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Case Number 232,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JUAN LAMBERTY,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 232, 2014
	)	
STATE OF DELAWARE,	)	
	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

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DATE: July 16, 2014

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NATURE AND STAGE OF THE PROCEEDINGS

Juan Lamberty ("Mr. Lamberty) was indicted for one count of failure to properly register as a registered sex offender pursuant to 11 *Del.C.* § 4121(r). (A8).

On April 16, 2013, defense counsel filed a motion to dismiss the lone charge on the basis that the sex offender registration statute portion dealing with homeless sex offenders was unconstitutional. (A10). The Superior Court requested briefing on the issue and Mr. Lamberty's Opening Brief in support of his motion was submitted on May 29, 2013. (A13). The State filed its answer on June 26, 2013 and Mr. Lamberty responded on July 30, 2013. (A52; 72). By order dated April 10, 2014, the Superior Court denied the motion to dismiss. (A88).

After waiving his right to jury trial, Mr. Lamberty was found guilty of the charged offense. (A134). Mr. Lamberty was sentenced to 35 days of imprisonment at Level 5, suspended after 25 days at Level 5. (*See* Sentencing Order, attached as Exhibit B to Opening Brief).

Mr. Lamberty filed a timely notice of appeal. This is his opening brief in support of his appeal.

SUMMARY OF THE ARGUMENT

1. Under 11 *Del. C.* § 4120, homeless offenders face an onerous registration process that is not rationally related to protecting the community or reducing recidivism. Requiring homeless sex offenders to report more frequently because they cannot obtain permanent housing violates the Equal Protection Clause of the Fourteenth Amendment. Therefore, this Court should reverse Lamberty's sentence.

2. By allowing the Superintendent of the Delaware State Police to designate reporting locations without any standards to guide his or her discretion, the legislature has unconstitutionally delegated its power. Adequate safeguards and standards to guide discretion are absent from 11 *Del. C.* § 4121 and cannot be inferred from the statute. Because this statute is void of any guidelines concerning sex offender reporting locations, it must be declared unconstitutional.

STATEMENT OF FACTS

On March 23, 2004, Mr. Lamberty plead guilty to rape in the fourth degree. As a result of that conviction, he was designated a Tier 2 (Moderate Risk) Sex Offender pursuant to 11 *Del. C.* §4120(g)(3). This section requires Tier 2 offenders to verify their registry information in person "every 6 months."

On November 27, 2012, Mr. Lamberty appeared in person to register with the Delaware State Police. (A120). At that time, he registered as "homeless" in Wilmington.[1] As a homeless Tier 2 offender, Mr. Lamberty is required to register at a location designated by the Superintendent of the Delaware State Police in person every 30 days pursuant to 11 *Del. C.* §4121(k). All registered sex offenders must also pay an annual administrative fee of $30.00 no later than January 31st of each year. 11 *Del. C.* §4121(g).

Having no money and no means to get to his designated reporting location, Mr. Lamberty failed to appear in December 2012 to verify his homeless registration. (A117). He was arrested on January 22, 2013 for Failure to Properly Report as Registered Sex Offender. Mr. Lamberty expressed to the arresting officer that he did not report because he had "no

[1] Mr. Lamberty became homeless in 2011 following the death of his son. (A117).

money with which to take a bus, or otherwise get to [Delaware State Police] Troop 2 (A109).

Following his arrest, Mr. Lamberty moved to Cleveland, Ohio to live with his Sister. His brother paid for the bus fare since he could not afford it. (A115). Mr. Lamberty now registers at a location that is within walking distance of his sister's home and has registered every 90 days as required by law. (A116).

I. REVERSAL IS REQUIRED BECAUSE 11 *DEL C.* § 4120 *ET SEQ.* VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY PLACING AN ONEROUS REGISTRATION PROCESS ON HOMELESS, INDIGENT OFFENDERS.

Question Presented

Whether 11 *Del. C.* § 4120 *et seq.* violates the Equal Protection Clause of U.S. Constitution when it places a more onerous burden on homeless, indigent, sex offenders and is not rationally related, nor advances the purpose of the registration statute? The issue was preserved by a motion to dismiss. (A9).

Standard and Scope of Review

Constitutional claims are subject to *de novo* review. *Abrams v. State*, 689 A.2d 1185, 1187 (Del. 1997).

Merits of Argument

That portion of the sex offender registration statute that imposes more onerous reporting requirements on homeless offenders violates the Equal Protection Clause 14th Amendment to the United States Constitution. Requiring homeless sex offenders to report more frequently because they cannot obtain permanent housing is a violation of Equal Protection under the

law. The statute places an undue burden on homeless offenders and effectively subverts the goals of the sex offender registry. While Section 4120(k) ostensibly furthers the goal of monitoring sex offenders, in application, it makes compliance unreasonably difficult for homeless individuals. Burdened with frequent, in-person reporting requirements and inaccessible reporting locations, homeless offenders cannot realistically meet their obligations. Section 4120(k) therefore belies the statute's stated purpose, resulting in an unreasonable and discriminatory classification that is not rationally related to a legitimate state interest. Thus, Section 4121 of the Sex Offender Registration statute, as applied, cannot withstand judicial scrutiny.

The 14th Amendment provides that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, §1.

"This clause does not require that all persons be treated alike, but rather that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

The United States Supreme Court has held that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996), citing *Heller v. Doe*, 509 U.S. 312, 319-320 (1993). Similar to the Colorado Constitutional "Amendment 2" on which the Supreme Court was asked to rule in *Romer*, the Delaware homeless sex offender registration law "has the peculiar property of imposing a broad and undifferentiated disability on a single named group" and is, therefore, an exceptional and . . . invalid form of legislation." *Romer*, 517 U.S. at 632.

A. The Statutory Schemes Of The Sex Offender Registration Arbitrarily Singles Out And Burdens The Homeless And The Poor.

Although Delaware's General Assembly did not ostensibly intend to create classifications based on wealth, it is clear that an unintended consequence of the legislation is to treat indigent, homeless offenders differently from non-indigent offenders in the same tier. Because homeless individuals are also routinely in poverty, their ability to appear in-person at some remote reporting location is severely constrained.

The statute, in effect, makes indigency a crime. Those who are homeless are routinely also poorer financially than those offenders with

stable residences. This lack of funds decreases the ability of homeless sex offenders to get to those places randomly designated by the Superintendent of the Delaware State Police more often than their stably-housed, perhaps employed, counterparts. Mr. Lamberty (and other homeless persons) cannot necessarily afford to take the bus to DSP Troop 2, which is approximately 14 miles from the City of Wilmington. To require someone to walk over 14 miles simply because they are both homeless and indigent six times as often as someone who has the financial means to either take the bus on a more regular basis or obtain more stable housing, effectively makes being homeless and poor a felony in the State of Delaware.

If the homeless indigent sex offender lives in Selbyville, Delaware, in the central portion of lower Sussex County, that person would have to walk or otherwise find free or inexpensive transportation to a location designated by the Superintendent of the Delaware State Police approximately 55.35 miles away[2], namely Delaware State Police Headquarters in Dover. From Delmar, on the west side of lower Sussex County, that trek encompasses travel of just over 50 miles in each direction. From Claymont in northern New Castle County, a person is required to travel over 23 miles to Troop 2,

[2] All mileage listed is approximate and obtained from www.mapquest.com based on seeking directions from each town (Delmar, Selbyville, Claymont) to either Dover or the actual addresses of Troop 1 and Troop 2 and then from North Poplar Street, Wilmington to the respective listed addresses.

while the same person in Claymont would have to travel only approximately 3 miles to Troop 1 (which is NOT a location designated by the Superintendent of the Delaware State Police). Mr. Lamberty or another homeless person in Wilmington would only have to travel approximately 4.5 miles to Troop 1 and approximately 3 miles to the Wilmington Police Department in the 400 Block of North Walnut Street[3].

"Although the mere rationality standard gives a great deal of deference to legislative classifications, it does have some bite." *See, Wilson v. State,* Del. Supr., 500 A.2d 605, 609 (1985) (citing *U.S. Dept. of Agriculture v. Moreno,* 413 U.S. 528 (1973)). The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *See Zobel v. Williams,* 457 U.S. 55, 61-63 (1982). Furthermore, some objectives— such as "a bare ... desire to harm a politically unpopular group,"— are not legitimate state interests. *Moreno,* 413 U.S. 528, 535 (1973).

Section 4120(k), in effect, punishes homeless sex offenders. While Tier 3 crimes are more dangerous, by definition, than their Tier 2 counterparts, homeless sex offenders are subject to stricter supervision for

[3] This mileage is obtained from www.mapquest.com based on seeking directions from "Wilmington, Delaware 19805" to "300 North Walnut Street, Wilmington, Delaware 19801."

lacking a residence. This status-based classification is not rationally related to public safety. It is significant to note, as has the United States Supreme Court, that "the condition at issue here—indigency—is itself no threat to the safety or welfare of society." *Bearden v. Georgia,* 461 U.S. 660, 669 n. 9 (1983).

B. The Statutory Schemes Of The Sex Offender Registration, As It Applies To Homeless Offenders, Is Irrational And Operates Contrary To Its Intended Purpose.

In 2007, Delaware amended its sex offender registration requirements in an effort to bring Delaware into compliance with the 2006 federal Adam Walsh Child Protection and Safety Act (Title 1—Sex Offender Registration and Notification Act, commonly referred to as SORNA). The amended statute requires sex offenders to periodically verify their address in person, rather than by mail as was allowed prior to the amendments. A Tier 3 offender must verify their information in person every 90 days; Tier 2 every 6 months; and Tier 1 every twelve months. 11 Del. C. §4120(g).

But for sex offenders who are "homeless," the registration requirements are more frequent. A homeless, Tier 3 offender must report in person every seven days; Tier 2 every thirty days; and Tier 1 every ninety days. 11 *Del. C.* §4121(k). All registrants must submit to having their

mugshot and fingerprints taken each time they verify their information; this must be done in-person at SBI.[4]

Moreover, the amended statute gives the Superintendent of the Delaware State Police authority to designate the reporting locations. See, 11 *Del. C.* §4120(g); §4121(k). Since the statute's enactment, the Superintendent has designated only two reporting locations: Delaware State Police Troop 2 ("DSP2") in Glasgow, New Castle County and SBI in Dover, Kent County. (A106).

The sex offender registry is intended to reduce recidivism rates through the comprehensive evaluation, identification, classification, treatment, and continued monitoring of sex offenders. 11 *Del. C.* §4120A(a). However, section 4120(k) frustrates this goal by demanding that homeless offenders fulfill near impossible reporting requirements for the duration of their registration period. Prior to the statute's enactment, police arrested just 42 homeless offenders for failing to report in 2007. In 2008, the amended statute took effect and police arrested 79 homeless offenders for failing to report. In fact, arrests for failure to comply with Section 4120(k) between 2007 and 2013 increased by more than 200%. (*See* DELJIS Statistical

[4] Delaware Sex Offender Central Registry: Frequently Asked Questions; accessible at https://sexoffender.dsp.delaware.gov/.

affidavit attached as Exhibit C). Under the current system, the risk of noncompliance is exacerbated by the obstacles erected by the statute.

Although the State has a legitimate interest in protecting the community from violent sex offenders, the more onerous burdens placed on homeless offenders is without a rational basis. The fear that a homeless offender could evade monitoring if they did not register more frequently is simply unfounded. More frequent reporting does not reduce the homeless offender population nor does it make the community safer. There is no evidence that the homeless pose more of a risk of re-offending or of having child victims than registrants with stable residences. In the instant case, had Mr. Lamberty been permitted to register at the police agency closest to his location – Wilmington Police Department – he would have been able to walk to its location in about an hour and it would have cost him nothing to get there.

Section 4120(k) is perpetuated by myth of "stranger danger," despite evidence that most victims knew their perpetrator. For example, statistics show that perpetrators reported that their victims were strangers in less than 30% of rapes and 15% of sexual assaults. Moreover, a study reviewing sex crimes as reported to police revealed that 93% of child sexual abuse victims knew their abuser; 34.2% were family members and 58.7% acquaintances.

Only 7% of child victims reported that they were abused by strangers. Moreover, about 40% of sexual assaults take place in the victim's own home, and 20% take place in the home of a friend, neighbor or relative.[5] As a result, frequent verification of a homeless offender's "habitual locale, park or locations during the day and night, public buildings, restaurants, and libraries frequented" does not further the community's safety.

In order to pass constitutional muster, the statute must be such that individuals seeking to comply may reasonably do so. The Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking ("SMART")[6] "encourages jurisdictions that face challenges with in-person requirements to consider alternative methods in which these requirements may be met and to work closely with SMART Office personnel in submitting acceptable alternatives for review."[7] Permissible alternatives include allowing an offender to appear at his or her local police station,

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[5] Jill S. Levenson, Ph.D. *Sex Offender Residence Restrictions*: *A Report To The Florida Legislature,* p.4 (2005).

[6] The SMART Office was authorized in the Adam Walsh Child Protection and Safety Act of 2006. The responsibilities of the SMART Office include providing jurisdictions with guidance regarding the implementation of the Adam Walsh Act, and providing technical assistance to the states, territories, Indian tribes, local governments, and to public and private organizations.

[7] U.S. Department of Justice: SORNA Implementation Documents; available at http://ojp.gov/smart/pdfs/SORNA_ImplementationDocuments.pdf; p. 5.

video conferencing, or utilizing probation officers to effectuate interim appearance with an offender

In this case, the disparate treatment of homeless offenders is not rationally related to any legitimate state purpose. Not only is the nexus between the statutory means and proffered government interest irrational, the statutory classification of affected individuals is likewise irrational and arbitrary. By imposing harsher regulations on homeless sex offenders, the amended statute impermissibly discriminates against a "discrete and insular minority." *United States v. Carolene Products Co.*, 304 *U.S.* 144, 151 n.4 (1934). Thus, the trial court erred in denying Mr. Lamberty's motion to dismiss because 11 *Del. C.* §4120 *et seq.* violates the Equal Protection Clause of Fourteenth Amendment to the United States Constitution.

II. REVERSAL IS REQUIRED BECAUSE 11 *DEL C.* § 4121 *ET SEQ.* IS UNCONSTITUTIONAL AS IT VIOLATES THE DOCTRINES OF SEPARATION OF POWERS AND NON-DELEGATION.

Question Presented

Whether 11 *Del. C.* § 4121 *et seq.* constitutes an impermissible delegation of legislative power by vesting unfettered authority to the Superintendent of the Delaware State Police? The issue was preserved by a motion to dismiss. (A9).

Standard and Scope of Review

Constitutional claims are subject to *de novo* review. *Abrams v. State*, 689 A.2d 1185, 1187 (Del. 1997).

Merits of Argument

The State legislature allows the Superintendent of the Delaware State Police to designate reporting location(s) for sex offenders. *See*, 11 *Del. C.* §4120(g); §4121(k). The statute, as amended, unconstitutionally delegates legislative power without specifying sufficient guidelines within which the Superintendent may act. Because this statute is void of any standards to guide the Superintendent's discretion, it must be declared unconstitutional.

Delaware courts have long recognized the necessity for the General Assembly to delegate its regulatory authority to administrative agencies. *See*,

Hoff v. State, Del.Super., 197 A. 75 (1938). The test for determining the validity of a legislative delegation, which originated in *State v. Durham*, 191 A.2d 646 (Del.Super. 1963) and was later adopted by this Court in *Atlantis I Condo. Ass'n v. Bryson*, 403 A.2d 711 (Del. 1979), states:

> "Generally, a statute or ordinance vesting discretion in administrative officials **without fixing any adequate standards for their guidance** is an unconstitutional delegation of legislative power. But a qualification to that rule is that where the discretion to be exercised relates to police regulation for the protection of public morals, health, safety, or general welfare, and it is impracticable, to fix standards without destroying the flexibility necessary to enable the administrative officials to carry out the legislative will, the legislation delegating such discretion without such restrictions may be valid. **Adequate safeguards and standards to guide discretion must be found in or be inferable from the statute**, but the standards need not be minutely detailed, and the whole ordinance may be looked into in light of its surroundings and objectives for purposes of deciding whether there are standards and if they are sufficient."

191 A.2d, at 649-650. (emphasis added). Judicial review of a legislative delegation therefore focuses on "the totality of protections against (administrative) arbitrariness, including safeguards and standards", regardless whether those protections are set forth in the legislation itself or in the procedures used by the administrative agency to execute the legislation. *Atlantis I Condo. Ass'n*, 403 A.2d at 713, 717.

Here, the statute at issue is wholly absent of any standards to guide the Superintendent's discretion. Instead, it puts all the power in the hands of a

single executive branch administrative officer. Under 11 *Del. C.* §4120(i), the Superintendent may "promulgate reasonable rules, regulations, policies and procedures" that become "enforceable upon adoption by the agency, and shall not be subject to Chapter 11 or Chapter 101 of title 29." The Superintendent may therefore designate reporting locations without following the "notice, hearing and comment" provisions of Chapter 101. *See*, 29 *Del. C.* §10115; §10116; §10117. Moreover, the legislature will not examine whether "this delegation of delegation of authority has resulted in regulations being promulgated without effective review or oversight and conformity to legislative intent." *See*, 29 *Del. C.* §1131. As a result, judicial review is the only protection against the exercise of unbridled discretion by the Superintendent in this case.

As the statute is written, the Superintendent could designate Delaware State Police Troop 1 in north Wilmington as the **only** location at which all sex offenders statewide would be allowed to register. Homeless sex offenders in or around Selbyville, Delaware, would have to make the 109 mile one-way journey to Troop 1, even though Troop 4 in Georgetown, Delaware, is less than 20 miles away.[8] If taken to its logical conclusion,

[8] All mileage listed here is approximate and obtained from www.mapquest.com based on seeking directions from each town (Selbyville, Wilmington and Georgetown) to the actual addresses of Troop 1 and Troop 4.

nothing in the current statute prevents the Superintendent from designating **no** locations as available for in-person registration or verification. There are no guidelines—adequate or otherwise—concerning where these offenders should be required to register. Subsections (b), (c), (d)(1), and (f) of title 11 specify the time allotted for initial registration, the contents of the registration forms to be developed by the Superintendent, and the actions required of the Superintendent upon receiving a new registration. But there is no precise standard for designating reporting locations in the statute. "[T]he discretion conferred on the [Superintendent] is unconfined and vagrant." *Hoff*, 197 A. 75 at 80. He or she may designate locations as they see fit, without any input from the public or oversight from the legislature.

Even though the Superintendent's discretion relates to "police regulation for the protection of public morals, health, safety, or general welfare," it is feasible to fix standards without frustrating the purpose of this legislation. If the legislature required at least one location to be designated in each of Delaware's three counties, the Superintendent could still reasonably carry out the legislature's will. Requiring a minimal amount of registration locations would increase the Superintendent's ability to enforce the sex offender registration laws and come closer to satisfying the statute's state purpose, which is tracking sex offenders as a group. In this instance,

providing **some** guidelines concerning where sex offenders have to register is not impracticable.

Finally, should this Court be reluctant to strike down Section 4120(k) on constitutional grounds, the issue could alternatively be resolved by finding that the regulations imposed on homeless sex offenders are unreasonable as applied, in violation of11 *Del. C.* §4120(i).[9] The Superintendent expects every sex offender in Delaware to verify their registration at two locations in the entire State. For the myriad of reasons detailed above, this expectation is simply unreasonable.

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[9] This Court will refrain from deciding constitutional questions unless a decision can be reached on no other ground. *Carper v. Stiftel,* 384 A.2d 2, 7-8 (Del. 1977). *Accord Wheatley v. State,* 465 A.2d 1110, 1111 (Del. 1983) (citing the "cardinal rule that constitutional questions will not be decided unless essential to the disposition of the case.").

Conclusion

For the reasons and upon the authority cited herein, the undersigned respectfully submits that Mr. Lamberty's conviction should be reversed and sentence vacated.

Respectfully submitted,

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Dated: July 16, 2014