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Bottum v. Idaho State Police Appellant's Brief Dckt. 39772

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IN THE SUPREME COURT OF THE STATE OF IDAHO

RANDALL PHILLIP BOTTUM,)
)
Petitioner-Appellant,)
)
vs.)
)
IDAHO STATE POLICE, BUREAU)
OF CRIMINAL IDENTIFICATION)
CENTRAL SEX OFFENDER)
REGISTRY,)
)
Respondent.)
_____)

Docket No. 39772-2012

BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District for Kootenai County

The Honorable Michael J. Griffin, District Judge, presiding.

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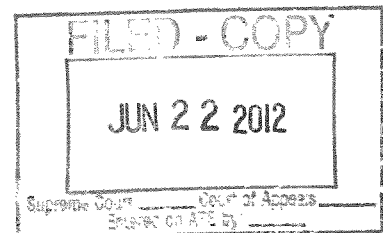


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Statement of the Case

(i)

Nature of the Case

This is an appeal from the denial of a Petition to be released from sex offender registration.

(ii)

Course of the Proceedings Below

Appellant filed his Petition to be Released from Sex Offender Registration Requirements on June 15, 2011. R., pp. 1-17. The Idaho State Police, Bureau of Criminal Identification, filed its objection to the Petition on June 24, 2011. The case was eventually assigned to the Honorable Michael J. Griffin, District Judge.

Oral argument on the Petition was heard on February 6, 2012. Tr., p. 4. The Court issued its Findings of Fact, Conclusions of Law and Order Denying the Petition on February 8, 2012. R., pp. 37-39. The Notice of Appeal was filed March 12, 2012. R., 40-42.

(iii)

Statement of the Facts

On July 29, 1991, the Petitioner was sentenced for the offense of Lewd Conduct with a Minor Child, a violation of Idaho Code Section 18-1508. He received a suspended sentence, with five (5) years probation and 120 day jail sentence. R., pp. 5-8. He completed his jail sentence on November 26, 1991, graduated from a sex offender treatment program and was

discharged early from supervised probation due to his exemplary performance. R., p. 9.

At the time Petitioner was sentenced, there was no sex offender registration statute in existence. In 1993 the “Sex Offender Registration Act” was passed, effective July 1, 1993. 1993 Sess. Laws, ch. 155, pp. 392-94. That law required registration for a period of 10 years “after the date of discharge from probation, parole or release from incarceration, whichever is greater” and provided for expungement of the registration obligation at the end of that period of time. 1993 Sess. Laws at pp. 393-94.

In 1998 the Legislature repealed the “Sex Offender Registration Act” and enacted the “Sexual Offender Registration Notification and Community Right-to-Know Act” [hereinafter referred to as SORA], codified at Idaho Code Section 18-8301 et seq. That statute, like its predecessor, was made applicable to those individuals who were on probation (like Petitioner) for a sex offense covered by the law as of July 1, 1993. When enacted, the SORA allowed “any person, other than one designated as a violent sexual predator” to petition to be released from registration requirements “after a period of ten (10) years from the date the person was released from incarceration or placed on parole, supervised release or probation, whichever is greater....” Idaho Code Section 18-8301(1). Under this version of the SORA, Petitioner was eligible (and qualified) to be released from registration requirements as of November, 2001.

In 2009 the SORA was amended to expand the definition of a crime defined as an “aggravated offense” to include “lewd conduct” under Idaho Code Section 18-1508, as an offense that precluded any relief from the registration requirements of the statute.

Issue Presented on Appeal

Does Idaho Code Section 73-101 bars application of the 2009 amendments to the Sex Offender Registration Act to Appellant's petition to be released from sex offender registration requirements?

Argument

In an advisory ruling, the Court has determined that the Ex Post Facto Clause of both the federal and state constitutions does not prohibit retroactive application of amendments to the SORA, which render formally eligible petitioners ineligible for relief from the registration requirements of the statute, as “the constitutional prohibition on ex post facto law applies only to penal statutes which disadvantage the offender affected by them.” *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). *State v. Johnson*, ___ Idaho ___, (December 8, 2011), 2011 op. no. 130 [the Court's holding was that it lacked jurisdiction to consider the appeal, as the Petitioner had filed his Petition in the original criminal action as opposed to initiating a new civil action, and therefore the District Court lacked jurisdiction to consider the Petition].

The SORA “provides an essential regulatory purpose that assists law enforcement and parents in protecting children and communities.” *Ray v. State*, 133 Idaho 96, 101 (1999). The SORA has been determined to be “civil and nonpunitive” and therefore outside an Ex Post Facto Clause analysis. *State v. Johnson, supra*; see also *State v. Gragg*, 143 Idaho 74 (Ct. App. 2005), rev. denied.

“Idaho Code Section 73-101 sets forth that no statute, whether criminal or civil in nature, is retroactive unless expressly so declared. ‘A retrospective or retroactive law is one which takes

away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.’ 82 C.J.S. Statutes Section 407 (1999). ‘[I]n Idaho , a statute is not applied retroactively unless there is ‘clear legislative intent to that effect.’ *Gailey v. Jerome County*, 113 Idaho 430, 432, 745 P.2d 1051, 1053 (1987) (quoting *City of Garden City v. City of Boise*, 104 Idaho 512, 515, 660 P.2d 1355, 1358 (1983)). However, in the absence of express declaration of legislative intent, a statute, which is remedial or procedural in nature, and which does not create, enlarge, diminish, or destroy vested rights, is generally held not to be retroactive, even though it was enacted subsequent to the events to which it applies. *Id.*” *Wheeler v. Idaho Dept. of Health and Welfare*, 147 Idaho 257, 262 (2009) [eventually deciding “there was no need...to consider” the retroactivity issue as the pivotal event (child support arrearages triggering a driver’s license suspension) occurred after the effective date of the legislation in question)].

The 2009 amendment to the SORA at issue in this case was not expressly made retroactive. 2009 Sess. Laws, ch. 250. The amendment makes substantive changes to eligibility for relief from the duty to register as a sex offender that “attaches a new disability in respect to transactions or considerations already past.” Prior to the amendment, Appellant had been eligible to be released from SORA requirements since 2001. The effect of the amendment, by including the offense to which he plead guilty in 1991 as now an offense the precludes any relief from the registration requirements regardless of the personal circumstances of the petitioner, can only be considered substantive legislation that is not technical or procedural in nature.

To counsel’s knowledge the Court has not applied Section 73-101 to amendments to the

SORA. In a somewhat related case, the Court did briefly address Section 73-101, but appears to have equated that with an Ex Post Facto Clause analysis without specifically addressing the statute's effect on "civil" legislation. *State v. Forbes*, ___ Idaho ___ (April 11, 2012), 2012 op. no. 61. It is the Appellant's position that such an analysis does not adequately consider the clear prohibition in the statute against retroactive application of the 2009 amendment in question.

Conclusion

For the foregoing reasons, it is respectfully requested that the decision of the District Court be reversed and the matter remanded with instructions to grant the Appellant's Petition.

Respectfully submitted this ___ day of June, 2012.

FREDERICK G. LOATS
Attorney for Appellant

Certificate of Service

I hereby certify that two (2) copies of the Brief of Appellant were served upon Attorney for Respondent by mailing the same, postage pre-paid to Stephanie A. Altig, Lead Deputy Attorney General, Idaho State Police, 700 S. Stratford Drive, Meridian, Idaho 83642, this ___ day of June, 2012.

FREDERICK G. LOATS
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