12-14-2017

State v. Kinney Appellant's Reply Brief Dckt. 44752

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 44752**
	)	
v.	)	**KOOTENAI COUNTY**
	)	**NO. CR 2016-6589**
ROBERT JOHNSON KINNEY,	)	
	)	**REPLY BRIEF**
Defendant-Appellant.	)	
_____	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE RICH CHRISTENSEN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Following a jury trial, the jury found Robert Johnson Kinney guilty of one count of felony sexual battery of a minor. Mr. Kinney appealed, asserting the district court erred when it failed to dismiss the charge against him on proportionality grounds, because the restrictions imposed on Mr. Kinney by the Sexual Offender Registration Notification and Community Right-to-Know Act, I.C. §§ 18-8301 to 18-8331 (the Act or SORA), constitute cruel and unusual punishment.

In its Respondent's Brief, the State argues Mr. Kinney has not shown Idaho precedent should be overturned, and has not established SORA constitutes cruel and unusual punishment. (*See* Resp. Br., pp.5-22.)

The Reply Brief is necessary to address certain of the State's arguments on whether SORA is punitive.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Kinney's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err when it failed to dismiss the charge against Mr. Kinney on proportionality grounds?

ARGUMENT

The District Court Erred When It Failed To Dismiss The Charge Against Mr. Kinney On Proportionality Grounds

A. Introduction

Mr. Kinney asserts the district court erred when it failed to dismiss the charge against him on proportionality grounds. Contrary to the district court's determination, as well as the State's arguments on appeal, Idaho's SORA violates the United States and Idaho constitutional prohibitions against cruel and unusual punishment. The Act is punitive, and the previous decisions of the Idaho Supreme Court holding otherwise are manifestly wrong and should be overturned. The punishment imposed by the Act is cruel and unusual, because it is grossly disproportionate to Mr. Kinney's offense.

B. Idaho's SORA Violates The Constitutional Prohibitions Against Cruel And Unusual Punishment

Mr. Kinney asserts Idaho's SORA violates the constitutional prohibitions against cruel and unusual punishment. The restrictions imposed by the Act constitute punishment, and those Idaho Supreme Court decisions holding the Act is not punitive are manifestly wrong and should be overturned. The punishment imposed by SORA in this case is grossly disproportionate to Mr. Kinney's offense.

1. SORA Is Punitive

Mr. Kinney asserts SORA is punitive. *See Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016). Mr. Kinney acknowledges the Idaho Supreme Court has previously held the Act is not punitive, *see Smith v. State*, 146 Idaho 822, 839 (2009); *State v. Joslin*, 145 Idaho 75 (2007); *Ray v. State*, 133 Idaho 96, 100 (1999), *abrogated on other grounds by Padilla v. Kentucky*, 559

U.S. 356 (2010), but asserts those decisions are manifestly wrong and should be overturned. Mr. Kinney submits that consideration of the five most-relevant factors[1] identified in *Smith v. Doe*, 538 U.S. 84 (2003), reveals that Idaho's SORA, much like the Michigan act examined by the Sixth Circuit in *Does #1-5*, is now punitive.

In its Respondent's Brief, the State leans on the decisions of the Idaho Supreme Court holding that SORA is not punitive, including *State v. Johnson*, 152 Idaho 41 (2011). (*See* Resp. Br., pp.8-9, 12-14.) The State also relies upon decisions of the Idaho Court of Appeals arriving at the same conclusion. (*See* Resp. Br., pp.10-11, 14.) Rather than examine each of the five most-relevant factors individually, the State appears to address them as a group when arguing that the Act is not punitive. (*See* Resp. Br., pp.15-19.) However, the State's arguments contain several flaws.

First, the State is incorrect that the pertinent amendments to SORA were all added between 2001 and 2006. (*See* Resp. Br., p.15.) The State argues, "[c]ontrary to [Mr.] Kinney's assertions on appeal, the 'in person' registration requirement was not added in 2011, but was added in 2005." (Resp. Br., p.15.) However, the in person registration requirement from 2005 was part of the recodification of a requirement regarding annual registration, as governed by I.C. § 18-8307(5)(b). *See* 2005 Idaho Sess. Laws, ch. 233 § 2. The requirement to appear in person regarding the different duty to update registration, as governed by I.C. § 18-8309, was

[1] As discussed in the Appellant's Brief (*see* App. Br., pp.13-14), those factors "are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Smith v. Doe*, 538 U.S. at 97.

added in 2011.[2] *See* 2011 Idaho Sess. Laws, ch. 311 § 9. Thus, the pertinent amendments to SORA were not all added between 2001 and 2006.

Additionally, contrary to the State's arguments (*see* Resp. Br., p.15), Idaho's appellate courts have not addressed all the changes encompassed in the amendments to SORA. While the Idaho Supreme Court held in *Johnson* that "SORA has changed little since this Court considered it in Ray and since the Court of Appeals considered it in [*State v. Gragg*, 143 Idaho 74 (Ct. App. 2005)]," *Johnson*, 152 Idaho at 45, *Johnson* suffers from the same infirmities as other post-*Ray* decisions. The analysis in *Smith v. State* and *Joslin* was highly indebted to *Ray*, without really considering any changes to the Act. *See Smith v. State*, 146 Idaho at 839; *Joslin*, 145 Idaho at 86. In *Johnson*, the only change analyzed was the change to the legislative findings in the Act; the Court stated, "[t]he presently codified SORA findings in [the 2011 version of] I.C. § 18-8302 are nearly identical to the [1998] version we evaluated in *Ray*." *See Johnson*, 152 Idaho at 45.

Thus, the *Johnson* Court did not analyze the 2006 addition of the access to school grounds restrictions from I.C. § 18-8329, nor did the Court analyze the 2011 version of the I.C. § 18-8309 duty to update registration information, with its new requirement to appear in person. *See Johnson*, 152 Idaho at 45. The Court of Appeals decided *Gragg* before those changes were enacted. *See Gragg*, 143 Idaho at 465. Thus, Idaho's appellate courts have not addressed all the changes encompassed in the amendments to SORA.

Next, the State's discussion of the access to school grounds restrictions from I.C. § 18-8329 (*see* Resp. Br., pp.17-18), is unavailing. The State contends, "there is nothing in this record on which this Court can base a finding that any geographical restrictions placed on sex offenders

[2] Specifically, the duty to update registration requirement to appear in person applies to a registrant who "changes his or her name, street address or actual address, employment or student status." I.C. § 18-8309(1).

in Idaho are so burdensome as to constitute punishment." (Resp. Br., p.17.) However, the Idaho Supreme Court has used research presented in cases from other jurisdictions to support its holdings. For example, in *State v. Almarez*, 154 Idaho 584 (2013), the Court noted, "[t]he New Jersey Supreme Court recently undertook a very thorough examination of the current state of scientific research regarding eyewitness identifications and concluded that '[t]he research . . . is not only extensive,' but 'it represents the gold standard in terms of the applicability of social science research to the law.'" *Almarez*, 154 Idaho at 593 (quoting *State v. Henderson*, 27 A.3d 872, 916 (N.J. 2011)) (some internal quotation marks omitted). The *Almarez* Court stated, "[w]e agree with the New Jersey Supreme Court and find that this extensive research convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification." *Id.*

Thus, by analogy to *Almarez*, the Court could use the research discussed in *Does #1-5*, including the map and empirical studies relied upon by the Sixth Circuit in that case, *see* 834 F.3d at 701-02, 704-05, to hold the access to school grounds restrictions and other restrictions imposed by SORA are now punitive in effect.

Also, much like I.C. § 18-8329, the Michigan act in *Does #1-5* contained exceptions to its general prohibition against sexual offender registrants being allowed onto school grounds. *See Does #1-5*, 834 F.3d at 698. Those exceptions were similar to the exceptions in Section 18-8329. *Compare* Mich. Comp. Laws §§ 28.734 to 28.736, *with* I.C. § 18-8329(2). The Sixth Circuit nonetheless held the geographical restrictions in the Michigan act were "very burdensome," and that the Michigan act "resembles, in some respects at least, the ancient punishment of banishment." *See Does #1-5*, 834 F.3d at 701-02.

In spite of the State's flawed arguments, the actual effect of Idaho's current SORA is punitive. *See id.* at 705. