NO. COA14-435

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

IN THE MATTER OF:
DAVID PAUL HALL

Mecklenburg County
No. 81 CRS 065575

Appeal by petitioner from order entered 30 September 2013 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for the State.

Glenn Gerding and Anne M. Hayes for petitioner.

BRYANT, Judge.

Where the language of N.C. Gen. Stat. § 14-208.12A shows a clear intent by our legislature to incorporate the requirements of the federal sex offender registration statutes, SORNA, into our State's statutory provisions governing the sex offender registration process, and to retroactively apply those provisions to sex offenders currently on the registry, we affirm the trial court's order doing so. It is well-established by our

Courts that the application of N.C. Gen. Stat. § 14-208.5 *et seq.* which governs the sex offender registration process does not violate our prohibition against *ex post facto* laws. Where petitioner fails to raise a constitutional argument before the trial court, that argument is deemed waived on appeal.

On 18 January 1982, petitioner David Paul Hall pled guilty to first-degree rape and second-degree kidnapping and was sentenced to life in prison. After serving over twenty years, petitioner was released on parole in April 2003 and properly registered himself as a sex offender in Mecklenburg County.

On 3 May 2013, petitioner filed a petition in Mecklenburg County Superior Court seeking termination of his sex offender registration. After a hearing on 23 September 2013, the trial court entered an order on 30 September denying the petition. Petitioner appeals.

Petitioner raises three issues on appeal: (I) whether the trial court erred in relying on the federal SORNA statute to deny his petition to terminate his sex offender registration; (II) whether the trial court's application of SORNA to support denying the petition constituted an *ex post facto* violation; and

(III) whether the denial of the petition violated petitioner's substantive due process rights.

I.

Petitioner contends the trial court erred in relying on the federal SORNA statute to justify the denial of his petition for termination of his sex offender registration. Specifically, petitioner contends such reliance on SORNA was erroneous because N.C. Gen. Stat. § 14-208.12A was not meant to be applied retroactively. We disagree.

> Resolution of issues involving statutory construction is ultimately a question of law for the courts. Where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*. . . .
>
> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. Moreover, when confronted with a clear and unambiguous statute, courts are without power to interpolate, or superimpose, provisions and limitations not contained therein.
>
> The best indicia of the legislature's intent are the language of the statute or ordinance, the spirit of the act and what

> the act seeks to accomplish. Moreover, in discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible. *In pari materia* is defined as upon the same matter or subject.

In re Borden, 216 N.C. App. 579, 581, 718 S.E.2d 683, 685 (2011) (citations and quotations omitted).

North Carolina General Statutes, section 14-208.12A, provides that

> (a) Ten years from the date of initial county registration, a person required to register under this Part may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article. . . .
>
> (a1) The court may grant the relief if:
>
> (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
>
> (2) *The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State*, and
>
> (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

N.C. Gen. Stat. § 14-208.12A(a), (a1) (2013) (emphasis added).

SORNA,[1] 42 U.S.C.S. § 16911 *et seq.*, the Sex Offender Registration and Notification Act, establishes federal standards for sex offender registration and sets up guidelines for state sex offender registration programs. The federal standards are implemented and applied pursuant to the provisions of N.C. Gen. Stat. § 14-208.5 *et seq.*, which set forth North Carolina's sex offender registration program. *See* N.C. Gen. Stat. § 14-208.7(a) (2013) ("A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides. . . . Registration shall be maintained for a period of at least 30 years following the date of initial county registration unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14-208.12A.").

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[1] SORNA was initially known as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program ("the Jacob Wetterling Act"). 42 U.S.C. § 14071 (1997). Upon its repeal in 2006, the Jacob Wetterling Act was replaced by the Adam Walsh Child Protection and Safety Act ("the Adam Walsh Act"). 42 U.S.C. § 16901 (2006). The Adam Walsh Act covers substantially the same material as previously covered by the Jacob Wetterling Act; it further details and updates the registration requirements for sex offenders. *See id.*; *see also In re McClain*, ___ N.C. App. ___, ___, 741 S.E.2d 893, 895, *discretionary review denied*, 366 N.C. 600, 743 S.E.2d 188 (2013) (discussing the evolution of the federal SORNA statute).

SORNA utilizes three tiers. Under SORNA, a tier I sex offender must register for fifteen years, a tier II sex offender must register for twenty-five years, and a tier III sex offender must register for life. However, a tier I sex offender may reduce his or her registration period to ten years by keeping a clean record; likewise, a tier II sex offender may reduce his or her registration period to twenty years. Only a tier III sex offender who is "adjudicated delinquent [as a juvenile] for the offense" may reduce his or her registration period to twenty-five years; otherwise, a tier III sex offender is subject to lifetime registration. *See* 42 U.S.C.S. § 16915(a), (b) (2013).

Here, petitioner pled guilty to first-degree rape in which a knife was used to threaten the victim; petitioner was not adjudicated delinquent for this offense. Therefore, based on the application of SORNA standards, petitioner is a tier III sex offender subject to lifetime registration. *Compare id.* § 16911(4) ("The term 'tier III sex offender' means a sex offender whose offense is punishable by imprisonment for more than 1 year and [] is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense: aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18, United States Code [18 USCS

§§ 2241 and 2242])[.]"), *and* 18 U.S.C.S. § 2241(a) (2013) (defining "aggravated sexual abuse" as "[w]hoever . . . knowingly causes another person to engage in a sexual act -- (1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both."), *with* first-degree rape as defined by N.C. Gen. Stat. § 14-27.2(a)(2) (2013) ("A person is guilty of rape in the first degree if the person engages in vaginal intercourse [] [w]ith another person by force and against the will of the other person, and [] [e]mploys or displays a dangerous or deadly weapon[.]").

Petitioner argues that because N.C.G.S. § 14-208.12A, as amended in 2001, did not apply retroactively to petitioner's sex offender registration requirements, the 2006 amendment of this statute cannot be applied retroactively either. N.C.G.S. § 14-208.12A(a) (2001) stated that: "The requirement that a person register under this Part automatically terminates 10 years from the date of initial county registration if the person has not been convicted of a subsequent offense requiring registration

under this Article." In 2006, N.C.G.S. § 14-208.12A(a) was amended, and subsection (a1) added, to provide that:

> *(a) A person required to register under this Part may petition the superior court in the district where the person resides to terminate the registration requirement 10 years from the date of initial county registration if the person has not been convicted of a subsequent offense requiring registration under this Article.*
>
> (a1) The court may grant the relief if:
>
> (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
>
> (2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and
>
> (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

(emphasis added).

Petitioner's argument that the 2006 amendment is not applicable to his petition to terminate his sex offender registration lacks merit, since N.C.G.S. § 14-208.12A (2006) is clearly retroactively applicable to petitioner. Petitioner was

released from prison in April 2003, at which time petitioner registered with the Mecklenburg County Sheriff's Office as a sex offender. As such, petitioner was not eligible to petition the Mecklenburg County Superior Court for termination of his sex offender registration until ten years later, in April 2013.

This Court has addressed a similar retroactivity argument in *In re Hamilton*. In *In re Hamilton*, the petitioner argued that the requirements governing the termination of sex offender registration pursuant to N.C.G.S. § 14-208.12A were not intended to be retroactively applied. We disagreed, finding that:

> The implementing language of [N.C.G.S. § 14-208.12A] states that it became effective 1 December 2006, and further specifies that it "is applicable to persons for whom the period of registration would terminate on or after [the effective] date." Petitioner's period of registration was not scheduled to terminate until 2011, and thus, section 14-208.12A plainly and explicitly applies to Petitioner. Further, while Petitioner contends the 2006 amendment to section 14-208.7, deleting the automatic termination language and adding language that the registration requirement last for "at least ten years" is ambiguous, we are not persuaded. The General Assembly did not explicitly state that this amendment was to apply retroactively to persons already on the registry. However, reading section 14-208.7 *in pari materia* with section 14-208.12A, *we must construe the abolition of the automatic termination provision as applying to persons for whom the period of registration would terminate on or after 1*

> *December 2006.* To do otherwise would render the implementing language of section 14-208.12A superfluous and frustrate the General Assembly's intent in enacting and amending the registration scheme.

In re Hamilton, 220 N.C. App. 350, 355—56, 725 S.E.2d 393, 397 (2012) (emphasis added). Therefore, since petitioner could not become eligible to petition for termination of his sex offender registration until 2013 at the earliest, N.C.G.S. § 14-208.12A is retroactively applicable to petitioner. *See id.*; *see also In re McClain*, ___ N.C. App. at ___, 741 S.E.2d at 896 (affirming the trial court's incorporation of SORNA in N.C.G.S. § 14-208.12A), *discretionary review denied*, 366 N.C. 600, 743 S.E.2d 188 (2013); *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36—37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citations omitted)). Accordingly, petitioner's argument is overruled.

II.

Petitioner next contends the retroactive application of SORNA to N.C.G.S. § 14-208.12A constitutes an *ex post facto* violation. We disagree.

"An appellate court reviews conclusions of law pertaining to a constitutional matter de novo." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citations omitted).

Petitioner argues that the trial court's retroactive application of SORNA to N.C.G.S. § 14-208.12A constitutes an *ex post facto* violation. The State, in contrast, contends petitioner has not properly preserved this argument for appellate review. Specifically, the State argues that petitioner's *ex post facto* argument was not properly preserved for review because this argument was not ruled upon by the trial court.

Constitutional issues which are not raised and passed upon at trial cannot be reviewed for the first time on appeal. *See State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (citations omitted). Here, the record indicates that petitioner raised an argument during the petition hearing concerning whether the trial court's retroactive application of SORNA constituted an *ex post facto* violation. In addition, petitioner sent a memorandum addressing his *ex post facto* argument to the trial court after the hearing but before the trial court entered its order denying the petition. Although the trial court did not make any findings of fact or conclusions of law regarding

petitioner's *ex post facto* argument in its order denying the petition, we disagree with the State's contention that this issue has not been properly preserved for review. Rather, based on the record, which clearly indicates that petitioner presented his *ex post facto* argument to the trial court and the trial court's own statement that it would "take the time to read through the materials" provided to it by both petitioner and the State, it would appear that by entering an order denying the petition, the trial court implicitly rejected petitioner's *ex post facto* argument.[2] As such, we address petitioner's *ex post facto* argument.

The enactment of *ex post facto* laws is prohibited by both the United States and the North Carolina Constitutions. *See* U.S. CONST. art. I, § 10 ("No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts . . . ."); N.C. CONST. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and

[2] We note that the better practice would have been for the trial court to have ruled explicitly upon petitioner's *ex post facto* argument, either in a separate order or by including additional findings of fact and conclusions of law in the order. However, since the record supports a determination that the trial court reviewed and denied petitioner's *ex post facto* argument, we will review petitioner's contentions on appeal.

incompatible with liberty, and therefore no ex post facto law shall be enacted."). This prohibition against *ex post facto* laws applies to:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

State v. Wiley, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (citations and quotation omitted). "Because both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition, we analyze defendant's state and federal constitutional contentions jointly." *Id.* (citation omitted).

Petitioner argues that the trial court's retroactive application of SORNA to N.C.G.S. § 14-208.12A constitutes an *ex post facto* violation because this application has a "clearly punitive effect".

> An ex post facto analysis begins with determining whether the express or implicit intention of the legislature was to impose

> punishment, and if so, that ends the inquiry. If the intention was to enact a civil, regulatory scheme, then by referring to the factors enunciated in *Kennedy v. Mendoza-Martinez* for guidance, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the legislature's civil intent.

Bowditch, 364 N.C. at 341—42, 700 S.E.2d at 6 (citations and quotations omitted).

In examining the legislative intent behind our sex offender registry statutes, it is well established that N.C.G.S. § 14-208.12A creates a "non-punitive civil regulatory scheme." *See State v. Pell*, 211 N.C. App. 376, 377, 712 S.E.2d 189, 190 (2011) (noting that "the sex offender registration requirement provided in Article 27A was a non-punitive civil regulatory scheme." (citing *State v. White*, 162 N.C. App. 183, 193, 590 S.E.2d 448, 455 (2004)). Nevertheless, as we are urged to do so by defendant's vigorous argument, we will "further examine whether the statutory scheme is so punitive . . . as to negate the legislature's civil intent." *Bowditch*, 364 N.C. at 342, 700 S.E.2d at 6 (citations and quotations omitted).

In determining whether the effects of a civil statute are truly punitive, this Court applies the factors as set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168—69 (1963).

White, 162 N.C. App. at 194, 590 S.E.2d at 455 (citation omitted).

> [T]he most relevant factors for registration laws [have been found] to be whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a non[-]punitive purpose; or is excessive with respect to this purpose.

Id. (citation and quotation omitted).

In reviewing whether the requirements of sex offender registration are so punitive as to negate the civil intent behind such registration, our Courts have consistently held that the sex offender registration provisions as set forth in N.C. Gen. Stat. § 14-208.5 *et seq.* (Article 27A) do not amount to *ex post facto* violations. *See* N.C.G.S. § 14-208.5 (2013) (setting forth the purposes behind the sex offender registration requirements); *see also State v. Sakobie*, 165 N.C. App. 447, 452, 598 S.E.2d 615, 618 (2004) ("[T]he legislature did not intend that the provisions of Article 27A be punitive [and] . . . the effects of North Carolina's registration law do not negate the General Assembly's expressed civil intent and that retroactive application of Article 27A does not violate the

prohibitions against *ex post facto* laws." (citing *White*, 162 N.C. App. at 194—98, 590 S.E.2d at 455—58)).

Petitioner argues that despite our Court's well-established line of decisions holding that sex offender registration does not constitute an *ex post facto* violation, such a view is inapplicable to the instant case since it involves lifetime registration. Petitioner contends lifetime registration, such as that based on SORNA, is so overly punitive as to constitute an *ex post facto* violation. We reject petitioner's contention, since the reasoning in *Bowditch*, upholding lifetime satellite-based monitoring of sex offenders, informs us that the imposition of lifetime sex offender registration programs does not constitute an *ex post facto* violation. *See Bowditch*, 364 N.C. at 342—43, 700 S.E.2d at 6—7 (holding that satellite-based monitoring ("SBM") of sex offenders does not create an *ex post facto* violation, for "the placement of the SBM program within Article 27A of Chapter 14 of our General Statutes is significant. The SBM program follows immediately after the Article 27A sections comp[ri]sing the Sex Offender Registration Programs [pursuant to] N.C.G.S. §§ 14-208.5 to -208.32 (2009). *Before enactment of the SBM program, the Supreme Court of the United States had determined sex offender registration statutes*

to be civil regulations, Smith [v. Doe], 538 U.S. [84,] 105-06, 123 S.Ct. 1140 [2003], and North Carolina appellate courts had reached the same conclusion, see State v. Sakobie, 165 N.C. App. 447, 451-52, 598 S.E.2d 615, 617-18 (2004). Moreover, the legislature's statement of purpose for Article 27A, found at section 14-208.5, explains that 'the purpose of this Article [is] to assist law enforcement agencies' efforts to protect communities.' Understandably, section 14-208.5 explicitly refers to registration, but the SBM program [set forth in §§ 14-208.40—208.45, Part 5 of Article 27A] is consistent with that section's express goals of compiling and fostering the 'exchange of relevant information' concerning sex offenders. The decision to codify the SBM statutory scheme in the same Article and immediately following the registration programs implies a legislative objective to make the SBM program one part of a broader regulatory means of confronting the unique 'threat to public safety posed by the recidivist tendencies of convicted sex offenders.' [*State v.*] *Abshire*, 363 N.C. [322,] 323, 677 S.E.2d [444,] 446." (emphasis added)).

This broader, regulatory means of addressing the need for law enforcement officers and the public to have information regarding certain convicted sex offenders may seem burdensome,

but it is not penal or punitive. We note that defendant has argued vigorously for a different result regarding the burden imposed on him by the registration requirements as they currently exist. Without addressing each individual point raised by defendant, we acknowledge these arguments and note that they have been previously addressed and rejected by our Courts. *See State v. Williams*, 207 N.C. App. 499, 505, 700 S.E.2d 774, 777—78 (2010). Moreover, this Court has held that Article 27A of Chapter 14 of our North Carolina General Statutes sets forth civil, rather than punitive, remedies and, therefore, does not constitute a violation of *ex post facto* laws. *See id.* Therefore, in light of this Court's prior decisions rejecting the argument that our sex offender registration statutes constitute an *ex post facto* law, we are bound to say that petitioner's argument lacks merit. *See In re Civil Penalty,* 324 N.C. at 384, 379 S.E.2d at 37 ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citations omitted)). Accordingly, petitioner's argument is overruled.

III.

Finally, petitioner argues that the trial court's denial of the petition violated petitioner's substantive due process rights. However, since petitioner did not raise this argument before the trial court, this argument has not been properly preserved for appeal. *See* N.C. R. App. P. 10(a)(1) (2014) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."); *see also Garcia*, 358 N.C. at 410, 597 S.E.2d at 745. Moreover, we note that even if petitioner's argument had been properly preserved for appeal, it has already been determined that the registration requirements of N.C.G.S. § 14-208.5 *et seq.* do not amount to a violation of due process. *See State v. Williams*, ___ N.C. App. ___, ___, 761 S.E.2d 662, 665—68 (2014) (holding that the imposition of lifetime SBM did not violate the defendant's due process); *White*, 162 N.C. App. at 189—90, 590 S.E.2d at 453 ("[T]he notice provisions of the registration act (N.C. Gen. Stat. §§ 14-208.8 [*et seq.*]) remove the statute from due process attacks[.]" (citation omitted)). Accordingly, petitioner's argument is deemed waived. The order of the trial court is, therefore, affirmed.

Affirmed.

Judges ELMORE and ERVIN concur.