

Case Summary

Herman F. Filice appeals the denial of his “motion to remove sexually violent predator status.” We affirm the denial of Filice’s motion, but we redirect Filice to file a new petition in accordance with Indiana Code section 11-8-8-22.

Facts and Procedural History

Filice committed Class B felony criminal deviate conduct and Class B felony attempted rape on August 2, 2005. He was convicted by a jury on April 25, 2007, and sentenced to a term of incarceration on June 13, 2007. Filice is now incarcerated in the New Castle Correctional Facility in Henry County, Indiana.

At Filice’s sentencing hearing, the trial court made no determination that Filice was a sexually violent predator. The Indiana Department of Correction now classifies Filice as a sexually violent predator in its offender information system.

On August 13, 2009, Filice filed a *pro se* motion in Marion Superior Court to remove his sexually violent predator classification. The trial court denied the motion without a hearing. The court issued the following order:

Comes now the Court, and the Defendant having filed his *pro se Motion to Remove Sexually Violent Predator Status*, and the State having filed its Response thereto, now finds as follows:

1. The Defendant was convicted on April 25, 2007 of Criminal Deviate Conduct, Class B felony, and Attempt Rape, Class B felony. He was sentenced on June 13, 2007 to an aggregate term of ten (10) years.
2. The Defendant is subject to the provisions of the Indiana Sex Offender Registration Act.
3. The Defendant is subject to the provisions of Indiana Code 35-38-1-7.5, sexual violent predator status designation.
4. The Defendant’s convictions are included in the designation for an automatic application of sexually violent predator status.

5. Pursuant to *Jensen v. State*, (Ind.2009) 905 N.E.2d 384, application of the current version of Ind. Code 35-38-1-7.5 to the Defendant is appropriate and not violative of constitutional rights.

WHEREFORE, the Defendant's Motion is hereby DENIED.

Appellant's App. p. 47.

Filice now appeals.

Discussion and Decision

Filice argues that his classification as a sexually violent predator is an unconstitutional ex post facto punishment and that the trial court erred by denying his motion to remove sexually violent predator status.

Under Indiana's sex offender registration statutes, some sex offenders may be designated "sexually violent predators." *See* Ind. Code § 35-38-1-7.5. A sexually violent predator is "a person who suffers from a mental abnormality or personality disorder that makes the individual likely to repeatedly commit a sex offense" *Id.* § 35-38-1-7.5(a). Sexually violent predators have stricter reporting and registration requirements than ordinary sex offenders. *See, e.g., id.* §§ 11-8-8-14(b); 11-8-8-19(b).

At the time Filice committed his offenses in 2005, in order for a sex offender to be designated a "sexually violent predator," the trial court had to find that the defendant was a sexually violent predator at his sentencing hearing after consulting two mental health specialists. Ind. Code § 35-38-1-7.5(c) (2004).

The sexually violent predator requirements were amended in 2006 and 2007. The statutes now provide that offenders who commit certain specified crimes are automatically classified as sexually violent predators. *See* Ind. Code § 35-38-1-7.5(b).

Among the specified offenses are rape and criminal deviate conduct. *Id.* § 35-38-1-7.5(b)(1)(A), (B). The statutes further provide that, “[a]t the [offender’s] sentencing hearing, the court shall indicate on the record whether the person has been convicted of an offense that makes the person a sexually violent predator” *Id.* § 35-38-1-7.5(d).

The Indiana Supreme Court recently held that, for those offenders who committed their crimes under the pre-2006 regime, imposition of the new sexually violent predator *per se* classifications does not violate the constitutional prohibition on ex post facto punishment. *Jensen v. State*, 905 N.E.2d 384 (Ind. 2009). In *Jensen*, the defendant pled guilty to Class C felony vicarious sexual gratification and Class C felony child molesting in 2000. *Id.* at 388. The sheriff’s department informed Jensen in September 2006 that he would have to register for life as a sexually violent predator. *Id.* at 389. Jensen filed a motion with the trial court to determine his registration status. *Id.* After a hearing, the trial court found Jensen to be a sexually violent predator. *Id.* Jensen appealed, arguing that his new classification as a sexually violent predator constituted ex post facto punishment. *Id.* at 390. Our Supreme Court disagreed and affirmed. *Id.* at 389. The Court held that, as applied to Jensen, the new classification and registration requirements were not unconstitutional. *Id.* at 389-95.

Here Filice committed criminal deviate conduct and attempted rape in 2005. The registration statutes now classify Filice’s offenses as *per se* sexual violent predator crimes. Filice is designated a “sexually violent predator” by the Department of Correction in its offender registration system. The trial court found that, in accordance

with *Jensen*, Filice's classification as a sexually violent predator does not violate the constitutional prohibition on ex post facto punishment.

The trial court, the Marion Superior Court, was the court where Filice was allegedly convicted of the offenses that ostensibly qualify him as a sexually violent predator. Filice presently lives in Henry County. Pursuant to Indiana Code section 11-8-8-22, Filice was required to file his petition in the circuit or superior court of the county in which the offender resides. Ind. Code § 11-8-8-22(d). He failed to do so. We therefore affirm the denial of Filice's motion, but we redirect Filice to file a new petition in accordance with Section 11-8-8-22(d) in Henry County.

Affirmed.

NAJAM, J., and BROWN, J., concur.