Filed 5/2/17 P. v. Johnson CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DERRICK LYNN JOHNSON, Defendant and Appellant.	B270246 (Los Angeles County Super. Ct. No. BA438628)

APPEAL from a judgment of the Superior Court of Los Angeles County. Drew E. Edwards, Judge. Affirmed.

Melissa Hill, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Ilana Herscovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Derrick Lynn Johnson (defendant) appeals from the judgment entered after a jury convicted him of failing to register as a sex offender. Defendant was required to register as a sex offender following his 1986 conviction of two counts of sexual penetration with a foreign object and seven counts of first degree burglary, crimes he committed when he was 17 years old, and for which he was tried as an adult.

Defendant contends California's mandatory lifetime sex offender registration requirement as applied to juvenile offenders constitutes punishment in violation of the ex post facto clauses of the United States and California Constitutions, constitutes cruel and unusual punishment, and violates substantive due process.

We conclude the registration requirement does not constitute punishment within the meaning of federal or California ex post facto laws and on that basis affirm the judgment.

BACKGROUND

In 1986, defendant pleaded no contest in adult court to nine crimes he committed when he was 17 years old: two counts of forcible sexual penetration with a foreign object, in violation of Penal Code section 289, subdivision (a),[1] and seven counts of first degree burglary. He was committed to the California Youth Authority for 10 years and was discharged from parole in 1993.

Defendant's conviction of offenses in violation of section 289 made him subject to lifetime sex offender registration requirements under section 290.[2] (§§ 290, 290.008.) He was

---

[1] All further statutory references are to the Penal Code, unless stated otherwise.

[2] Section 290 requires a person convicted of an enumerated offense to register as a sex offender with local law enforcement

convicted in 1996 and 2012 for failing to register, but submitted annual updates to his registration on August 26, 2009, and May 17, 2012. In his May 17, 2012 registration, defendant listed his address as a residence in Missouri. On page two of the registration form, defendant signed and acknowledged that his duty to register as a sex offender was a lifetime requirement, that he must update his registration information within five days of any change, and that he must register as a transient if homeless.

On July 27, 2015, and again on August 7, 2015, public safety officers at the University of Southern California responded to trespass calls and encountered defendant in the law library. Defendant had a suitcase, a jacket, and several other items in his possession. He produced a Missouri driver's license as identification. The officers determined that defendant was a transient because he did not provide a local address and had been storing his personal belongings in a school locker. Defendant was arrested on August 7, 2015.

In an amended information filed on November 5, 2015, the Los Angeles County District Attorney charged defendant with failure to register as a sex offender. The information further alleged that defendant had suffered nine prior serious and/or violent felony convictions. The trial court denied a motion by defendant to dismiss the information. The matter proceeded to a jury trial, at which defendant testified in his own defense.

Defendant testified that he was an iron welder and that he traveled to different states for work. He denied living in

---

authorities in the city or county in which the person resides for the rest of the person's life. Section 290.008 imposes the same lifetime registration requirement on juvenile offenders who were committed to the California Youth Authority for an enumerated offense. (§ 290.008, subd. (a).) Violation of section 289 is an enumerated offense under both statutes.

California or residing at the USC campus. Defendant admitted that he last registered on May 17, 2012, and that he had suffered prior convictions in 1996 and 2012 for failing to register. He further admitted that he had been in Los Angeles for approximately one month before his arrest.

At the conclusion of the trial, the jury found defendant guilty and found the prior conviction allegations to be true. The trial court denied defendant's motion for a new trial and sentenced him to state prison for two years, doubled to four years pursuant to sections 667, subdivisions (b) though (i) and 1170.12, subdivisions (a) through (d).

This appeal followed.

DISCUSSION

I. Applicable law and legal principles

A. Ex post facto analysis

Article I, section 10, clause 1 of the federal Constitution provides, in pertinent part: "No state shall . . . pass any . . . ex post facto Law." Article I, section 9 of the California Constitution similarly provides that an "ex post facto law . . . may not be passed." Both constitutional provisions prohibit enactment of laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." (*Collins v. Youngblood* (1990) 497 U.S. 37, 43; *People v. Grant* (1999) 20 Cal.4th 150, 158.)

To determine whether a particular law is punishment for purposes of an ex post facto analysis, the United States Supreme Court, in *Smith v. Doe* (2003) 538 U.S. 84 (*Smith*), prescribed a two-part test. Under part one of that test, a court must determine whether the Legislature intended to impose punishment. "If the intention of the legislature was to impose punishment, that ends the inquiry." (*Id.* at p. 92.) If the court concludes, however, that the Legislature intended to enact "a regulatory scheme that is civil and nonpunitive," it must then

determine whether the statutory scheme is "'"so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil."'" (*Ibid.*) To make this latter determination, a court must apply the factors set forth in *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144 (*Mendoza-Martinez*). (*Smith*, at p. 97.) These factors, which are "'neither exhaustive nor dispositive'" (*ibid.*), include whether the law imposes what has been viewed traditionally as punishment, creates an affirmative disability or restraint, promotes the traditional aims of punishment, has a rational connection to a nonpunitive purpose, or is excessive with respect to the nonpunitive purpose. (*In re Alva* (2004) 33 Cal.4th 254, 266-267 (*Alva*).)

B. Sex offender registration for juvenile offenders

Section 290.008, subdivision (a) provides: "Any person who, on or after January 1, 1986, is discharged or paroled from the Department of Corrections and Rehabilitation to the custody of which he or she was committed after having been adjudicated a ward of the juvenile court pursuant to Section 602 of the Welfare and Institutions Code because of the commission or attempted commission of any offense described in subdivision (c) shall register in accordance with the [Sex Offender Registration] Act." The statute imposes a lifetime registration requirement on juvenile offenders who were committed to the California Youth Authority[3] for an enumerated sex offense. (*In re Robert M.* (2013) 215 Cal.App.4th 1178, 1182-1183 (*Robert M.*).)

II. Sex offender registration is not punishment

A statute violates the ex post facto clauses of the federal and California Constitutions only if it retroactively imposes

---

[3] The California Youth Authority is now known as the Division of Juvenile Facilities, which is within the Department of Corrections and Rehabilitation. (*In re J.L.* (2008) 168 Cal.App.4th 43, 47, fn. 1.)

punishment for a criminal act. (*Collins v. Youngblood, supra,* 497 U.S. at p. 43; *People v. Grant, supra,* 20 Cal.4th at p. 158.) Sex offender registration is not punishment. "[T]he United States Supreme Court confirmed beyond doubt that laws requiring the registration of convicted sex offenders -- including now common provisions for public dissemination of information about the identity and whereabouts of dangerous offenders -- do not impose punishment for purposes of the federal ex post facto clause. [Citation.]" (*Alva, supra*, 33 Cal.4th at p. 273, citing *Smith*.) The California Supreme Court has also held that mandatory sex offender registration required by section 290 is not punishment for purposes of the ex post facto clause of the California Constitution. (*Alva*, at p. 292; *People v. Castellanos* (1999) 21 Cal.4th 785, 796 (*Castellanos*).) Our state high court concluded that the law is regulatory in nature, intended to assure that persons convicted of enumerated crimes shall be readily available for police surveillance at all times because the Legislature has deemed them likely to commit similar offenses in the future. (*Castellanos*, at p. 796.)

Defendant contends the foregoing authorities should be reconsidered in light of statutory amendments subsequent to his 1986 conviction that imposed additional restrictions. He cites amendments that extend the registration requirements to sex offenders who are out-of-state residents employed in California or enrolled in California educational institutions (§§ 290.002, 290.009); that require offenders to provide and keep current substantial quantities of personal information, including a list of all Internet service providers and Internet identifiers used, address, employment, and vehicle ownership (§§ 290.012, 290.013, 290.015); that allow law enforcement agencies to disclose an offender's personal information to members of the public upon request for such information (§ 290.45); and that

impose restrictions on residency, travel, and entry onto school grounds and adult care facilities (§§ 626.81, 653c, 3003.5). Defendant contends these additional restrictions make section 290 an ex post facto law because they post-date the commission of his qualifying crimes and apply retroactively.

The additional restrictions imposed since defendant's 1986 conviction do not apply retroactively. Rather, they apply prospectively to conduct occurring after their statutory effective dates. For example, with regard to residency restrictions imposed in 2006 making it unlawful for a person required to register as a sex offender to live near a school or park where children regularly gather (§ 3003.5), the California Supreme Court concluded that the restrictions do not constitute punishment for a defendant's past crimes. Although section 3003.5 applies to defendant solely by virtue of his status as a registered sex offender, the residency restrictions apply to conduct occurring after the statute's effective date and do not impose additional punishment for his 1986 conviction. (*In re E.J.* (2010) 47 Cal.4th 1258, 1276-1278, 1280.) The same analysis applies with respect to the other restrictions imposed after defendant's 1986 conviction. Those restrictions do not violate the ex post facto clauses of the federal or California Constitutions. (*E.J.*, at p. 1280.)

Defendant argues that neither the United States Supreme Court nor the California Supreme Court has considered whether the mandatory lifetime sex offender registration requirement as applied to juvenile offenders constitutes punishment in violation of the federal and California ex post facto clauses. He argues that a different standard should apply to persons who were convicted of a qualifying sex crime before the age of 18. As support for his position, defendant cites dissenting opinions by Justices Stevens and Ginsberg in *Smith*, and studies that

conclude that juvenile sex offenders recidivate at lower rates than adult offenders. The dissenting opinions and the cited studies are not a valid basis for departing from applicable federal and California Supreme Court authority. (See *Auto Equity Sales Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456 [appellate courts are bound by decisions of the California Supreme Court].)

As further support for his argument that a different standard should apply to juvenile offenders required to register as sex offenders, defendant cites *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*) and *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), in which the United States Supreme Court held that the Eighth Amendment prohibits imposition of the death penalty on juvenile offenders whose crimes were committed before the age of 18 (*Roper*, at p. 568), and a life sentence without parole on juvenile defendants who did not commit homicide (*Graham*, at p. 68). Both of those cases involved the imposition of indisputably criminal punishments -- the death penalty and life imprisonment. Neither *Roper* nor *Graham* addressed whether a statute that is regulatory in nature, such as section 290, was intended to impose punishment, or is "so punitive in purpose or effect" as to constitute punishment for ex post facto purposes. That issue was squarely decided by the United States Supreme Court in *Smith*, and by the California Supreme Court in *Castellanos* and *Alva*. Both courts concluded that sex offender registration laws such as section 290 do not constitute punishment in violation of the federal and California ex post facto clauses. (*Smith, supra*, 538 U.S. at p. 93; *Castellanos, supra,* 21 Cal.4th at p. 796.)

Defendant provides no valid basis for concluding that sex offender registration, as applied to juvenile offenders, constitutes punishment in violation of the federal or California ex post facto clauses. Under the two-part test prescribed by the United States Supreme Court in *Smith*, the statute is not punitive. There is no

evidence the Legislature intended sex offender registration as a punishment for juvenile offenders. Rather, the evidence is to the contrary. The lifetime registration requirement applies only to juveniles who were committed to the California Youth Authority for committing an enumerated offense. (§ 290.008; *Robert M., supra,* 132 Cal.App.4th at p. 1183.) It does not apply to "wards committed to juvenile hall for the same sexual offenses. [Citation.]" (*Robert M.,* at p. 1183.) By distinguishing between the two types of juvenile offenders, "the Legislature consciously sought to require registration only of those 'violent or repeat offenders' whose dangerousness warranted the imposition of a penal measure otherwise reserved for convicted criminals. It chose to do so by predicating registration on the juvenile's having been subjected to the most restrictive of all juvenile court dispositions, Youth Authority commitment." (*In re Bernardino S.* (1992) 4 Cal.App.4th 613, 621.) The registration requirement as applied to juvenile offenders is regulatory in nature. (*Ibid.*; *Castellanos, supra,* 21 Cal.4th at p. 796.)

Applying part two of the *Smith* test, sex offender registration in California is not punitive in effect. (*Alva, supra*, 33 Cal.4th at p. 279.) Our state high court reached this conclusion after applying the factors set forth in *Mendoza-Martinez*: "Registration has not historically been viewed as punishment, imposes no direct disability or restraint beyond the inconvenience of compliance, and has a legitimate nonpenal objective. Though registration may have incidental deterrent or retributive effects, and applies to conduct which is already a crime, these features are not sufficient to outweigh the statute's regulatory nature. Nor is it dispositive that the registration statute appears in the Penal Code, and that the obligation to register is imposed as part of a criminal proceeding." (*Alva, supra,* 33 Cal.4th at p. 279.)

Finally, the registration requirement is not excessive in relation to its regulatory purpose. The statute applies only to those juvenile offenders whose dangerousness and risk of recidivism warrant imposition of the registration requirement. (*Bernardino S., supra*, 4 Cal.App.4th at pp. 620-621.) "The line drawn by the Legislature may not include all juvenile wards as to whom the degree of dangerousness is unacceptably high, and it may not exclude all those as to whom the risk is low. However, the Legislature is not required to formulate a perfect classification or a perfect test. If it were, few statutory distinctions could survive." (*Id.* at p. 621.)

The lifetime sex offender registration requirement as applied to persons who committed qualifying sex offenses as juveniles is not punishment. The requirements accordingly do not violate the federal or California ex post facto clauses.

III. Cruel and unusual punishment

In view of our holding that sex offender registration as applied to juvenile offenders does not constitute punishment, we need not address defendant's argument that it violates federal and California constitutional prohibitions against cruel and unusual punishment.

IV. Substantive due process

Defendant contends the registration requirement violates his substantive due process rights to certain liberty interests, including the ability to change residences and to live in certain areas, enter schools and parks, and pursue certain occupations. Defendant failed to raise this argument in the trial court below and failed to present any evidence to support the merits of his as applied constitutional challenge. He accordingly forfeited the right to do in this appeal. (See *In re Taylor* (2015) 60 Cal.4th 1019, 1039 [as applied constitutional challenge contemplates analysis of facts and circumstances of a particular case]; *People v.*

Jeha (2010) 187 Cal.App.4th 1063, 1078 [court will exercise discretion to consider substantive due process claim not raised in the trial court if it involves only application of legal principles to undisputed facts].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT