MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Tark Andrew Richard Wendling,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

November 15, 2023

Court of Appeals Case No.
23A-CR-398

Appeal from the
Madison Circuit Court

The Honorable
Mark Dudley, Judge

Trial Court Cause No.
48C06-0610-FB-405

Memorandum Decision by Senior Judge Robb
Chief Judge Altice and Judge Pyle concur.

Robb, Senior Judge.

Case Synopsis and Issues

[1] Tark Andrew Richard Wendling appeals from the trial court's denial of his petition, filed pursuant to Indiana Code section 11-8-8-22 (2013), to be removed from the Indiana Sex Offender Registry (the Registry). On appeal, he argues that: 1) the court abused its discretion by relying on *Lemmon v. Harris*, 949 N.E.2d 803 (Ind. 2011) when denying his request to be relieved from the lifetime registration requirements; and 2) his registration requirement as a sexually violent predator (SVP) by operation of law violates Indiana's ex post facto clause. We affirm.

Facts and Procedural History

[2] Wendling pleaded guilty to one count of Class B felony criminal deviate conduct and was sentenced to a term of ten years, with six years executed in the Indiana Department of Correction and four years suspended to probation in 2007 for the crime he committed in 2006. At the time, a "sex offender" was defined by Indiana Code section 11-8-8-4.5(2) (2007) to include a person such as Wendling who was convicted of criminal deviate conduct, a criminal offense under a statute which has since been repealed. Indiana Code section 11-8-8-6 (2006) provided that a "sexually violent predator" had the meaning set forth in Indiana Code section 35-38-1-7.5(b)(1)(B) (2006), which included persons committing criminal deviate conduct. And Indiana Code section 35-38-1-7.5(d) (2006) required the trial court to determine whether the person was a sexually

violent predator as defined by subsection (b) of that statute at the sentencing hearing. The trial court did not do so in Wendling's case. Nonetheless, Wendling concedes that at the time of his sentencing, he was a sex offender who was required to register for ten years upon his release from the Indiana Department of Correction, but not that he has a lifetime registration requirement as an SVP.

[3] Wendling was released from incarceration in 2010 to serve his probationary term. Although he never went before a parole board, the DOC informed him that he had to register as a sex offender for ten years. He did so until his probation was revoked in May 2011 for a probation violation to which he admitted. The court revoked one year of his previously-suspended four-year sentence, and Wendling completed this sentence in October 2011. However, in February 2012, the court revoked the remaining three-year suspended sentence and ordered him to serve that time in the DOC with no return to probation.

[4] Wendling was released from the DOC in 2014, and, according to him, was informed by the DOC that he was a sex offender who had to register. He says, however, the DOC never provided him with the DOC's parole stipulation form, state form 48108. Exhibit Vol. I, pp. 23-26 (Defense Exhibit 2). That stipulation form includes the provision that sex offenders like Wendling "must never be in . . . any residence with any child . . . without written approval in advance by [the] parole agent in consultation with [the] treatment provider." *Id.* at 23. The stipulation form further provided that the offender "shall continue to register your approved residence, employment, vehicles, and e-mail

and social media accounts and passwords, according to Indiana Code while on Parole supervision." *Id.* at 25.

[5] Wendling continued to register every six months following his release. But, in 2020, a parole officer came to Wendling's home and told him that he had violated his lifetime parole and had to leave his home. Wendling was living with his wife and his eight- and ten-year-old children. He was charged under Indiana Code section 35-44.1-3-9(a) for a parole violation by a sexual predator. According to Wendling, this was the first time he learned that he was on lifetime parole.

[6] On February 9, 2022, Wendling filed his petition for removal from the Registry pursuant to Indiana Code section 11-8-8-22. He challenged the manner in which he became classified as a sexually violent predator and argued that his lifetime registration requirement constituted ex post facto punishment.

[7] After holding a hearing, the court entered its written order denying Wendling's petition, and suggested that Wendling, like the defendant in *Lemmon v. Harris*, could pursue relief under Indiana Code section 35-38-1-7.5(g) (2020), which provides a separate petition process and analysis for relief from the registration requirements under the Registry. Wendling now appeals from the trial court's order.

Discussion and Decision

I. **Abuse of Discretion in Applying *Lemmon v. Harris*?**

[8] Wendling first claims that "The trial court erred by relying solely on *Lemmon v. Harris*, 949 N.E.2d 803 (Ind. 2011), and in failing to recognize case distinctions." Appellant's Br. p. 9. He asserts that his case mirrors *Jones v. State*, 885 N.E.2d 1286, 1287 (Ind. 2008), where our Supreme Court concluded that "the language of the SVP statute does not authorize a trial court to initiate an SVP determination for the first time during a probation revocation proceeding." He argues that citizens may be "entitled to have the government observe or offer fair procedures" under the "Due Process Clause of the Fifth and Fourteenth Amendment[s]" and that such was denied Wendling because "neither the plea agreement nor the trial court's sentencing judgment made any reference to [Wendling] as an SVP." Appellant's Br. pp. 11-12.

[9] In *Lemmon v. Harris*, however, our Supreme Court explicitly distinguished *Jones*. In *Jones*, the court did not make an SVP determination at Jones' original sentencing hearing. Instead, the court attempted to make that SVP determination at a probation revocation hearing. Our Supreme Court concluded that the court had erred by making that determination because the court was required to do so at sentencing, not at the hearing determining the sanction for a probation violation. 885 N.E.2d at 1288-89. The statute in effect at the time of Jones' probation revocation hearing required a judicial determination of the SVP status. *Id.* at 1288. The 2007 amendment providing

for SVP status to occur by operation of law took effect months after Jones' probation hearing.

[10] Thus, the holding in *Jones* is distinguishable, namely because in Wendling's case, although the court did not make the SVP determination at his original sentencing hearing, the judicial determination was not required by the time he was released from incarceration, secure detention, or probation in 2014. Put differently, Wendling's status occurred by operation of law (because, unlike *Jones*, the 2007 amendment was effective), and did not result from a sanction hearing for a probation violation (which the Supreme Court, in *Jones*, determined was improper).

[11] We conclude that Wendling's case is controlled by *Lemmon v. Harris*. In that case, Harris refused to sign a DOC form indicating that his status had changed and that he was required to register for life as an SVP. He initiated a declaratory judgment action, arguing that the DOC lacked the authority to make that determination and seeking a declaration that his reporting requirement was for ten years following his release from incarceration. Our Supreme Court concluded that because the statutory amendment plainly and explicitly applies to persons committing designated offenses and are '"released from incarceration, secure detention, or probation for the offense after June 30 1994[,]"' the 2007 amendment to Indiana Code section 35-38-1-7.5 (2007) applied retroactively to Harris. 949 N.E.2d at 809 (quoting Ind. Code section 35-38-1-7.5(b)).

[12] Thus, the trial court did not err by applying *Lemmon v. Harris* to Wendling's claims. Like Harris, upon his release from incarceration in 2014, Wendling was an SVP by operation of law because he committed the qualifying offense (criminal deviate conduct) and he was released after June 30, 1994.

[13] We next turn to Wendling's claims that his due process rights were violated. He claims that the trial court violated his due process rights by failing to make the SVP determination at his sentencing hearing. A similar claim was rejected by a panel of this Court in *Vickery v. State*, 932 N.E.2d 678 (Ind. Ct. App. 2010). Vickery claimed a violation of his due process rights because the trial court failed to conduct a hearing on his SVP classification. *Id.* at 683. Vickery learned for the first time that he was an SVP by consulting the online version of the Registry.

[14] We observed that the Sex Offender Registration Act "specifically states the criteria for 'per se' classification of a sex offender as an SVP. . . ." *Id.* Because Vickery satisfied those criteria, there was "no need for a hearing when the necessary fact . . . is not arguable." *Id.* The same is true here. Wendling was convicted of a qualifying offense, and he was released from incarceration after June 30, 1994. He is an SVP by operation of law and a hearing would not negate any of the qualifying criteria. Wendling's due process rights were not violated by the trial court's failure to make the SVP determination at Wendling's sentencing hearing.

[15] Wendling further claims that the DOC violated his due process rights by failing to notify him of his lifetime registration requirement. He also claims the absence of a registration requirement in his plea agreement violated his due process rights. However, these arguments are unavailing.

[16] As for the notice argument, even if the DOC informed Wendling that he had to register for ten years, the applicable version of the statute established the criteria for SVP status, Wendling qualified as an SVP, and by operation of law must register for life. There is no language in the statute requiring that notice be given to an SVP of his status by operation of law or that the failure to notify the offender of his SVP status is actionable.

[17] "The appellant is presumed to have known the law, and if he did not it is no [defense]." *Marmont v. State*, 48 Ind. 21, 31 (1874). Thus, contrary to his claim, Wendling had no reasonable expectation that he would not be placed on the Registry for life. And the DOC is only required to "ensure that an offender who is no longer required to register as a sex or violent offender is notified that the obligation to register has expired . . . ." Ind. Code § 11-8-8-19 (2019). Additionally, Wendling has suffered no prejudice from the lack of notification because he was within the ten-year reporting period he believed was the reporting requirement at the time he was notified of his parole violation. Put differently, his argument is premature.

[18] Further, we have addressed arguments similar to Wendling's argument related to the contents of the plea agreement. We concluded that "[t]he SVP

designation thus is a separate statutory classification that has nothing to do with the terms of the parties' plea agreement and does not render the agreement void." *Raley v. State*, 86 N.E.3d 183, 185 (Ind. Ct. App. 2017). And "the terms of the plea agreement did not preclude SVP status, nor could the trial court have excused [the defendant] from being designated as an SVP pursuant to Indiana Code section 35-38-1-7.5." *Id.* "The court did not have the power to ignore a statutory mandate." *Id.* Moreover, "[p]lacement on the Registry is mandatory, and the Act affords neither the trial court nor the DOC any discretion in the matter of the registration requirements." *Nichols v. State*, 947 N.E. 2d 1011, 1017 (Ind. Ct. App 2011). "Plea agreements 'have no effect on operation of the Act.'" *Id.* (quoting *In re G.B.*, 709 N.E.2d 352, 356 (Ind. Ct. App. 1999)).

[19] In sum, we conclude that the trial court appropriately followed our Supreme Court's rationale in *Lemmon v. Harris*. Additionally, we find no grounds for relief in Wendling's due process arguments.

II. Ex Post Facto Clause Violation?

[20] Wendling contends that his lifetime registration requirement on the Registry violates article I, section 24 of the Indiana constitution, essentially arguing that the change in registration requirement is punitive and that he was not given fair warning that his conduct would give rise to what he claims is a criminal penalty.

[21] The Indiana Constitution provides that "[n]o ex post facto law . . . shall ever be passed." Ind. Const. art. I, §24. Generally, "the Ex Post Facto Clause forbids laws imposing punishment for an act that was not otherwise punishable at the time it was committed or imposing additional punishment for an act then proscribed." *Harris*, 949 N.E.2d at 809. "A law is *ex post facto* if it substantially disadvantage[s] [a] defendant because it increase[s] his punishment, change[s] the elements of or ultimate facts necessary to prove the offense, or deprive[s] [a] defendant of some defense or lesser punishment that was available at the time of the crime." *Stroud v. State*, 809 N.E.2d 274, 288 (Ind. 2004) (internal quotations omitted). "Underlying the Ex Post Facto Clause is the desire to give people fair warning of the conduct that will give rise to criminal penalties." *Harris*, 949 N.E.2d at 809.

[22] Our Supreme Court has adopted the intent-effects test for determining whether a retroactive, more onerous law imposes criminal punishment as opposed to civil regulation. *See Wallace v. State*, 905 N.E.2d 371, 378 (Ind. 2009) ("we agree that the intent-effects test provides an appropriate analytical framework for analyzing ex post facto claims under the Indiana Constitution"). And because there is no "express statement of legislative intent, we are aided by the principle that every statute stands before us clothed with the presumption of constitutionality until that presumption is clearly overcome by a contrary showing." *Jensen v. State*, 905 N.E.2d 384, 390 (Ind. 2009). "The party challenging the constitutionality of the statute bears the burden of proof, and all doubts are resolved against that party." *Id.* "'If two reasonable interpretations

of a statute are available, one which is constitutional and the other not, we will choose that path which permits upholding the statute because we will not presume that the legislature violated the constitution unless the unambiguous language of the statute requires that conclusion.'" *Id.* at 390-91 (quoting *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E,2d 1034, 1037 (Ind. 1998)).

[23] The trial court found that "Wendling did not present any evidence of the Legislature's intent . . . ." Appellant's App. Vol. II, p. 7. And he does not advance an argument along those lines in his brief. Consequently, we turn to the effects part of the analysis.

[24] We agree with the trial court's conclusion that Wendling's as-applied constitutional challenge must fail because it mirrors the same argument that was made by the defendant in *Harris*. Like the defendant in *Harris*, Wendling was required to register on the sex offender list for a period of ten years following his release from incarceration. Prior to Harris' and Wendling's release from prison, the trial court was no longer required by statute to determine a person's SVP status. Instead, a person is an SVP by operation of law if he commits one of the designated offenses. And the sentencing court was only required to indicate on the record whether the defendant had committed one of the designated offenses. The trial court did so in both cases. Further, the 2007 amendment provided that it applied to persons who commit designated offenses and are released from incarceration, secure detention, or probation of the offense after June 30, 1994. Therefore, Indiana Code section 35-38-1-7.5 applies retroactively to Wendling as it applied to Harris.

[25] Seven factors are weighed against each other under the effects test: "'[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.'" *Jensen*, 905 N.E.2d at 391 (quoting *Wallace*, 905 N.E.2d at 379).

[26] Our Supreme Court determined in *Harris*, that "the first three factors may lean toward treating the Act as punitive, but the other four—and particularly the last factor—lean in favor of treating the Act as nonpunitive when applied to Harris." 949 N.E.2d at 813. We reach the same result in Wendling's case.

[27] As for the first three factors: [1] the increase to a lifetime-registration requirement leans toward a punitive effect; [2] whether the offender provides information under the Act for ten years or life, the Act increases shame on an offender and, thus, leans toward a punitive effect; and [3] the finding of scienter in Wendling's case (because the offense includes the element of knowingly or intentionally) leans toward a punitive effect.

[28] As for the final four factors: [4] the Act promotes the deterrence of criminal conduct and promotes community condemnation of offenders, traditionally punitive, but the effects apply equally to those required to register for ten years

and those who are required to register for life, leaning toward a nonpunitive effect; [5] the Act applies to criminal behavior for which Wendling was required to register before the 2007 Amendment, leaning toward a nonpunitive effect; [6] the effect of the Act is nonpunitive because it advances a legitimate, regulatory purpose that promotes public safety; and [7] according to the provision in Indiana Code section 35-38-1-7.5(g), Wendling can petition the court to consider whether he should no longer be considered an SVP, a factor leaning toward a nonpunitive effect.

[29] In sum, as in *Harris*, the first three factors lean toward a punitive effect, but the remaining four factors lean toward a nonpunitive effect. Thus, retroactive application of the lifetime registration requirement does not run afoul of the ex post facto clause. We find no error here.

[30] And Wendling's assertion that his case factually and legally aligns with *Gonzalez v. State*, 980 N.E.2d 312 (Ind 2013) does not support the relief he seeks. The facts in *Gonzalez* involved the application of the 2006 amendment to the Act, and there was "no available channel through which [Gonzalez] may petition the trial court for review of his future dangerousness or complete rehabilitation." *Id.* at 320. Thus, the effects analysis leaned in favor of the conclusion that the application of the lifetime registration requirement ran afoul of the ex post facto clause under factor [7]. This is not the case in Wendling's situation.

[31] As a final point, although Wendling did not support the argument to the trial court during the evidentiary hearing, he makes a brief separation-of-powers challenge on appeal. Appellant's Br. pp. 16-17. However, our Supreme Court has already rejected the argument that the designation by operation of law allows the DOC to reopen final judgments to exercise a judiciary function. *Harris*, 949 N.E.2d at 813-15. And the SVP status is determined by the applicable statutes, not by the trial court, DOC, or plea agreements. *Raley*, 86 N.E.3d at 185. The same is true in Wendling's case.

[32] In sum, we conclude that Wendling's status as an SVP by operation of law does not run afoul of the ex post facto clause.

Conclusion

[33] We conclude the trial court did not err by applying the analysis in *Lemmon v. Harris*, when deciding whether relief was warranted under Wendling's petition. Further, we find that Wendling's status as an SVP by operation of law does not violate the ex post facto clause.

[34] Affirmed.

Altice, C.J., and Pyle, J., concur.