2017 IL App (1st) 142603-U

FIFTH DIVISION
March 3, 2017

No. 1-14-2603

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 12 CR 17969
CARMEN TITO,	)	
Defendant-Appellant.	)	Honorable Michael B. McHale, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where (1) defendant was properly found guilty of two counts of aggravated criminal sexual assault and (2) defendant's substantive and procedural due process rights were not violated by the Sex Offender Registration Act.

¶ 2 Following a bench trial, defendant Carmen Tito was found guilty of three counts of home invasion, two counts of aggravated criminal sexual assault, one count of aggravated criminal sexual abuse, and one count of possession of a controlled substance. The trial court merged the

three counts of home invasion and sentenced defendant to an aggregate of 26 years in the Illinois Department of Corrections. Defendant was further required to register as a sex offender pursuant to the Sex Offender Registry Act (SORA) (730 ILCS 150/1 *et seq.* (West 2014)). On appeal, defendant argues: (1) pursuant to the one-act, one-crime doctrine, his two convictions for aggravated criminal sexual assault cannot stand where both convictions were based on the same aggravating factor; and (2) the SORA statutory scheme violates federal and Illinois constitutional due process rights by infringing on the registrant's fundamental liberty interests without providing substantive or procedural due process. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was initially charged in a 59-count indictment based on his unauthorized entry into the home of M.G. and her subsequent sexual assault which thereafter occurred. Prior to trial, the State nol-prossed 36 counts of the indictment. The State proceeded against defendant on three counts of home invasion (counts 1-3), 16 counts of aggravated criminal sexual assault (counts 4-11, 14, 20-21, and 34-38), one count of aggravated criminal sexual abuse (count 51), one count of robbery (count 57), one count of aggravated battery (count 58), and one count of possession of a controlled substance (count 59).

¶ 5 The victim, M.G., testified as follows. At the time of trial, she was 56 years old. On August 27, 2012, at 3:30 p.m. she was inside her apartment when defendant, who was only wearing a t-shirt and underpants, entered her apartment through the unlocked kitchen door. Defendant's penis was exposed and he demanded her cell phone. M.G. handed him her cell phone and defendant instructed her to go to the front room. Thereafter, defendant approached M.G. and touched her breasts over her clothes. M.G. screamed. Defendant grabbed her and "kept punching [her] in [the] face." Defendant knocked M.G. down and held a pillow over her

face. M.G. was able to move her head so it was no longer under the pillow and defendant informed her that if she did not do what he said he was going to kill her.

¶ 6 Defendant sat down on the couch and forced M.G. to perform oral sex on him. Defendant then removed M.G.'s pants and underwear and inserted his penis into her anus. Shortly thereafter, defendant instructed M.G. to go to the bedroom where he had her perform oral sex on him and then had vaginal sex with her. He then made her return to the front room where he made her engage in oral and vaginal sex. Defendant and M.G. went back to the bedroom where he had vaginal intercourse with her on the bed and on a chair. M.G. testified she did not believe that defendant ejaculated, and could not recall telling police officers that defendant had ejaculated. She further testified she observed defendant ingest what she believed to be cocaine during the attack.

¶ 7 Defendant then instructed M.G. to take a shower and went into the bathroom with her. M.G. entered the shower, but only wet the side of her hair. Defendant and M.G. remained in the bathroom for 10 to 15 minutes, then defendant left. M.G. followed defendant, but defendant instructed her to get back into the shower and remain there for five minutes. M.G. did not get into the shower, but stayed in the bathroom for two to three minutes. When she emerged, defendant was no longer inside her apartment. M.G. opened the kitchen door and observed defendant's feet going upstairs. According to M.G., defendant was inside her apartment for three hours.

¶ 8 M.G. then got dressed in a shirt and underpants and ran out of the apartment building to a nearby carwash. She informed a car wash employee of what had occurred. The police arrived and thereafter brought defendant to the car wash where M.G. identified him as the person who attacked her. M.G. was then taken by ambulance to the hospital where she was seen by a doctor

and underwent testing. M.G. could not recall what she said to the hospital staff regarding the attack. When she was discharged from the hospital, M.G. went to the police station where she identified defendant in a line up.

¶ 9 On cross-examination, M.G. denied asking defendant prior to the attack if he wanted "to party." M.G. further explained that defendant's penis was flaccid when he entered her apartment and when he first made her perform oral sex on him. M.G. also provided estimates of the length of time of each of the sexual encounters which added up to 76 minutes, but on redirect acknowledged that she was not sure of the length of time each encounter took.

¶ 10 Laurene Papendik (Papendik), M.G.'s neighbor, testified that on August 27, 2012, she resided in the same apartment building as M.G. At 6 p.m. she was sitting outside on her balcony with her boyfriend, Gary Gutknecht (Gutknecht), when she observed M.G. According to Papendik, "She just flew by us running like a bat out of hell. She was in her underwear and a t-shirt. I thought that was strange." Papendik got up, and observed M.G. running down Archer Avenue. Papendik climbed over her balcony railing and followed M.G. Papendik found M.G. crouched down next to the soda machine at the car wash. M.G. was crying, shaking, and very distraught. Papendik asked her what had happened and M.G. told her she had been raped and that the perpetrator was still in the apartment building. Papendik exited the car wash and told her boyfriend that the perpetrator was in the apartment building. Gutknecht and a car wash employee went back to the apartment building. Papendik remained with M.G. until the police arrived.

¶ 11 Gutknecht testified that on August 27, 2012, he resided with his girlfriend Papendik at the same apartment building as M.G. At 6 p.m. that evening, he was on his balcony with Papendik when he observed M.G. running past the balcony. Both he and Papendik went over the balcony

railing to follow M.G. Papendik continued to go down Archer Avenue, while he remained on the sidewalk. Papendik then informed him that the perpetrator was "still upstairs." An employee from the car wash came with him to look for the perpetrator. When they entered the apartment building, the employee went up the front stairs and Gutknecht went up the back stairs. Gutknecht then observed defendant on the third floor pounding on a door. Gutknecht and the car wash employee detained defendant until the police arrived three minutes later. Defendant did not attempt to resist Gutknecht or run away.

¶ 12 Dr. Joe Eggebeen (Dr. Eggebeen), an emergency physician employed by Holy Cross Hospital, testified as follows. On August 27, 2012, at 7:15 p.m. he evaluated M.G. at the emergency room. M.G. informed him that she had been punched several times by an assailant and vaginally and orally sexually assaulted. M.G. did not report an anal sexual assault. Dr. Eggebeen conducted a physical examination of M.G. and discovered tenderness and swelling of both lips, bruising and tenderness of her left chest wall, and tenderness in the vaginal area, but with no specific signs of trauma. According to Dr. Eggebeen, the lack of signs of trauma was consistent with what M.G. had reported as it is not common to find signs of trauma when individuals report a sexual assault. This is because the vaginal walls expand easily and absorb injury "very well." Dr. Eggebeen did not recall any injury to M.G.'s anus. A pelvic examination was conducted and swabs were taken from the victim's vagina and mouth along with scrapings from the victim's finger nails. The results of a CT scan of M.G.'s face demonstrated swelling around M.G.'s left eye.

¶ 13 Chicago police officer Charles Honkisz (Honkisz) testified on August 27, 2012, at 6:15 p.m. he and his partner, Officer Dan Goetz, responded to a call of a burglary in progress at an apartment building on the 4800 block of South Archer Avenue. When they arrived, Honkisz

observed defendant being detained by two men on the stairs. Defendant was holding a woman's wallet and a cell phone. Honkisz handcuffed defendant and brought him outside where he was identified by M.G. as the perpetrator.

¶ 14 The State then proceeded to offer the following testimony by stipulation. DNA and blood samples were taken from defendant and M.G., respectively. In addition, M.G.'s bed sheets were collected from her apartment and tested along with defendant's clothing, which included two pairs of denim shorts, one pair of grey briefs, and one black t-shirt. Testing by a forensic scientist revealed that semen was identified on the fitted bed sheet, that blood and semen were indicated on the jean shorts, and that blood was indicated on the briefs. Regarding the semen, the parties stipulated that a forensic scientist would testify that the fitted sheet contained a DNA profile from which defendant could not be excluded. As to the blood found on the jean shorts and briefs, the parties also stipulated that a female DNA profile was identified which matched the DNA profile of M.G. The parties further stipulated that the sexual assault kit collected from M.G. was examined by a forensic scientist and that examination indicated that no semen was identified on the vaginal swabs collected from M.G., but that blood-like stains were discovered on the vaginal swabs. Lastly, the parties stipulated that one of the three bags recovered from defendant tested positive for the presence of cocaine.

¶ 15 Prior to the State resting, photographs were admitted into evidence which portrayed M.G. with a black eye, swollen lip, and scratches on her arm and breasts.

¶ 16 Defendant then moved for a directed finding. The trial court took the matter under advisement and ultimately granted defendant's motion as to counts 11, 38, and 58. Defendant's motion was denied as to the remaining 20 counts.

¶ 17 Defendant then testified as follows. At 5 p.m. on August 27, 2012, he went to his

friend's apartment located on the 4600 block of South Archer Avenue to purchase cocaine. Upon entering the apartment building, he observed M.G. standing near her apartment door. Defendant proceeded to the third floor where he purchased cocaine. As he was coming down the stairs, he again observed M.G. M.G. asked him if he "got party." Defendant replied, "yeah, sure" and followed M.G. to her apartment. Once inside, M.G. again asked him if he "got party." In response, defendant removed his wallet, placed it on the kitchen table, and showed her a baggie of cocaine. Defendant followed M.G. to the front room where M.G. surprised him by removing her t-shirt and bra. Defendant then touched her breasts. M.G. removed the remainder of her clothing and began to perform oral sex on him. Defendant, however, did not achieve an erection. Defendant suggested they move to the bedroom where M.G. continued to attempt oral sex on him, but he still could not achieve an erection.

¶ 18 Defendant then went to the bathroom, leaving M.G. in the bedroom. When he exited the bathroom, defendant felt uncomfortable so he hurriedly put on what he thought were his clothes. Defendant, however, realized that he had mistakenly put on M.G.'s jean shorts, but instead of removing them, he pulled his jean shorts on over top of them. Defendant then, in a rush to collect his belongings, mistakenly took M.G.'s wallet and cell phone from the kitchen table along with his own wallet. It was only when defendant was down the hallway that he realized he had M.G.'s belongings. Rather than return to the apartment, he decided he would leave her possessions at his friend's apartment upstairs. His friend, however, was not at home despite defendant seeing him only a half an hour before. Two men then approached defendant. One man prevented defendant from leaving while the other man went to get the police.

¶ 19 Defendant denied having anal or vaginal intercourse with M.G. He further denied ejaculating, but admitted it was possible that he could have had some "pre-ejaculation leakage"

when on M.G.'s bed or in his jean shorts. He also denied striking, threatening, or suffocating M.G. Defendant further testified he did not observe any bruises or injuries on M.G.'s body except for a scar in her midsection.

¶ 20 The defense rested. After considering the evidence, the trial court found defendant guilty on all the remaining 20 counts. Defendant then moved for a new trial, which was denied. Defendant, however, subsequently filed an amended motion for reconsideration of the verdicts. Upon reconsideration, the trial court found defendant not guilty of 12 of the 20 counts and entered findings of guilty on three counts of home invasion (counts 1-3), two counts of aggravated criminal sexual assault (counts 5 and 7),[1] one count of aggravated criminal sexual abuse (count 51), and one count of possession of a controlled substance (count 59). The trial court then merged the home invasion counts into a single count and sentenced defendant to terms of incarceration of 10 years for home invasion, 7 years for aggravated criminal sexual abuse, and 3 years for possession of a controlled substance, all to be served concurrently. The trial court further sentenced defendant to two 8-year terms of incarceration for aggravated criminal sexual assault to be served consecutively, for an aggregate total of 26 years. Defendant was further advised that he would have to register as a sex offender for life. This appeal follows.

¶ 21 ANALYSIS

¶ 22 On appeal, defendant raises two contentions: (1) pursuant to the one-act, one-crime doctrine, his two convictions for aggravated criminal sexual assault cannot stand where both convictions were based on the same aggravating factor; and (2) the SORA statutory scheme violates federal and Illinois constitutional due process rights by infringing on the registrant's

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[1] Relevant to this appeal, count 5 alleged defendant committed an act of sexual penetration upon M.G.'s mouth by use of force and caused her bodily harm when he struck her about the face. Count 7 alleged defendant committed an act of sexual penetration upon M.G.'s vagina by use of force and caused her bodily harm when he struck her about the face.

fundamental liberty interests without providing substantive or procedural due process. We address each contention in turn.

¶ 23 One-Act, One-Crime Doctrine

¶ 24 Defendant first argues that one of his aggravated criminal sexual assault convictions must be reduced to criminal sexual assault based on the one-act, one-crime doctrine because both counts were premised on a single aggravating factor; namely, that he struck the victim about the face. Defendant maintains that the evidence at trial established that he struck M.G. in the face prior to making her perform oral sex, but not prior to any vaginal penetration. Thus, because two counts of aggravated criminal sexual assault were based on the same aggravating circumstance, this court must reduce count seven to criminal sexual assault and remand for resentencing on this offense.

¶ 25 The State disagrees and maintains that defendant's two convictions for aggravated criminal sexual assault were properly based upon two separate acts of oral and vaginal sexual penetration. The State further asserts that though the evidence demonstrated the victim was struck in the face multiple times, even if she was only struck once, defendant can still be convicted when such a common act is part of both offenses.

¶ 26 Initially, we note, and the defendant acknowledges, that this issue has been forfeited for review on appeal because he failed to raise it before the trial court. However, an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process. Thus, the second prong of the plain-error rule, which allows plain errors affecting substantial rights to be reviewed on appeal, is satisfied. *People v. Harvey*, 211 Ill. 2d 368, 388-89 (2004). Therefore, we turn to the merits of the parties' arguments.

¶ 27 Pursuant to the one-act, one-crime doctrine a defendant cannot be convicted of multiple

offenses "carved from the same physical act," where the "act" is defined as "any overt or outward manifestation which will support a different offense." *People v. King,* 66 Ill. 2d 551, 566 (1977). To determine whether multiple convictions may properly be entered, courts must engage in a two-step analysis. First, the court must determine whether the defendant's conduct consisted of separate acts or a single physical act. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). If the court determines that the defendant committed multiple acts, the court then goes on to determine whether any of the offenses are lesser included offenses. *Id.* If so, then, under *King*, multiple convictions are improper; if not, then multiple convictions may be entered. *Id.* Whether a conviction should be vacated under the one-act, one crime doctrine is a question of law which the court reviews *de novo. In re Angel P.*, 2014 IL App (1st) 121749, ¶ 63.

¶ 28 It is well established that multiple convictions are permitted when a defendant has committed several acts, despite the interrelationship of those acts. *King*, 66 Ill. 2d at 566; *People v. Smith*, 246 Ill. App. 3d 647, 652 (1993). Therefore, a defendant may be prosecuted for more than one criminal act that arises from the same episode or transaction, so long as the charges do not arise from the same physical act. *People v. Segara*, 126 Ill. 2d 70, 77 (1988). In the instance of offenses involving sexual assault, a defendant may be convicted on each act of penetration. See *People v. Bishop*, 218 Ill. 2d 232, 247 (2006). The one-act, one-crime doctrine thus does not apply when the charging instrument and the evidence have established that the defendant committed multiple acts of sexual penetration. *Id.* In the case of aggravated criminal sexual assault, while multiple convictions based on the same physical act are improper, a person can be guilty of two offenses even when a common act is part of both offenses. *Rodriguez*, 169 Ill. 2d at 188-89; see *People v. Anderson*, 325 Ill. App. 3d 624, 638 (2001) (upholding the defendant's convictions of three counts of aggravated criminal sexual assault based on the same aggravating

factor); *People v. Bell*, 217 Ill. App. 3d 985, 1012-13 (1991) (upholding the defendant's multiple convictions of aggravated criminal sexual assault where the defendant committed separate acts of sexual penetration).

¶ 29 We find the cases of *Segara* and *Rodriguez* to be instructive. In *Segara*, following a bench trial, the trial court found the defendant guilty of eight counts of aggravated criminal sexual assault based on the evidence that the defendant entered the victim's home and began to beat her. *Segara*, 126 Ill. 2d at 72-73. He then vaginally raped the victim and forced her to perform oral sex. *Id.* at 73. On appeal, the appellate court vacated all but one of the aggravated criminal sexual assault convictions based on the one-act, one-crime doctrine. *Id.* at 72. The defendant sought review in the supreme court because he believed the matter should be remanded for resentencing due to the fact all but one of his convictions for aggravated criminal sexual assault were vacated. *Id.* at 74. In reviewing the matter, our supreme court held that the appellate court improperly vacated one of the defendant's aggravated criminal sexual assault convictions. *Id.* at 77. The court explained:

> "after defendant forcibly entered the victim's room and after he severely beat her, he committed two acts of criminal sexual assault. For defendant to claim that only one rape occurred, 'demeans the dignity of the human personality and individuality.' [Citation]. To the victim, each rape was 'readily divisible and intensely personal; each offense is an offense against *a person*.' (Emphasis in original.) [Citation]. To permit a defendant to rape an individual several times over a period of time in the same place with little or no break between each act deprecates the heinous and violent nature of each act and the effect each act has upon the victim. Defendant committed two acts each of equal value (Class X felonies) and appropriately may be prosecuted and convicted for each act." *Id.*

¶ 30 In *Rodriguez*, the defendant was charged with eight counts of aggravated criminal sexual assault, one count of home invasion, and two counts of intimidation. *Rodriguez*, 169 Ill. 2d at 185. Some of the sexual assault counts were based on the defendant's displaying or threatening to use a dangerous weapon and others were based on the defendant's committing the offense during a home invasion. *Id.* The jury returned three general verdicts of guilty, one for each offense. *Id.*

¶ 31 The appellate court affirmed the defendant's convictions for aggravated criminal sexual assault and intimidation, but vacated the home invasion conviction as a lesser-included offense of aggravated criminal sexual assault. *Id.* On appeal to the supreme court, the State argued that the appellate court misapplied the *King* doctrine. *Id.* at 186. The court determined that the two offenses of home invasion and aggravated criminal sexual assault were based on separate acts, although a common act—threatening the victim with a gun—was a part of both offenses. *Id.* at 188. The court reasoned, " 'As long as there are multiple acts *as defined in King*, their interrelationship does not preclude multiple convictions.' " (Emphasis in original.) *Id.* at 189 (quoting *People v. Meyers*, 85 Ill. 2d 281, 288 (1981)). Our supreme court concluded that "the convictions for both aggravated criminal sexual assault and home invasion are proper where defendant committed multiple acts, despite the interrelationship of those acts." *Id.* Thus, under *Rodriguez*, an individual can be convicted of separate offenses based on a common act. *Id.* at 188-89.

¶ 32 We conclude that the one-act, one-crime doctrine was not violated here where the evidence demonstrated that defendant severely beat the victim and threatened her life prior to committing multiple acts of sexual penetration. See *id.* An examination of the facts of the instant case reveals that defendant committed two separate and distinct acts of sexual penetration

upon the victim while there existed a common aggravating factor. To require the State prove defendant beat the victim before each and every sexual penetration in order for him to be found guilty of multiple counts of aggravated criminal sexual assault is unsupported by the case law. See *Segara*, 126 Ill. 2d at 77; *Rodriguez*, 169 Ill. 2d at 188-89; *Anderson*, 325 Ill. App. 3d at 638 (upholding the defendant's multiple convictions of aggravated criminal sexual assault based on the same aggravating factor). Accordingly, defendant was properly convicted of two counts of aggravated criminal sexual assault.

¶ 33 We further observe that defendant has failed to cite any relevant authority supporting his position that the State must establish separate aggravating factors in order for him to be guilty of multiple counts of aggravated criminal sexual assault. Defendant relies on two cases: *People v. Crespo*, 203 Ill. 2d 335 (2001) and *People v. Bishop*, 218 Ill. 2d 232 (2006), but we observe that both of these cases involved challenges to the sufficiency of the indictments, which is not at issue here. In addition, our supreme court in *Crespo* indicated that it would have been proper to charge the defendant under multiple counts for each time he stabbed the victim, but that the State intended to treat the conduct of defendant as a single act and thus the multiple convictions were improper. *Crespo*, 203 Ill. 2d at 344-45. Here, the State did not intend to treat defendant's conduct as one single act where it proceeded under a theory that defendant committed aggravated criminal sexual assault each time he penetrated the victim after he severely beat her.

