitutional are not persuasive. The statutes do not impose a cruel and unusual punishment or punishment of any other kind. Instead, they impose a regulatory duty that, while accompanied with a detrimental stigma, do not rise to the level of punishment. Additionally, the statutes survive the rigors of equal protection and due process analysis. Lastly, they are not overbroad or vague, especially when applied to the facts of this case.

Although the application of Nevada's sex offender registration and notification statutes to misdemeanor sex offenders may seem harsh, it is reasonable to assume that the legislature expressly intended for cases like Cunningham's to be included in its domain. Indecent exposure is expressly included as one of the enumerated crimes that result in

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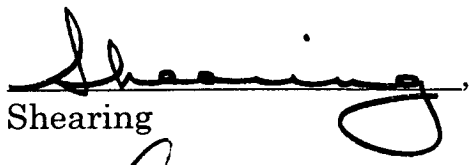
[31]Travis v. State, 700 So.2d 104, 106 (Fla. Dist. Ct. App. 1997).

automatic requirement of registration and notification. The legislature made no exceptions for misdemeanors. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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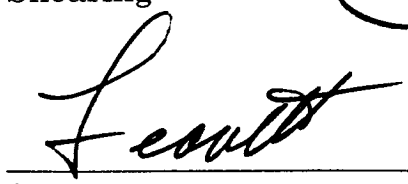

_____, J.
Leavitt

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Becker

cc: Hon. Michael L. Douglas, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk