# STATE OF MICHIGAN

# COURT OF APPEALS

In the Matter of TD, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellant,

v

TD,

Respondent-Appellee,

FOR PUBLICATION
May 26, 2011
9:00 a.m.

No. 294716
Washtenaw Circuit Court
Family Division
LC No. 2006-001101-DL

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

METER, J.

Petitioner appeals as of right from an order granting respondent relief from the registration requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The trial court found that, as applied to respondent, registration under the SORA is cruel or unusual punishment under Michigan's Constitution. We reverse.

In 2007, a jury found that respondent committed second-degree criminal sexual conduct (CSC II) as defined in MCL 750.520c(1)(d)(*ii*) (sexual contact aided or abetted by one or more persons and involving force or coercion). The incident underlying respondent's juvenile adjudication occurred in 2006 when respondent was 15 years old. Respondent and another male classmate approached a female classmate at school. The case report indicates that respondent punched the victim in the back and grabbed at her breast. He then held the victim in a chokehold and pulled her shirt to expose her breast. Respondent's accomplice pulled on the victim's belt. In an incident report, the victim relayed that she felt threatened and scared during the attack, and she stated that respondent let her go after she bit him on the arm.

After a dispositional hearing, respondent was detained in a youth home and placed on probation. Respondent participated in a community-based treatment program, as well as group and individual therapy. Respondent successfully completed his treatment and was released from probation.

Subject to certain exemptions, the SORA provides that juveniles who have been adjudicated responsible for a "listed offense," see MCL 28.722(e), must register on the public

sex-offender registry, MCL 28.722(a)(iii); MCL 28.723. CSC II is a listed offense. MCL 28.722(e). CSC II under 750.520c(1)(d)(*ii*) is not subject to any exemptions pertaining to juvenile offenses, and thus respondent must fully register under the act after reaching age 18.[1] See MCL 28.728(3)(a).

Shortly after reaching age 18, respondent petitioned the trial court for certain relief from the SORA under MCL 28.728c. MCL 28.728c(3) states: "This section is the sole means by which an individual may obtain judicial review of his or her registration requirements under this act." However, respondent fell within the statute's mandatory prohibition against granting relief from the registration requirements. MCL 28.728c(14) states that "[t]he court shall not grant a petition filed under this section if any of the following apply . . . ." The statute then lists specific instances in which the offender is not eligible for relief from the SORA. Juveniles adjudicated responsible for CSC II under 750.520c(1)(d)(*ii*) are not eligible for relief. MCL 28.728c(14)(c)(*ii*).

The trial court recognized that, under the statute, it did not have discretion to grant respondent's request. However, respondent also challenged the constitutionality of the SORA's registration requirements, and the trial court agreed that the statute was unconstitutional as applied to respondent. Respondent argued, and the trial court agreed, that the statute causes cruel or unusual punishment under the Michigan Constitution, see Const 1963, art 1, § 16, as applied to respondent.

We review constitutional issues de novo. *In re Ayres*, 239 Mich App 8, 10; 608 NW2d 132 (1999). The party challenging a statute as unconstitutional bears the burden of proof, and statutes are presumed constitutional. *Id*. "[T]he courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Id*.

In arguing that the SORA causes cruel or unusual punishment as applied to him, respondent specifically relies on expert testimony provided at the evidentiary hearing on his petition for relief. Respondent's expert testified that juvenile offenders can be successfully rehabilitated and pose a low risk of recidivism. Respondent argues that it is cruel or unusual to subject a rehabilitated, non-dangerous juvenile offender such as himself to the stigma of public registration as a sex offender.

Before this Court is obligated to evaluate whether a punishment is cruel or unusual, it must first determine whether the challenged government action is actually a form of punishment. *Id*. at 14. This Court has previously considered whether the SORA causes punishment. In *People v Pennington*, 240 Mich App 188, 191-192; 610 NW2d 608 (2000), this Court considered

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[1] As stated in *In re Wentworth*, 251 Mich App 560, 561; 651 NW2d 773 (2002): "In 1999, in response to a federal mandate, the Legislature amended the SORA adding public notification provisions. . . . A juvenile offender is initially exempt from inclusion within the public database; however, for CSC II violations, that exemption ends when the individual becomes eighteen years old."

a challenge to the SORA during which the defendant argued that it violated the constitutional prohibition against ex post facto laws. This Court held that the SORA's registration requirements are not punishment and, therefore, do not violate the prohibition on ex post facto laws. *Id.* at 193. *Pennington* adopted the reasoning of *Lanni v Engler*, 994 F Supp 849 (ED Mich, 1998), and *Doe v Kelley*, 961 F Supp 1105 (WD Mich, 1997), two federal cases holding that the SORA is directed at protecting the public and that it has no punitive purpose. *Pennington*, 240 Mich App at 193-197. *People v Golba*, 273 Mich App 603; 729 NW2d 916 (2007), also addressed whether the registration requirements of the SORA constituted punishment. In *Golba*, this Court held that requiring the defendant to register as a sex offender based on judicially found facts did not implicate the defendant's right to a jury trial because the SORA does not impose a penalty or punishment. *Id*. at 620-621. *Golba* noted that the SORA promotes awareness of potentially dangerous individuals to members of a community and that this protection of the community is a legitimate government interest. *Id*. at 620.

This Court has also considered whether the SORA's registration requirements constitute punishment as applied to juveniles. In *Ayres*, 239 Mich App at 21, this Court concluded that the SORA does not cause punishment. In that case, the 14-year-old respondent was found responsible for CSC II and was ordered to register as a sex offender pursuant to the SORA. *Id*. at 9-10. The respondent challenged this requirement, claiming that it violated the constitutional prohibition against cruel or unusual punishment. *Id*. at 10. The *Ayres* Court adopted the reasoning of the courts in *Lanni* and *Kelley*, quoting language from both indicating that the registration requirements are regulatory and not punitive. *Id*. at 14-18. The *Ayres* Court noted that the SORA "'does nothing more than create a mechanism for easier public access to compiled information that is otherwise available to the public only through arduous research in criminal court files.'" *Id*. at 15, quoting *Kelley*, 961 F Supp at 1109.

At first blush, *Ayres* appears controlling in this case, because *Ayres* specifically addressed a challenge by a juvenile to the SORA's registration requirements and concluded that the defendant's challenge to the SORA as cruel or unusual under the Michigan Constitution must fail. *Ayres*, 239 Mich App at 21. However, even though the *Ayres* defendant was required by the SORA to register as a sex offender, at the time of that opinion juvenile offenders were required only to register on a database used by law enforcement and not available to the public. *Id*. at 18-19. Since *Ayres*, the SORA has been amended to require some juvenile sex offenders to register on the public database upon reaching the age of majority. MCL 28.728. This change casts doubt on the holding of *Ayres*, because the *Ayres* Court partly based its conclusion that the SORA does not cause punishment on the fact that juveniles were not required to register publicly. *Ayres*, 239 Mich App at 18-19.

This Court questioned the holding in *Ayres* in *In re Wentworth*, 251 Mich App 560, 561; 651 NW2d 773 (2002). The juvenile respondent in *Wentworth* was found responsible for CSC II. *Id*. at 561. On appeal, the respondent argued that the SORA's registration requirements violated her due process rights and her right to privacy. *Id*. at 563, 566. After rejecting the respondent's constitutional challenges to the SORA, this Court stated, in dicta, that "the recent amendment of the statute removing . . . confidentiality safeguards [for juveniles] raises questions about the continuing validity of our holding in *Ayres*" concerning the issue of cruel or unusual punishment. *Id*. at 568-569.

In *People v Dipiazza*, 286 Mich App 137, 146; 778 NW2d 264 (2009), the Court stated that the "essential underpinning of the conclusion in *Ayres* that the registration requirement imposed by SORA does not punish was the fact that strict statutory guidelines protected the confidentiality of registration data concerning juvenile sex offenders." The *Dipiazza* Court noted that "this premise is no longer valid . . . ." *Id.* The Court thus went on to determine anew whether, in light of the specific facts of *Dipiazza*, the SORA registration requirements were punishment as applied to a juvenile. *Id*. at 147-153.

In *Dipiazza*, the defendant was adjudicated under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*, for attempted third-degree criminal sexual conduct. *Id.* at 140. When he was 18,[2] the defendant had a consensual sexual relationship with someone who was "nearly 15." *Id*. at 140. The defendant and the younger person were later married. *Id.* Under the HYTA, all proceedings regarding the criminal charge and disposition are closed to the public, as long as the defendant fulfills certain requirements. *Id*. at 141-142. The defendant successfully completed his program and his case was dismissed, leaving him with no conviction on his record. *Id*. at 140. The SORA was amended, effective October 1, 2004, to exclude individuals such as the defendant in *Dipiazza* from the public registration requirements. *Id*. at 143. The defendant's offense occurred before this date, however, and he thus challenged the SORA registration requirements as applied to him, arguing that the requirements constitute cruel or unusual punishment. *Id*. at 140-141.

The Court analyzed whether the requirements constitute punishment. *Id*. at 147. It used the test adopted in *Ayres*, stating the following: "[D]etermining whether government action is punishment requires consideration of the totality of circumstances, and particularly (1) legislative intent, (2) design of the legislation, (3) historical treatment of analogous measures, and (4) effects of the legislation." *Id*. at 147 (internal citations and quotation marks omitted); see also *Ayres*, 239 Mich App at 14-15. Applying these factors to the present case, we find that the SORA does not cause punishment.

Concerning the first factor, we note that the Legislature expressly set forth its intent with regard to the SORA in MCL 28.721a:

> The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state

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[2] As noted in *Dipiazza*, 286 Mich App at 141, the "HYTA is essentially a juvenile diversion program for criminal defendants under the age of 21."

> with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.

The *Dipiazza* Court held that the Legislature's expressed intent was not indicative of a punitive statute, because the statute was not meant to "chastise, deter, or discipline" offenders, but rather to assist in the prevention of and protection against future criminal sexual acts. *Dipiazza*, 286 Mich App at 148. However, the *Dipiazza* Court nevertheless found that the factor did not favor viewing registration as non-punitive, because "[t]he implied purpose of SORA, public safety, is not served by requiring an otherwise law-abiding adult to forever be branded as a sex offender because of a juvenile transgression involving consensual sex during a Romeo and Juliet relationship." *Id*. at 149. The *Dipiazza* Court also emphasized that if defendant had been assigned to youthful trainee status after October 1, 2004, he would not be subject to the public registration requirements. *Id*.

The facts in this case are different. This case did not involve a consensual relationship, respondent in this case did not have his conviction discharged because of the HYTA program, and, unlike in *Dipiazza*, there was no pending or recent amendment that would affect respondent's registration obligations and make them appear inequitable. Respondent committed a predatory sexual offense and poses a more serious danger to the community than the defendant in *Dipiazza*. We find that the first factor, legislative intent, weighs in favor of finding the registration requirement to be non-punitive because the Legislature specifically set forth a non-punitive intent in the statute.

When determining whether government action is punishment, the next factor to be considered is the design of the legislation. *Id*. at 147. The *Dipiazza* Court recognized that the federal courts, in *Kelley*, 961 F Supp at 1109, and *Lanni*, 994 F Supp at 853, found that the registration requirements were purely regulatory and remedial and that they did not impose any requirement or inflict suffering, disability, or restraint on the offender. *Dipiazza*, 286 Mich App at 149. The *Dipiazza* Court disagreed with that assessment, indicating that the SORA created public access to records that were previously sealed and in this way caused the loss of rights or privileges. *Id*. at 150. The Court stated:

> Because MCL 762.14 is designed to prevent youthful trainees from suffering a disability or losses of privileges and rights except with respect to requiring registration, and because there was no public dissemination of the sex offender registry at the time, it seems clear the Legislature did not intend to punish youthful trainees by requiring them to register. The dissemination of nonpublic information through SORA, however, had the opposite effect. The later SORA amendment removing those assigned to trainee status after October 1, 2004, appeared to rectify that issue. [*Dipiazza*, 286 Mich App at 150-151.] [3]

[3] The HYTA specifically mandates that individuals given youthful trainee status "shall not suffer a civil disability or loss of right or privilege." MCL 762.14(2); see also *Dipiazza*, 286 Mich App

This reasoning does not apply to the present case. Respondent was not subject to the guarantees contained in the HYTA, and his record was never "nonpublic" according to MCR 3.925(D)(1), which states: "Records of the juvenile cases, other than confidential files, must be open to the general public."[4] The second factor, design of the legislation, weighs in favor of finding that the SORA's registration requirement is not punishment, because the notification scheme is regulatory and remedial and does not cause a punitive release of previously sealed information.[5]

This Court next considers the historical treatment of analogous measures when determining whether government action is punishment. *Dipiazza*, 286 Mich App at 147. With regard to this factor, the *Dipiazza* Court stated: "However, no analogous measure exists, nor is there historical antecedent that relates to requiring a defendant to register as a sex offender when the defendant was a teenager engaged in consensual sex and the defendant was assigned to youthful trainee status after October 1, 1995, but before October 1, 2004." *Id*. at 151. The *Dipiazza* Court's analysis was limited to the specific facts in that case. Therefore, the reasoning and analysis do not apply to respondent; his offense was factually distinct.

In *Ayres*, this Court distinguished public registration from historical punishments such as branding, shaming, and banishment because public registration "'does nothing more than provide for compilation of and public accessibility to information that is already a matter of public

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at 150; MCL 762.14(2). The HYTA then lists registration under the SORA as an exception to this mandate. MCL 762.14(2) and (3); see also *Dipiazza*, 286 Mich App at 150. The *Dipiazza* Court viewed this exception as an explicit recognition that the SORA's registration requirements cause a disability and a loss of a right or privilege, at least as applied to a youthful trainee. *Id.*

[4] According to MCR 3.925(E)(2)(c), respondent's juvenile record must be destroyed when respondent becomes 30 years old. However, the fact remains that the record will have been public before that time.

[5] The *Dipiazza* Court also stated:

> That defendant is suffering a disability and a loss of privilege is further confirmed by the fact that there are not strict limitations on public dissemination as there were in *Lanni, supra*. The *Lanni* court noted that the registry limited searches so that a person living in a particular zip code can only search that zip code on the registry. *Lanni*, [994 F Supp] at 853. Consequently, the court in *Lanni* found that a law designed to punish a sex offender would not contain such strict limitations on dissemination. *Id.* Searches on the sex offender registry are no longer limited, however, to the searcher's zip code, but rather the registry provides a searcher with information about every person registered as a sex offender living in every zip code in the state. [*Dipiazza*, 286 Mich App at 151.]

We do not find that this change in searching ability transforms the SORA into a punitive scheme.

record.'" *Ayres*, 239 Mich App at 15, quoting *Kelley*, 961 F Supp at 1110.[6] *Ayres* further noted that the registration requirement does not impose any suffering, restraint, or obligation and stated:

> "The notification provisions themselves do not touch the offender at all. While branding, shaming and banishment certainly impose punishment, providing public access to public information does not. . . . And while public notification may ultimately result in opprobrium and ostracism similar to those caused by these historical sanctions, such effects are clearly not so inevitable as to be deemed to have been imposed by the law itself." [*Ayres*, 239 Mich App at 16, quoting *Kelley*, 961 F Supp at 1110.]

We agree with this analysis and find that factor three, historical treatment of analogous measures, weighs in favor of finding that the SORA's registration requirements are not punishment because they are not equivalent to historical practices such as branding, shaming, and banishment. *Ayres*, 239 Mich App at 15-16.

Finally, this Court considers the effects of the legislation. *Dipiazza*, 286 Mich App at 147. The Public Sex Offender Registry (PSOR) states that its purpose is "to better assist the public in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." See *id*. at 151. The *Dipiazza* Court concluded that registration was an unfair "branding" under the facts of that case, because the defendant was not dangerous and because he had no true "conviction" by virtue of the HYTA. *Id*. at 152. The Court also found that the defendant had been unable to find employment because of his status as a registered sex offender and as a result had suffered emotional and financial consequences. *Id*. at 152-153.

Respondent's offense did not involve a consensual act, and he was not subject to the HYTA like the defendant in *Dipiazza*. Accordingly, much of the reasoning in *Dipiazza* is inapplicable. Moreover, in analyzing the final "punishment" factor, the *Ayres* Court examined *Kelley* and noted that "indirect consequences" of public registration such as harassment, assault, job loss, eviction, and dislocation are only indirectly caused by public registration and flow instead from actions by the public. *Ayres*, 239 Mich App at 16, quoting *Kelley*, 961 F Supp at 1111. "'Actions taken by members of the public, lawful or not, can hardly be deemed dispositive of whether legislation's purpose is punishment . . . .'" *Ayres*, 239 Mich App at 16, quoting *Kelley*, 961 F Supp at 1111. We adopt this reasoning and find that any consequences flowing from registration are not punishment in the present case.

Because the applicable factors weigh against a finding that the registration requirements of the SORA constitute punishment as applied to respondent, we find that the trial court erred in its ruling. We note that the majority of the binding precedent holds that the SORA does not

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[6] We note, again, that the *Ayres* Court specifically adopted the analyses of *Lanni* and *Kelley* as its own. *Ayres*, 239 Mich App at 18.

cause punishment, and the *Dipiazza* Court's holding to the contrary appears confined to the specific facts of that case.

Respondent makes several additional arguments for upholding the trial court's conclusion that the SORA's registration requirements are unconstitutional as applied to this case. Respondent's arguments have no merit. Respondent first argues that the SORA's mandatory prohibition against granting relief from the registration requirements to certain offenders violates the doctrine of separation of powers. We note, initially, that the separation of powers doctrine does not mandate complete separation, and overlap between the functions and powers of the branches is permissible. *People v Conat*, 238 Mich App 134, 146; 605 NW2d 49 (1999). We further find that the statutory requirement that trial courts shall not grant relief from registration to offenders convicted of certain delineated offenses does not violate the doctrine of separation of powers. The SORA's requirement that certain offenders not be granted relief from registration is well within the Legislature's power; indeed, the Legislature does not have to grant any offender relief from registration. See *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979) (discussing the Legislature's power to make choices affecting society). Moreover, courts may still pass on constitutional questions pertaining to the SORA, as we do in our opinion today.

Next, respondent argues that the SORA's registration requirements do not bear a rational relationship to any legitimate governmental interest. Rational-basis review "tests only whether the legislation is reasonably related to a legitimate governmental purpose." *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 557; 629 NW2d 402 (2001). The SORA was enacted pursuant to the state's police powers to prevent and protect against the commission of criminal sexual acts by convicted sex offenders, MCL 28.721a, and its purpose involves a legitimate governmental interest, see *People v Golba*, 273 Mich App 603; 729 NW2d 916 (2007) ("SORA is a remedial regulatory scheme furthering a legitimate state interest of protecting the public"). Further, a statute is constitutional "if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *TIG Ins Co, Inc*, 464 Mich at 557 (internal citation and quotation marks omitted). It is rational to require registration of sex offenders to enable the public to protect themselves, even if the risk of recidivism could be considered low in some cases.

Respondent next argues that the law is arbitrary and capricious. However, respondent has waived this argument by failing to provide pertinent legal citations indicating under what circumstances a court may invalidate a statute for being "arbitrary and capricious." See *In re Contempt of Barnett*, 233 Mich App 188, 191; 592 NW2d 431 (1998) (discussing waiver). At any rate, the Legislature made reasoned policy decisions in crafting the law, and we find nothing arbitrary or capricious in its wording.

Lastly, certain amici curiae have filed a brief to argue that the SORA's registration requirements should be found unconstitutional as applied to respondent because they are contrary to numerous public policies. Policy decisions, however, are for the Legislature. *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000).

Reversed.

/s/ Patrick M. Meter
/s/ Michael J. Kelly