

No. 1-15-1938

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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
Plaintiff-Appellee,)	Cook County, Illinois.
)	
v.)	No. 11 CR 17332 (01)
)	
JUAN RODRIGUEZ,)	Honorable
)	Lauren Ediden,
Defendant-Appellant.)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* Applying rational basis review, Illinois Sex Offender Registration Act (SORA) statutory scheme survives defendant Juan Rodriguez’s facial and as-applied substantive due process challenge.

¶ 2 In May 2013, the State appealed the trial court’s ruling that defendant Juan Rodriguez, who was found *not* not guilty of aggravated criminal sexual assault on the basis of unfitness, was not required to register as a sex offender pursuant to the Sex Offender Registration Act, 730 ILCS 150/1, *et seq.* (West 2012) (SORA), because he was incapable of understanding the registration requirements. We held that pursuant to *People v. Cardona*, 2013 IL 114076, ¶ 25

“an individual found *not* not guilty of a sex offense, even on the basis of being found unfit, falls within the purview of SORA,” and is required to register. *People v. Rodriguez*, 2014 IL App (1st) 141255-U, ¶ 25.

¶ 3 On remand, the trial court ordered Rodriguez to register as a sex offender, and Rodriguez now appeals that ruling, arguing that the SORA statutory scheme is unconstitutional both on its face and as applied to him, an unfit defendant allegedly incapable of understanding the registration requirements. For the reasons that follow, we affirm.

¶ 4 BACKGROUND

¶ 5 The facts of this case were set forth in detail in our order of December 30, 2014, *Rodriguez*, 2014 IL App (1st) 141255-U, ¶¶ 4-17, and we describe here only those proceedings that occurred following remand to the trial court.

¶ 6 On April 16, 2015, the trial court held a hearing to notify Rodriguez, who was represented by counsel, of his obligation to register under SORA. The State read the registration requirements to Rodriguez on the record and they were translated into Spanish. But when Rodriguez was asked to sign a document stating that he understood the registration requirements, he repeatedly stated “I don’t understand what is this. I don’t know what this is.” In response to his counsel’s objection that Rodriguez was incapable of understanding what was required of him, the State struck the language indicating otherwise, but Rodriguez persisted in his refusal to sign. The trial court then ordered the State to indicate on the form that it was “read and translated in open court,” that Rodriguez was present with his attorney and a translator, and that he refused to sign. This appeal follows.

¶ 7 ANALYSIS

¶ 8 The sole issue on appeal is the constitutionality of subjecting unfit defendants found *not* not guilty of sexual assault to SORA’s “statutory scheme,” which, according to Rodriguez, encompasses the duty to register (730 ILCS 150/3 (West 2014)), the penalty for noncompliance with the registration requirements and the failure to register (730 ILCS 150/7, 10 (West 2014)), the limitations on a sex offender’s residence and presence in certain locations (720 ILCS 5/11-9.3, 9.4-1 (West 2014)), the requirement that a sex offender must renew his driver’s license yearly (730 ILCS 5/5-5-3(o) (West 2014)), and the prohibition on name changes for sex offenders (730 ILCS 5/21-101 (West 2014)).

¶ 9 At the outset, two preliminary matters demand our attention. First, we address the State’s argument that the law of the case doctrine bars Rodriguez’s constitutional challenge to SORA. The State contends that we decided this issue in our 2014 order holding that Rodriguez was required to register as a sex offender. But contrary to the State’s assertion, our holding did not rest on constitutional grounds. Rather, we relied on *Cardona* and engaged in statutory interpretation to conclude that notwithstanding that he was found *not* not guilty of committing a sex offense, Rodriguez met the statutory definition of a sex offender, and as such, was required to register under SORA. *Rodriguez*, 2014 IL App (1st) 141255-U, ¶ 25. Because we did not rule on the constitutionality of the SORA statutory scheme, the law of the case does not preclude consideration of Rodriguez’s constitutional challenge in this appeal.

¶ 10 Next, we turn to the issue of standing. The State contends that Rodriguez lacks standing to mount a challenge to all but section 3 of SORA, setting forth the registration requirements. In order to have standing to challenge the constitutionality of a statute, a person must have suffered or be in imminent danger of suffering a direct injury as a result of the statute’s enforcement. *People v. Greco*, 204 Ill. 2d 400, 409 (2003). In other words, a party may not raise a

constitutional challenge to a statute that does not affect him or her. *In re Veronica C.*, 239 Ill. 2d 134, 147 (2010).

¶ 11 We have previously considered and rejected the State's argument that a defendant sex offender lacks standing to challenge the limitations on presence and residence applicable to him as well as the other civil consequences he faces as a result of his sex offender status (yearly renewal of his driver's license and inability to change his name). See *People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶¶ 40-43; *People v. Pollard*, 2016 IL App (5th) 130514, ¶¶ 26-27. In *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 41, we explained that the restrictions on residency, presence, and name changes, as well as the requirement to renew one's driver's license annually, are all automatically applicable to a defendant classified as a sex offender. Merely because a defendant does not allege that he wishes to live in a certain prohibited location or change his name, it does not follow that he is not affected by these laws. *Id.* at ¶ 42. Therefore, Rodriguez has standing to challenge these provisions.

¶ 12 However, we agree with the State that Rodriguez lacks standing to challenge section 10 of SORA (prescribing the penalty for failure to register), because he has not been charged with violating that section. The juvenile defendant made a similar claim to standing in *In re A.C.*, 2016 IL App (1st) 153047, ¶ 24, which we rejected, explaining that where the respondent had not failed to comply with his registration requirements or been charged with a felony, he was not in danger of suffering a direct injury as a result of that provision. Similarly, Rodriguez has not alleged that he failed to register or that he has been charged with violating SORA's requirements, and as such, he likewise lacks standing to mount a constitutional challenge to this statutory section.

¶ 13 Turning to the merits of Rodriguez’s claims, we review a challenge to the constitutionality of a statute *de novo*. *People v. Mosley*, 2015 IL 115872, ¶ 22. All statutes are presumed constitutional and the party bringing a constitutional challenge bears the burden of rebutting that presumption. *People v. Hollins*, 2012 IL 112754, ¶ 13. If reasonably possible, we must construe the statute to affirm its constitutionality and validity. *Id.*

¶ 14 When confronted with a claim that a statute violates the constitutional guarantee of due process, the first step is to determine the nature of the right purportedly infringed by the statute. *People v. Cornelius*, 213 Ill. 2d 178, 203 (2004). Here, Rodriguez contends that the statute infringes on an unfit defendant’s fundamental right to be free from punishment, and as such, is subject to strict scrutiny. See *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 307 (2008) (statutes implicating fundamental rights are reviewed under strict scrutiny).

¶ 15 Before considering the merits of this claim, we must first determine whether the SORA statutory scheme constitutes “punishment” at all. Our supreme court has answered that question in the negative on several occasions, most recently in 2013. *People v. Cardona*, 2013 IL 114076, ¶ 24; see also *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 203 (2009); *People v. Malchow*, 193 Ill. 2d 413, 424 (2000). Rodriguez acknowledges these holdings, but maintains that they are outdated, as the registration requirements and limitations imposed on sex offenders have become more onerous since these cases were decided. Specifically, today’s SORA (1) increases the number of agencies with which a sex offender must register to include not only police departments in the county where the offender resides, but also in the county where he works or attends school (730 ILCS 150/3(a), (d) (West 2014)); (2) increases the amount of information a sex offender must provide when registering to include a photograph, telephone number, place of employment, employer’s telephone number, school attended, information about his qualifying

offense, information about identifying marks on his body, license plate numbers for vehicles registered in his name, and all email addresses, internet identities, and internet sites he maintains (730 ILCS 150/3(a) (West 2014)); (3) provides less time to report changes in this information (from ten days to three days) (compare 730 ILCS 150/3(b) (West 2014) with 730 ILCS 150/3(b) (West 1998)); (4) increases how often a sex offender must register and how often he must report in person (730 ILCS 150/6 (West 2014)); (5) increases the initial and annual registration fees (730 ILCS 150/3(c)(6) (West 2014)); (6) imposes harsher penalties for non compliance with registration requirements (730 ILCS 150/10 (West 2014)); and (7) imposes greater restrictions on where a sex offender can live or be present (720 ILCS 5/11-9.3, 11-9.4-1 (West 2014)).

¶ 16 Determining whether a law imposes punishment turns first on whether the legislature intended the law to be punitive or to establish civil consequences. *Smith v. Doe*, 538 U.S. 84, 92 (2003); *Cornelius*, 213 Ill. 2d at 208 (2004). Rodriguez does not dispute that with regard to SORA, the legislative intent was not to impose additional punishment on sex offenders. However, even when the legislature intends to enact a civil regulatory scheme, the law may nevertheless constitute punishment if “the clearest proof” shows that it is punitive in purpose or effect. *Malchow*, 193 Ill. 2d at 421 (citing *Kansas v. Hendricks*, 421 U.S. 346, 361 (1997)); *People v. Fredericks*, 2014 IL App (1st) 122122, ¶ 56. When determining whether an ostensibly civil statute has a punitive effect, Illinois courts have applied the seven factor test first set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), which considers whether (1) the sanction involves an affirmative disability or restraint, (2) the sanction has historically been regarded as punishment, (3) the sanction is applicable only upon a finding of *scienter*, (4) operation of the sanction promotes retribution and deterrence, (5) the behavior to which the sanction applies is already a crime, (6) an alternative purpose to which the sanction may

rationality be connected is assignable to it, and (7) the sanction appears excessive in relation to the alternative purpose assigned. See *Malchow*, 193 Ill. 2d at 421.

¶ 17 We previously applied the *Mendoza-Martinez* factors to the 2013 SORA in *Fredericks*, 2014 IL App (1st) 122122, ¶ 58, and *A.C.*, 2016 IL App (1st) 153047, ¶¶ 77-78, and determined that the changes to SORA since *Malchow* did not render the Act punitive. We reach the same conclusion today.

¶ 18 In the context of sex offender registration statutes, factors (3) and (5) are of little weight (see *Smith*, 538 U.S. at 105), and we instead focus on the remaining five factors. With regard to the first factor, Rodriguez contends that the requirement of in-person registration amounts to an affirmative restraint. But the 1998 SORA imposed an identical requirement, and *Malchow* nevertheless held that the Act did not amount to an affirmative disability as the defendant's movements and activities were not restrained in any way. *Malchow*, 193 Ill. 2d at 421. To be sure, the 2014 SORA imposes a shortened time period for complying with the in-person registration requirements in certain circumstances, but Rodriguez does not explain how this operates as a restraint on his movement.

¶ 19 Turning to the second factor, the act of appearing in person and registering is not traditionally regarded as punishment in the same way as mandatory supervised release or parole, as Rodriguez contends. Indeed, the Supreme Court rejected this identical argument in *Smith*, when it evaluated Alaska's SORA. In *Smith*, the Court explained that "[p]robation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction[.]" while under Alaska's SORA, offenders were able to move where they wished without supervision. *Smith*, 538 U.S. at 101-02. Illinois' SORA, like Alaska's, does not require offenders to seek permission to move about the

state, though it requires offenders to inform authorities about their movements. Nor do Illinois police have the authority to revoke an offender's registration as they do for parolees. Because the registration requirement is sufficiently dissimilar to parole, we cannot say it has historically been regarded as punishment.

¶ 20 Nor does the SORA scheme promote retribution or deterrence. Rather, as the court held in *Malchow*, it is concerned with ensuring public safety. *Malchow*, 193 Ill. 2d at 423. Certainly, SORA can also deter crime, but this is a collateral effect of the registration scheme that does not detract from the fact that the primary purpose of SORA is to protect the public. And because the purpose of SORA is to protect the public, the sixth *Mendoza-Martinez* factor – whether an alternative purpose to which the sanction may rationally be connected is assignable to it – also weighs in favor of finding that the SORA statutory scheme is non-punitive.

¶ 21 Finally, Rodriguez contends that because SORA does not allow a mechanism by which an offender can petition for relief from registering when he is no longer a danger, it is disproportionate to the need to protect the public – *Mendoza-Martinez*'s seventh factor. But the 1998 SORA likewise did not provide for a procedure that would allow an offender to obtain relief from the registration requirements, and the supreme court nevertheless found it proportional to the purpose of protecting the public. *Malchow*, 193 Ill. 2d at 423. Moreover, today's SORA in fact has a termination provision for juveniles who are adjudicated guilty of sex offenses who pose no risk of harm. See 730 ILCS 150/3-5 (West 2014). For these reasons, we conclude that while the SORA statutory scheme has become more onerous since 1998, it remains non-punitive in effect under *Mendoza-Martinez*.

¶ 22 Rodriguez's arguments to the contrary are premised on cases from outside Illinois. But where there is Illinois law on point, we need not, and should not, consider cases from other

jurisdictions. *People v. Qurash*, 2017 IL App (1st) 143412, ¶ 34. In any event, the cases to which Rodriguez cites are distinguishable. For example, Rodriguez relies on *Does #1-5 v. Snyder*, 834 F.3d 696, 705-06 (6th Cir. 2016), where the Sixth Circuit found that Michigan’s sex offender registration scheme, although ostensibly a civil regulatory statute, had punitive effects. But as we found in *People v. Parker*, 2016 IL App (1st) 141597, ¶ 64, not only is the Michigan scheme is distinguishable from the Illinois version of SORA, but the civil plaintiffs in *Does* also supported their claims with an “extensive demonstration” that included maps depicting the effects of the Michigan law’s geographical restrictions on sex offender presence and residence. Rodriguez, just as the defendant in *Parker*, has not presented any comparable evidence of the Illinois scheme’s punitive effects.

¶ 23 The remaining cases Rodriguez relies on from Alaska, Oklahoma, Indiana, and Maryland are likewise inapposite, as those states, unlike Illinois, have not adopted the Supreme Court’s “clearest proof” standard in evaluating whether a law has a punitive effect, and instead accept a different standard of proof. See *Doe v. State*, 189 P. 3d 999 (Alaska 2008); *Starkey v. Oklahoma Department of Corrections*, 305 P. 3d 1004 (Okla. 2013); *Gonzalez v. State*, 980 N.E.2d 312 (Ind. 2013); *Doe v. Department of Public Safety and Correctional Services*, 62 A.2d 123 (Md. App. Ct. 2013).

¶ 24 Because we have determined that the burdens imposed on those subject to SORA’s statutory scheme are not punitive so as to override the legislature’s intent to create a civil sanction, Rodriguez’s argument that the scheme violates his fundamental right to be free from punishment necessarily fails. But this is not the end of the analysis. Rodriguez’s failure to identify a fundamental right merely results in the application of rational basis review to the SORA statutory scheme. See *e.g.*, *In re J.W.*, 204 Ill. 2d 50, 67 (2003) (finding that Registration

Act did not implicate fundamental rights and applying rational basis review); *People v. Bingham*, 2017 IL App (1st) 143150, ¶ 19 (appeal allowed by *People v. Bingham*, Ill., May 24, 2017) (same); *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 81 (same).

¶ 25 Importantly, rational basis review is highly deferential to the legislature; it is not concerned with the wisdom of the statute or whether it is the best means to achieve the desired outcome. *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 125-26 (2004). Rather, “[s]o long as there is a conceivable basis for finding the statute rationally related to a legitimate state interest, the law must be upheld.” *Id.* at 126.

¶ 26 Rodriguez maintains that SORA fails rational basis review as it is both overinclusive and underinclusive. Specifically, he argues that the law is overinclusive because it encompasses offenders in its broad net who are unlikely to recidivate, and underinclusive because it allows those who pose a greater risk of recidivism to escape its reach by pleading guilty to lesser offenses. But under rational basis review, “a statute ‘is not fatally infirm merely because it may be somewhat underinclusive or overinclusive.’” *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 83 (quoting *Maddux v. Blagojevich*, 233 Ill. 2d 508, 547 (2009)). Here, despite being in certain ways under- or overinclusive, the SORA statutory scheme is rationally related to protecting the public from sex offenders, which is a legitimate state interest.

¶ 27 SORA enables law enforcement to monitor the whereabouts of sex offenders. And “by keeping sex offenders who have committed offenses against children away from areas where children are present (*e.g.*, school property and parks) and out of professions where they could come in contact with children (*e.g.*, driving an ice cream truck, being a shopping-mall Santa Claus), or vulnerable people (*e.g.*, driving an emergency services vehicle),” the legislature rationally limited the opportunities sex offenders have to reoffend. *Avila-Briones*, 2015 IL App

(1st) 132221, ¶ 84; see also *People v. Pollard*, 2016 IL App (5th) 130514, ¶¶ 41-43; but see *State v. Pepitone*, 2017 IL App (3d) 140627, ¶ 24 (appeal allowed by *People v. Pepitone*, Ill., May 24, 2017) (holding that section 11-9.4-1(b), prohibiting sex offenders from being present in public parks, is facially unconstitutional because it criminalizes potentially innocent conduct); *People v. Jackson*, 2017 IL App (3d) 150154, ¶ 29 (same). Thus, although the scheme may be imperfect, it is rationally related to the legitimate state interest of protecting the public from sex offenders and not unconstitutional on its face.

¶ 28 Rodriguez’s argument that the statutory scheme is unconstitutional as applied to him fares no better. Rodriguez maintains that his “cognitive and physical defects” “make reoffending next to impossible” and also make him unable to comprehend and comply with the SORA statutory scheme. But Rodriguez suffered from the same cognitive defects at the time he was charged with the offense that led to this proceeding; he has not alleged any new defects that would prevent him from committing a similar offense in the future. And we rejected Rodriguez’s contention that he was incapable of understanding or complying with the registration requirements in our earlier decision:

“The evidence adduced during the discharge hearing demonstrates that Rodriguez has some level of cognitive functioning as was evident when he partially closed the apartment's blinds, presumptively to conceal his actions, made sexual advances to J.K. when no other adult was home, repeatedly pushed and restrained J.K. and had a condom in his pocket that he showed to K.J. and stated “it's okay, I got protection.” Further, Rodriguez’ initial statement to Officer Domenech indicating, in an effort to deflect responsibility, that he only touched K.J. on her [shoulder] is indicative of his ability to appreciate that his actions were wrong.

The evidence also reveals that Rodriguez had worked in a shop where his responsibilities included sweeping, putting on gloves, and gathering scrap metal and brake lining and putting them in a truck. Rodriguez was also responsible for his own personal hygiene, had the ability to clean, do laundry, pay bills, and received a high school degree from a school that specializes in teaching individuals with cognitive deficits.” *Rodriguez*, 2014 IL App (1st) 141255-U, ¶ 26.

In light of this evidence, we concluded that Rodriguez was capable of complying with the registration requirements and we decline to find otherwise today.

¶ 29 For these reasons, we affirm the constitutionality of the SORA statutory scheme both on its face and as applied to Rodriguez.

¶ 30 CONCLUSION

¶ 31 Affirmed.