¶ 34 *Bishop* is similarly inapposite. In that case, the court vacated one of the defendant's convictions for aggravated criminal sexual assault based on the defendant's vaginal penetration of the victim that caused her bodily harm, namely pregnancy. *Bishop*, 218 Ill. 2d at 248-49. The State conceded, and the court agreed, that one of the convictions should be vacated because the counts were identical except that one count also alleged the defendant was the victim's family

member. *Id.* There were no allegations in *Bishop* that the victim suffered separate acts of sexual penetration. *Id.* Here, in contrast, the State alleged two separate acts of sexual penetration; namely, oral and vaginal penetration. We find the cases upon which defendant relies to be unpersuasive and for the reasons stated affirm his convictions.

¶ 35 Constitutionality of the SORA Statutory Scheme

¶ 36 Defendant next argues that SORA (730 ILCS 152/101 *et seq.* (West 2014)), and other related statutes applicable to sex offenders (collectively, the "SORA Statutory Scheme") violate his procedural and substantive due process rights through severe restrictions, intrusive monitoring, and burdensome registration requirements. Defendant maintains that he has a fundamental right to "live without burdensome and intrusive monitoring of the minutiae of his life, and without government interference in his right to live or be present in certain locations."

¶ 37 Prior to considering defendant's constitutional arguments, we first address the State's claim that defendant lacks standing to challenge SORA's penalty provision (730 ILCS 150/10 (West 2014)). We find defendant has standing. In order to have standing to bring a constitutional challenge, a party must demonstrate that he or she is within the class aggrieved by the alleged constitutionality. *In re M.I.*, 2013 IL 113776, ¶ 32. In addition, that individual "must have suffered or be in immediate danger of suffering a direct injury as a result of enforcement of the challenged statute." *People v. Greco*, 204 Ill. 2d 400, 409 (2003). "The claimed injury must be: (1) distinct and palpable; (2) fairly traceable to defendant's action; and (3) substantially likely to be prevented or redressed by the grant of the requested relief." *People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶ 27.

¶ 38 Here, defendant asserts that the SORA Statutory Scheme violates substantive and procedural due process. In *Avila-Briones*, this court considered a similar standing argument and

concluded the defendant did have standing to challenge the SORA Statutory Scheme. *Id.* at ¶ 43. The *Avila-Briones* court concluded that the provisions the defendant challenged would automatically apply to him upon his release and that he alleged that the provisions would impact his fundamental right to liberty. *Id.* ¶ 41. The reviewing court reasoned, "Whether these laws, in fact, do infringe on defendant's fundamental rights goes to the merits of his due-process claims, which should not affect his standing to bring them." *Id.* Accordingly, we also conclude defendant has standing to raise a due process challenge to the SORA Statutory Scheme. See *id.* ¶ 43. We now turn to consider the merits of defendant's constitutional arguments.

¶ 39 Defendant argues that the SORA Statutory Scheme violates the due process clauses of the United States and Illinois Constitutions. U.S. Const. amend. XIV; Ill. Const. 1970, art. I, § 2. He contends that, applying the factors set out in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-69 (1963), the SORA Statutory Scheme has become punitive rather than regulatory, that the lifetime regulations imposed by the SORA Statutory Scheme violate a fundamental liberty interest without safeguards to ensure that only those who pose an actual risk of reoffending are subject to those restrictions, and that the burdens and restrictions the SORA Statutory Scheme places on registrants' fundamental rights do not survive strict scrutiny or, if strict scrutiny is not applicable, rational basis review.

¶ 40 The constitutionality of a statute is a question of law, which is reviewed *de novo. People v. Molnar,* 222 Ill. 2d 495, 508 (2006). Statutes are afforded a presumption of constitutionality, and this court has an obligation to construe a statute in a manner that would uphold its constitutionality if reasonably possible. *Id.* The burden is on the party challenging the validity of a statute to establish its constitutional infirmity. *Id.* at 509. The Illinois Supreme Court has previously upheld the constitutionality of earlier versions of the sex registration and notification

statutes against constitutional challenges. See, *e.g., People v. Cornelius*, 213 Ill. 2d 178 (2004); *People v. Malchow*, 193 Ill. 2d 413 (2000); *People v. Adams*, 144 Ill. 2d 381 (1991).

¶ 41 Defendant's argument is based on what he refers to as the "2014 version of SORA," which includes substantive amendments to the SORA Statutory Scheme passed by the legislature within the last several years. We agree with defendant's contention that the current version of the SORA Statutory Scheme has become "more onerous with regard to the amount of information a sex offender must disclose, the number of agencies to which the offender must disclose that information, and how often a sex offender must register." *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 51.

¶ 42 Defendant maintains that the additional burdens imposed by amendments to the SORA Statutory Scheme are so significant that the statutes are in fact punitive, under the factors set out in *Mendoza-Martinez,* regardless of the fact that the legislature's intent was not to create a punitive scheme. Defendant argues that although our supreme court examined whether the SORA Statutory Scheme was "punitive," it did not employ the *Mendoza-Martinez* test and urges us to do so here.

¶ 43 Under the *Mendoza-Martinez* test, we examine seven factors to determine whether a civil statue has a punitive effect despite its nonpunitive intent:

> "(1) whether the sanction involves an affirmative disability or restraint; (2) whether the sanction has been historically regarded as punishment; (3) whether the sanction comes into play only on a finding of *scienter;* (4) whether operation of the sanction will promote retribution and deterrence; (5) whether the behavior to which the sanction applies is already a crime; (6) whether an alternative purpose to which the sanction may rationally be connected is assignable to it; and (7) whether the sanction appears excessive in

relation to the alternative purpose assigned." *People v. Fredericks*, 2014 IL App (1st) 122122, ¶ 58 (citing *Malchow*, 193 Ill. 2d at 421 (citing *Mendoza-Martinez*, 372 U.S. at 168-69)).

In Illinois, the punitive effect of the challenged provisions must be demonstrated by "the clearest proof." (Internal quotation marks omitted.) *Malchow,* 193 Ill. 2d at 421.

¶ 44 This court has already conducted such an analysis in *Fredericks* (involving the constitutionality of the 2013 SORA Statutory Scheme) and *In re A.C.*, 2016 IL App (1st) 153047 (involving the 2014 SORA Statutory Scheme) and concluded that under the *Mendoza-Martinez* test the amendment to SORA did not violate *ex post facto* protections or render the SORA punitive. See *Fredericks*, 2014 IL App (1st) 122122, ¶¶ 58-61; *A.C.*, 2016 IL App (1st) 153047, ¶¶ 72-77. Accordingly, based on the analysis in *Fredericks* and *A.C.*, we reject defendant's contention that the current version of the SORA has transformed into a punitive regime.

¶ 45 Turning to defendant's arguments that the SORA Statutory Scheme violates his substantive and procedural due process rights, we observe that this court in *Avila-Briones* rejected the same constitutional arguments that defendant asserts here. See *Avila-Briones*, 2015 IL App (1st) 132221, ¶¶ 71-93. These arguments have also been rejected by other divisions and districts of our appellate court. See *A.C.*, 2016 IL App (1st) 153047, ¶ ¶ 35-79 (rejecting due process and eighth amendment challenges to SORA as applied to a juvenile offender); *People v. Pollard*, 2016 IL App (5th) 130514, ¶ 23 (following the "persuasive reasoning" articulated in *Avila-Briones* and rejecting the defendant's procedural and substantive due process claims and eighth amendment proportionate penalties challenges to the SORA); *People v Parker*, 2016 IL App (1st) 141597, ¶ 77 (rejecting procedural and substantive due process challenges to the SORA Statutory Scheme). Having considered defendant's arguments, we agree with the

conclusions reached in these decisions.

¶ 46 "The procedural due process clause entitles individuals to certain procedures before the State may deprive them of a life, liberty, or property interest." *Avila-Briones,* 2015 IL App (1st) 132221, ¶ 88. In determining how much process is required, courts consider three factors: "(1) the private interest that will be affected by the government action; (2) the risk of an erroneous deprivation of that private interest through the procedures used and the probable value of additional procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional procedures would entail." *Id.*

¶ 47 In contrast, "[s]ubstantive due process bars the government from arbitrarily exercising its power without the reasonable justification of serving a legitimate interest." *Pollard,* 2016 IL App (5th) 130514, ¶ 31 (citing *Daniels v. Williams,* 474 U.S. 327, 331 (1986)). In determining whether a statute violates due process, we must first " 'determine the nature of the right purportedly infringed upon by the statute.' " *Id.* (quoting *In re J.W.,* 204 Ill. 2d 50, 66 (2003)). If a fundamental constitutional right is involved, we employ strict scrutiny analysis to determine if the statute serves a compelling government interest and is narrowly tailored to serve that interest. *Id.* ¶ 32 (citing *Cornelius,* 213 Ill. 2d at 204). If the statute does not impact a fundamental right, then we apply the rational-basis test to the statute. *Id.* at 203. Under the rational-basis test, the statute must simply bear a rational relationship to any legitimate government interest. *Avila-Briones,* 2015 IL App (1st) 132221, ¶ 71 (citing *People v. Boeckmann,* 238 Ill. 2d 1, 7 (2010)).

¶ 48 In *Avila-Briones*, the court addressed the same issue defendant raises here, whether there is a fundamental right "to be free from a lifetime of burdensome, intrusive monitoring and restrictions" and whether the SORA Statutory Scheme infringes on that right. *Avila-Briones*,

2015 IL App (1st) 132221, ¶¶ 69-71. Upon analyzing the SORA Statutory Scheme, the court concluded that the provisions did not infringe on any fundamental right (*id.* ¶¶ 72-76) and determined that it passes rational basis review because it serves the legitimate state interest of protecting the public from sex offenders and is rationally related to that interest despite the possibility that it may be over-inclusive (*id.* ¶¶ 82-84).

¶ 49 The reviewing court further rejected the argument defendant makes here, that the SORA Statutory Scheme violates procedural due process by failing to include a mechanism by which the state could evaluate his risk for reoffending. *Id.* ¶¶ 91-92. Relying on *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 4, 7-9 (2003), the *Avila-Briones* court noted that no such additional procedures would be necessary to satisfy due process because the SORA Statutory Scheme is based entirely upon the convicted offense, which the offender received a procedurally safeguarded opportunity to contest, and the offender's likelihood to reoffend is not relevant to determining whether he committed the charged crime. *Id.* ¶ 91. As observed by the *Avila-Briones* court, Illinois has adopted the rationale of *Connecticut Department of Public Safety* because "Illinois' system, like Connecticut's, is based entirely on the offense for which a sex offender has been convicted" and thus "a sex offender's likelihood to reoffend is not relevant to that assessment." *Id.* ¶ 92 (citing *People v. Stanley*, 369 Ill. App. 3d 441, 448-50; *In re J.R.*, 341 Ill. App. 3d 784, 795-96 (2003)).

¶ 50 In *A.C.*, a matter involving a juvenile, the respondent was adjudicated delinquent of aggravated criminal sexual abuse and ordered to register under the SORA. *A.C.*, 2016 IL App (1st) 153047, ¶ 1. On appeal, the respondent challenged the constitutionality of the 2014 SORA Statutory Scheme arguing in pertinent part that the SORA violated his substantive and procedural due process rights. *Id.* ¶¶ 35, 59. Relying on *J.W.*, 204 Ill. 2d 50 (2003), and *Avila-*

Briones, the *A.C.* court first determined that the respondent's claim did not involve a fundamental right (*A.C.*, 2016 IL App (1st) 153047, ¶ 43) and rejected respondent's contention that under the rational basis test the SORA Statutory Scheme violated substantive due process as it is "rationally related to the purpose of protection of the public from sexual offenders and constitute a reasonable means of accomplishing this goal." (*id.* ¶ 57). With regards to the respondent's procedural due process claim, the *A.C.* court observed that the SORA Statutory Scheme does not "implicate protected liberty or property rights" (*id.* ¶ 63) and concluded that it was appropriate to apply SORA to juveniles given its intent to protect the public and our supreme court's decisions that the SORA affords respondents sufficient procedural safeguards (*id.* ¶ 66).

¶ 51 Accordingly, based on the well-established case law, we conclude that there is no basis for defendant's argument that the SORA Statutory Scheme violates substantive or procedural due process. See *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 94; *A.C.*, 2016 IL App (1st) 153047, ¶¶ 57, 66); *Parker*, 2016 IL App (1st) 141597, ¶ 77; *Pollard*, 2016 IL App (5th) 130514, ¶¶ 44, 48.

¶ 52 CONCLUSION

¶ 53 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 54 Affirmed.