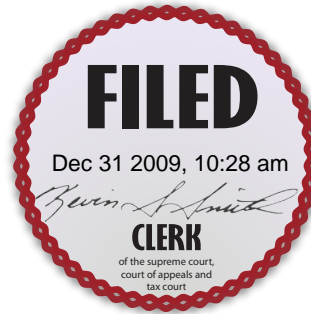


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

PHILLIP REEVES,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

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No. 27A02-0908-CR-932

APPEAL FROM THE GRANT CIRCUIT COURT
The Honorable Mark E. Spitzer, Judge
Cause No. 27C01-0803-FD-38

December 31, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Phillip Reeves appeals his conviction, following a bench trial, for violating the sex offender residency restrictions, a Class D felony. For our review, Reeves raises a single issue, which we restate as whether the sex offender residency restrictions in Indiana Code section 35-42-4-11(c) are unconstitutionally overbroad.¹ Concluding Reeves waived review of his argument by failing to timely raise it in a pre-trial motion to dismiss the charge, we affirm.

Facts and Procedural History

In 1996, Reeves pled guilty to one count of sexual misconduct with a minor and one count of child molesting and, as a result, is required to register as a sex offender. In 2006, our Legislature enacted Indiana Code section 35-42-4-11(c) making it a Class D felony for a person required to register as a sex offender to live within 1000 feet of a school, a youth program center, or a public park. On January 15, 2008, Reeves was arrested in Grant County and gave his current address as 1308 West Jeffras Avenue in Marion, Indiana. This address differed from the address on Reeves's sex offender registry. Detective Jamie Moore of the Grant County Sheriff's Department noticed the discrepancy and asked a jail officer to advise Reeves to update his address with the sex offender registry upon his release from the jail.

On February 6, 2008, Detective Moore sent a letter to Reeves informing Reeves he was past due for his annual sex offender registration, which had been due on June 25, 2007. Reeves registered the Jeffras Avenue address on February 12, 2008. Using Grant

¹ Reeves failed to include a statement of the issue in his appellate brief as required by Indiana Appellate Rule 46(A)(4). As a result, we had to construct his issue based on the argument section of his brief. Reeves's counsel is advised to abide by the Indiana Appellate Rules in future filings to this court.

County's geographic information software, Detective Moore determined the Jeffras Avenue address was 870.5 feet from a preschool, and thus, Reeves was in violation of the sex offender residency restrictions statute. On March 5, 2008, the State charged Reeves with failure to register as a sex offender and violating the sex offender residency restrictions, both Class D felonies. After a bench trial held on March 11, 2009, the trial court convicted Reeves of both counts.² The trial court held a sentencing hearing on May 22, 2009, after which it sentenced Reeves to an aggregate term of two and one-half years with one year suspended to probation. Reeves now appeals.

Discussion and Decision

Reeves argues Indiana Code section 35-42-4-11(c) is unconstitutionally overbroad. The State responds that Reeves waived review of this issue by failing to file a pre-trial motion to dismiss challenging the constitutionality of the statute.³ "Generally, a challenge to the constitutionality of a criminal statute must be raised by a motion to dismiss prior to trial, and the failure to do so waives the issue on appeal." Johnson v. State, 879 N.E.2d 649, 654 (Ind. Ct. App. 2008). Nonetheless, this court has considered the constitutionality of statutes despite an apparent waiver, and our supreme court has stated "the constitutionality of a statute may be raised at any stage of the proceeding including raising the issue sua sponte by this Court." Slone v. State, 912 N.E.2d 875, 878 (Ind. Ct. App. 2009) (quoting Morse v. State, 593 N.E.2d 194, 197 (Ind. 1992)), trans. denied.

² Reeves does not appeal his conviction for failure to register as a sex offender.

³ Reeves did raise the issue before the trial court in an oral motion to dismiss the residency restrictions charge after the presentation of the evidence.

However, Reeves’s argument challenging the constitutionality of the statute is barely cogent. Reeves admits “there was no expert testimony at trial as to how much territory in Marion or Grant County would be off limits to Reeves” but asks us to accept his assertion that “it is apparent that much of Marion, or any Indiana city or town for that matter, would be within 1000 feet of the enumerated areas.” Appellant’s Brief at 7. Reeves also admits the overbreadth doctrine applies to the First Amendment to the United States Constitution, see id.; see also Shuger v. State, 859 N.E.2d 1226, 1234-35 (Ind. Ct. App. 2007) (“The First Amendment overbreadth doctrine allows an individual to attack the constitutionality of a statute that applies to protected speech”), trans. denied, but does not demonstrate how his ability to choose a residence implicates his First Amendment rights. In addition, Reeves admits he has no fundamental right to choose where he will live and, therefore, “frames his constitutional challenge strictly as a question of overbreadth” Appellant’s Br. at 7 (emphasis added).

To consider Reeves’s constitutional challenge would require us to construct a valid, if ultimately unsuccessful, constitutional argument on Reeves’s behalf and to rely on Reeves’s speculation about the impact of the residency restrictions. “The waiver rule is founded on important policy considerations, including the preservation of judicial resources, opportunity for full development of the record, utilization of trial court fact-finding expertise, and assurance of a claim being tested by the adversary process.” Slone, 912 N.E.2d at 878 (quotation and citation omitted). Therefore, we conclude Reeves has waived his constitutional challenge, and we decline to consider his challenge notwithstanding that waiver.

Conclusion

Reeves has waived review of his conviction for violating the sex offender residency restrictions; therefore, the judgment of the trial court is affirmed.

Affirmed.

BAKER, C.J. and BAILEY, J., concur.