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IN THE
COURT OF APPEALS OF INDIANA

Tracey William Crowley,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 16, 2022

Court of Appeals Case No. 21A-MI-2064

Appeal from the St. Joseph Circuit Court

The Honorable John Broden, Judge

The Honorable Andre B. Gammage, Magistrate

Trial Court Cause No. 71C01-2102-MI-48

Altice, Judge.

Case Summary

[1] Tracey William Crowley, who was previously convicted in Michigan of a felony sexual offense and registered in Indiana as a sex offender when he moved to Indiana in 2004, appeals the trial court's denial of his petition for removal from Indiana's Sex and Violent Offender Registry. Crowley asserts that Indiana's registration laws as applied to him violate Indiana's ex post facto clause because a registry did not exist at the time of his conviction, either in Indiana or Michigan, and because the requirement that new residents to Indiana who have an out-of-state registration requirement must register with law enforcement upon arrival did not exist when he moved to Indiana.[1]

[2] We affirm.

Facts & Procedural History

[3] In 1988, when Crowley was twenty years old, he was convicted in Michigan of third-degree criminal sexual conduct, a felony. This offense is defined as sexual penetration between an adult and a person at least thirteen but under sixteen years of age accomplished by force or coercion. Mich. Comp. Laws § 750.520d(1)(b); *Appendix* at 17. Crowley was sentenced in October 1988 to the

[1] The State suggests that we should find that Crowley waived his argument regarding the requirement that those with an out-of-state registration requirement must register upon moving here because he did not raise it in his petition. Because the matter was presented and argued at the hearing, the trial court had the opportunity to consider it, and we decline to find that it was waived.

State Prison of Southern Michigan for a period of between fifteen and thirty years, with credit for 154 days served.

[4] At the time of his conviction, neither Indiana nor Michigan had established a sex offender registry. Six years later, in 1994, both Indiana and Michigan enacted laws requiring persons convicted of certain sex crimes to register as sex offenders with local law enforcement. *See* Ind. Code chap. 11-8-8 (originally codified as Ind. Code chap. 5-2-12); M.C.L. § 28.721 et seq.[2]

[5] Indiana's Sex Offender Registry Act (SORA or the Act) has since been amended many times, including to expand what constitutes a qualifying offense and imposing more requirements on the registrants.[3] Originally, the Act did not require sex offenders convicted in another jurisdiction prior to the Act's June 30, 1994 effective date to register. In 2001, Indiana extended the Act to require those persons convicted in another jurisdiction of a crime "substantially equivalent" to a sex crime in Indiana to register in Indiana. *See* I.C § 5-2-12-4 (later codified as I.C. §§ 11-8-8-4.5, -5 and now at Ind. Code § 1-1-2-4(b)).

[6] Most relevant for our purposes, SORA was amended in 2006 to define a sex offender to include "a person who is required to register as a sex offender in any

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[2] Michigan's act applied to individuals who committed an offense after October 1, 1995, or who were incarcerated or on parole or probation as of that date. M.C.L. § 28.723. The record does not reflect when Crowley was released from prison or parole but he does not challenge that he was required to register in Michigan.

[3] One of the qualifying offenses triggering registration is rape, I.C. § 11-8-8-5(a)(8), or a substantially similar offense committed in another jurisdiction, I.C. § 1-1-2-4(b)(3). Crowley makes no argument that his crime is not a qualifying offense or that, absent an ex post facto violation, he was not required to register.

jurisdiction[.]" I.C § 11-8-8-4.5(b)(1); *see also* I.C. § 11-8-8-5(b)(l) (same as to sex or violent offender). And in 2007 SORA was amended to provide that "a person who is required to register as a sex or violent offender in any jurisdiction shall register [in Indiana] for the period required by the other jurisdiction or the period described in this section, whichever is longer." I.C. § 11-8-8-19(f).

[7] In 2004, Crowley moved to Indiana. Upon moving here, Crowley registered as a sex offender and has continued to do so since his arrival.[4]

[8] On February 4, 2021, Crowley filed his petition to be removed from the Sex and Violent Offender Registry (the Registry), arguing that the requirement that he register as a sex offender constitutes ex post facto punishment in violation of the Indiana Constitution because, at the time of his 1988 conviction, there was no registry requirement in either Michigan or Indiana. Crowley relied primarily on *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009) and *Gonzalez v. State*, 980 N.E.2d 312 (Ind. 2013).

[9] In *Wallace*, an offender who had pled guilty to child molesting in 1989 and completed his sentence and probation in 1992 – two years prior to the enactment of the Act in 1994 – argued that the Act as applied to him violated Indiana's ex post facto clause. The *Wallace* Court determined that, in

[4] Presumably, Crowley registered under SORA's "substantial equivalency provision." I.C. § 1-1-2-4(b).

evaluating ex post facto claims under the Indiana Constitution, courts should apply what is known as the "intent-effects test":

> Under this test the court must first determine whether the legislature meant the statute to establish civil proceedings. If the intention of the legislature was to impose punishment, then that ends the inquiry, because punishment results. If however the court concludes the legislature intended a non-punitive, regulatory scheme, then the court must further examine whether the statutory scheme is so punitive in effect as to negate that intention thereby transforming what was intended as a civil, regulatory scheme into a criminal penalty.

905 N.E.2d at 378. In assessing whether a civil, regulatory statute was punitive in effect, courts consider seven factors that are weighed against each other:

> [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 for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.

Id. at 379. The *Wallace* Court, applying the factors of the intent-effects test, held that the application of Indiana's SORA to Wallace was punitive and violated Indiana's ex post facto clause.

[10] Four years later, the *Gonzalez* Court addressed the ex post facto claim of an offender whose registration requirement had increased from ten years to a

lifetime requirement. At the time of Gonzalez's 1997 conviction, the Act required him to register for ten years, but during his ten-year registration period, the legislature amended the registration requirement to require one to register for life. The Court, applying the seven-factor intent-effects test, determined that retroactive application of the lifetime registration to Gonzalez was punitive and violated Indiana's ex post facto clause. 980 N.E.2d at 321.

[11] Here, the State moved to dismiss or deny Crowley's petition for removal from the Registry arguing, among other things, that application of the relevant registration laws, and in particular the "other jurisdiction" requirement, to Crowley does not constitute ex post facto punishment. The State relied in large part on a pair of Indiana Supreme Court decisions, *Tyson v. State*, 51 N.E.3d 88 (Ind. 2016), and *State v. Zerbe*, 50 N.E.3d 368 (Ind. 2016), which challenged the retroactive application of the Act's 2006-07 "other jurisdiction" requirement that a person with an out-of-state registration requirement must register in Indiana upon arrival.

[12] In *Tyson*, an offender with a 2002 Texas delinquency adjudication for aggravated sexual assault and indecency with a child moved to Indiana in 2009 and was required to register in Indiana, and in *Zerbe* an offender with a 1992 Michigan conviction for sexual conduct with a minor, who registered in Michigan in 1999 and moved to Indiana in 2012, was required to register in Indiana. The Courts in those cases concluded that the effect of registering in Indiana upon moving here was, effectively, maintaining an out-of-state registration and thus not punitive, regardless of when or where the registrable

crime had been committed. The *Zerbe* Court explained, "it is not Zerbe's crime that triggers his obligation to register as a sex offender in Indiana; rather it is his Michigan registry requirement that does so." 50 N.E.3d at 370.

[13] Following a hearing, the trial court issued an order denying Crowley's petition for removal from the registry, finding that "the purpose of the lifetime registration . . . serves a regulatory purpose and is non-punitive" and the requirement "is not a violation of Indiana's ex post facto clause." *Appendix* at 5. The court issued a Memorandum of Law in further explanation of its decision. The court, citing to the other jurisdiction requirement of I.C. § 11-8-8-19(f), found that "Crowley was required to register as a sex offender for life in Michigan. He was, therefore, required to register for life in Indiana." *Id*. at 6. The court then applied the *Wallace* seven-part "intent-effects" test and determined that four of the seven factors point toward the effect of the registration requirement as applied to Crowley being non-punitive and not violative of the ex post facto clause.

[14] Crowley now appeals. Additional facts will be provided as needed.

Discussion & Decision

[15] Crowley's petition sought relief pursuant to Ind. Code § 11-8-8-22,[5] which, as is relevant here, permits one to seek removal from the registry "on a claim that the

[5] I.C. § 11-8-8-22 governs petitions to remove designations or to register under less restrictive conditions. "A person to whom this section applies may petition a court to: (1) remove the person's designation as an offender; or (2) require the person to register under less restrictive conditions." I.C. § 11-8-8-22(c). "After

application or registration requirements constitute ex post facto punishment." I.C. § 11-8-8-22(j). The petitioner has the burden of proof in a hearing under this section. I.C. § 11-8-8-22(h). When a petitioner claims that the registration requirement violates Indiana's ex post facto clause, as does Crowley here, this court gives no deference to the trial court's decision and instead reviews whether the registration requirement violates the ex post facto clause de novo. *Zerbe*, 50 N.E.3d at 369; *Tyson*, 51 N.E.3d at 90.

[16] Article 1, section 24 of the Indiana Constitution provides that "[n]o ex post facto law ... shall ever be passed." In general, the ex post facto clause prohibits laws that impose a punishment for an act that was not punishable at the time it was committed or imposes additional punishment to that then prescribed. *Lemmon v. Harris*, 949 N.E.2d 803, 809 (Ind. 2011); *Jensen v. State*, 905 N.E.2d 384, 389 (Ind. 2009). A law is ex post facto if it substantially disadvantages a defendant because it increases his punishment, changes the elements of or ultimate facts necessary to prove the offense, or deprives a defendant of some defense or lesser punishment that was available at the time of the crime. *Lemmon*, 949 N.E.2d at 809. "The underlying purpose of the Ex Post Facto Clause is to give effect to the fundamental principle that persons have a right to a fair warning of that conduct which will give rise to criminal penalties." *Wallace*, 905 N.E.2d at 377.

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receiving a petition under this section, the court may: (1) summarily dismiss the petition; or (2) give notice to [various entities] and set the matter for hearing." I.C. § 11-8-8-22(d).

[17] Crowley contends that "[b]cause he was not required to register in either Indiana or Michigan at the time of his conviction in 1988 and because the 2006 amendments to Indiana's sex offender registration laws that required newly-arrived out-of-state residents to register upon arrival in Indiana were not in place when he moved to Indiana in 2004[,]" he had "no warning that . . .he would be required to register," and his lifetime registration requirement constitutes a "quintessential ex post facto punishment." *Appellant's Brief* at 7, 10.

[18] As a threshold matter, we clarify that Crowley's claim is that the Act, and specifically the "other jurisdiction" registration requirements – enacted by the 2006-07 amendments – are unconstitutional as applied to him. He makes no claim, either below or on appeal, that he was not required to register in Michigan before moving here; indeed, he concedes that he was: "The lifetime registration requirement [in Indiana] was not triggered on its own, but by the commission of an offense [committed in Michigan] requiring registration."[6] *Id*. at 10 (citing MCL § 750.520d).

[19] Turning to the merits, the State argues that our Supreme Court in *Zerbe* and *Tyson* has already held that requiring an individual to register in Indiana due to a registration requirement in another jurisdiction, regardless of whether that individual committed the offense prior to SORA's enactment, does not violate

[6] The record does not disclose if or when Crowley registered in Michigan before moving to Indiana.

the ex post facto clause because it was a continuation across state lines of an existing requirement.

[20] Crowley urges that *Zerbe* and *Tyson* are factually distinguishable, and not applicable, because those offenders moved to Indiana after the 2006 amendments, whereas Crowley moved to Indiana two years before the 2006 amendments. He argues, instead, that we should find, pursuant to *Wallace* and *Gonzalez*, that the Act as applied constitutes ex post facto punishment. As Crowley suggests, it appears our state courts have not addressed the precise scenario before us. However, the Seventh Circuit recently has.

[21] Initially, in *Hope v. Comm'r of Ind. Dep't of Correction*, 984 F.3d 532 (7th Cir. 2021), *reh'g en banc granted, opinion vacated* (*Hope I*), the Seventh Circuit addressed claims by six sex offenders who relocated to Indiana and filed for declaratory and injunctive relief, arguing that Indiana's SORA violates their right to travel under the Privileges or Immunities Clause, their right to equal protection under the Fourteenth Amendment, and the prohibition on ex post facto laws in the United States Constitution. The district court granted relief to plaintiff-offenders on all claims, enjoining Indiana from requiring them to register, and the State appealed. Like Crowley, at least one offender had a

registry obligation in another state but moved to Indiana before the 2006-07 "other jurisdiction" amendments.[7]

[22] In its analysis, the *Hope I* majority observed:

> [I]f the State and the dissent are correct that, as a matter of state law, the other jurisdiction requirement is fully retrospective and can properly apply to individuals like Bash and Snider, there remains a dichotomy among Indiana residents based on the date of their arrival in Indiana. One who was a resident of Indiana before SORA required registration for his offense and remains so thereafter is not subject to a duty to register, period (*Wallace* leaves no doubt in that regard at all), whereas one who arrived in Indiana later may be subject to registration pursuant to the other jurisdiction requirement.

984 F.3d at 551. That is, Indiana distinguishes among its own citizens based on whether they arrived pre- or post-enactment of the Act's other jurisdiction provision, as it "grants the former full protection of its ex post facto clause but deprives newer arrivals of the same protection." *Id*. at 552. The Court opined, "We do not [know] what else to call this other than 'a mess.'" *Id*. at 537. Ultimately, a divided panel concluded that *Wallace* prevents the State from requiring a new resident to register under the "other jurisdiction" provisions of the Act if the new resident committed their crimes before Indiana adopted the

[7] Similar to Crowley, Gary Snider committed a crime in 1988 in Michigan that required him to register in Michigan, and he moved to Indiana in 2003, prior to the "other jurisdiction" amendments.

other jurisdiction requirements in 2006-07.[8] As to Snider and the other offender, who not only committed their crimes prior to those amendments, but also moved to Indiana before their enactment, the *Hope I* Court stated, "[I]t seems that under . . . *Wallace*, neither Snider or Bash (both of who arrived in Indiana prior to the enactment of the other jurisdiction requirement) should ever have been subject to a registration requirement in Indiana." *Id*. at 551.

[23] Thereafter, on rehearing *en banc*, the Seventh Circuit, in a divided opinion, reversed. *Hope v. Comm'r of Ind. Dep't of Correction*, 9 F.4th 513, 519 (7th Cir. 2021) (*Hope II*). The *Hope II* Court acknowledged that

> [under *Wallace*], [i]f an offender was under no registration requirement prior to SORA's passage, imposing a registration requirement in the first instance is impermissibly punitive. [H]owever, [under *Tyson*,] if another state previously subjected a pre-SORA offender to a registration requirement, requiring him to register in Indiana is not punitive. . . . Indiana caselaw thus has the peculiar effect of permitting the State to treat similarly situated offenders differently based solely on whether an offender had an out-of-state registration obligation.

Id. However, the *Hope II* Court ultimately held that there was no ex post facto violation to retroactively apply the other jurisdiction provisions to the plaintiff-offenders in the case before it. After observing that "*Wallace* did not foreclose

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[8] The *Hope I* Court reached its decision based on a violation of the Privileges and Immunities Clause and did not reach "the separate question of whether application of the other jurisdiction requirement also violates the ex post facto clause of the U.S. Constitution." 984 F.3d at 557.

all retroactive applications of SORA," the Court reviewed, among others, the Indiana Supreme Court's decisions in *Zerbe* and *Tyson*, and *Ammons v. State*, 50 N.E.3d 143, 145 (Ind. 2016), where the Court held that because Ammons, who was convicted of child molesting in 1988, "was already under an obligation to register in Iowa when he moved to Indiana in 2013, [] Indiana Code sections 11-8-8-5(b)(1) and -19(f) do not impose any additional punishment on him, [and] we find no ex post facto violation." 9 F.4th at 521. The *Hope II* Court summarized that

> [m]aintaining, extending, or modifying a duty under SORA generally is not punitive, but imposing a new duty is. It is immaterial to the analysis whether Indiana law is maintaining, extending, or modifying its own duties or those of another state. Likewise, it is irrelevant where or when the conviction occurred, as long as another state imposed a lawful registration obligation on the offender and SORA does not so significantly alter that obligation to result in added punishment.

Id. at 523. The Court noted that two of the plaintiff-offenders, including Snider, moved to Indiana before the 2006-07 enactment of the other jurisdiction provision, but found that "this wrinkle" did not affect the outcome. *Id*. at 522 n.2. In reaching its decision, the court applied the intent-effects test[9] and concluded that "[t]he plaintiffs have not carried their heavy burden of proving

[9] The federal intent-effect test applied by *Hope II* considers five of the seven factors that Indiana does.

that SORA is so punitive in effect as to override the Indiana legislature's intent to enact a civil law."[10] *Id*. at 534.

[24] With this backdrop, we examine Crowley's ex post facto claim under the "intent-effects" test. As to the initial inquiry of the test – whether the legislature intended to establish civil proceedings or to impose punishment – our courts have held that our legislature's intent was to create a civil, non-punitive regulatory scheme. *State v. Pollard*, 908 N.E.2d 1145, 1150 (Ind. 2009). Given this absence of punitive intent, we thus proceed to the second prong and examine the effects of the statute by considering the seven factors in order to ascertain whether it is so punitive as to transform it into a criminal penalty. Again, we consider:

> [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 for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.

Wallace, 905 N.E.2d at 379. Our task is not to count punitive versus non-punitive factors, "but to consider them collectively to determine whether the

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[10] While the *Hope II* Court reversed the District Court's decision on the right to travel and ex post facto grounds, it remanded for further analysis on the plaintiff-offenders' equal protection claim.

application of the challenged statute's effects upon the defendant are so punitive in nature as to constitute a criminal penalty." *Gonzalez*, 980 N.E.2d at 321.

[25] As to the first two factors, our courts historically have viewed the effect of the Act as punitive, as it imposes both a stigma and an affirmative obligation to publish the offender's private information. *Lemmon*, 949 N.E.2d at 811; *Jensen v. State*, 905 N.E.2d 384, 392 (Ind. 2009); *Gonzalez*, 980 N.E.2d at 317-18.

[26] Under the third factor, we consider whether the Act "comes into play only on a finding of scienter[,]" that is, "whether the sanction is linked to a showing of mens rea. "If so, it is more likely to be considered punishment." *Gonzales*, 980 N.E.2d at 318. Crowley's Michigan offense was criminal sexual conduct, for which there is not a scienter requirement. *See e.g.*, *Lemmon*, 949 N.E.2d at 812 (observing that there is no scienter requirement for sexual intercourse or deviate sexual conduct with a child under the age of fourteen). Therefore, in this case, the third factor weighs in favor of treating the effects of the Act as non-punitive as applied here.

[27] Under the fourth factor, we ask whether the statute "will promote the traditional aims of punishment – retribution and deterrence." This court in *Gonzalez* found that "[a]lthough lifetime registration required by the Act has a likely deterrent effect and promotes community condemnation of offenders, it also serves a valid regulatory function by providing the public with information related to community safety" and concluded that this factor weighed in favor of treating the effects of the Act as non-punitive. 980 N.E.2d at 318; *see also*

Lemmon, 949 N.E.2d at 812 (finding this factor favored non-punitive treatment where offense required registration both before and after 2007 amendment to Act). We conclude likewise here.

[28] The fifth factor considers whether the behavior to which the statute applies is already a crime. Because Crowley's offense was not a triggering offense at the time it was committed, the fifth factor weighs in favor of treating the effects of the Act as punitive as to Crowley. *Compare Gonzalez*, 980 N.E.2d at 318-19 (where defendant's offense of child solicitation was already a registration-triggering offense at the time of commission, the fifth factor weighed in favor of treating enhanced registration period – from ten years to lifetime – as non-punitive when applied to defendant).

[29] The sixth factor requires us to examine whether the statute may rationally advance a non-punitive purpose. This statement "is best understood as an inquiry into whether the Act advances a legitimate, regulatory purpose." *Wallace*, 905 N.E.2d at 383. Our courts have consistently treated this factor as favoring the Act's effects as being non-punitive. *See Gonzalez*, 980 N.E.2d at 319; *State v. Kirby*, 120 N.E.3d 574, 582 (Ind. Ct. App. 2019); *Hollen v. State*, 994 N.E.2d 1166, 1174 (Ind. Ct. App. 2013). Likewise, here, this factor weighs in favor of treating the effects of the Act as non-punitive as applied to Crowley.

[30] The seventh and final factor addresses whether the statute is excessive in relation to the alternative purpose assigned, which is protection of the public from repeat sexual crime offenders. The seventh factor is afforded considerable

weight in determining whether the statute is punitive in effect. *Tyson*, 51 N.E.3d at 96. "The touchpoint for the excessiveness factor is whether the regulatory means chosen are reasonable in light of the nonpunitive objective," not whether "the legislature has made the best choice possible to address the problem it seeks to remedy." *Hope II*, 9 F.4th at 534 (internal quotations omitted). In *Tyson*, our Court found that the 2006 other jurisdiction amendment to the definition of sex offender "had little impact" on Tyson, who already was registered as a sex offender in Texas until 2014 before he moved to Indiana in 2009, where he registered as a sex offender in this state until 2014. 51 N.E.3d at 96. "Maintaining that obligation across state lines is far from excessive, especially relative to the significant public safety purpose our sex offender registry serves." *Id*. We conclude the same reasoning applies to Crowley such that this factor weighs as being non-punitive in effect.

[31] Weighing the seven factors as they apply to Crowley and his circumstances, we find that, on balance, application of the 2006-07 other jurisdiction registration requirement to Crowley does not constitute ex post facto punishment. We are not unsympathetic to the fact that Crowley's offense was committed over thirty years ago and by all accounts he has lived a productive and crime-free life in our state. However, that is not our inquiry. We are tasked with determining whether the Act as applied to him violates the Indiana Constitution's ex post facto clause. Based on the intent-effects tests, as well as considering the recent guidance of our federal counterparts in *Hope II* – who discussed and applied our Supreme Court's directive in *Tyson* and *Zerbe* to at least one offender who, like

Crowley moved to Indiana before the 2006-07 amendments – we conclude it does not.

[32] Judgment affirmed.

Bailey, J. and Mathias, J., concur.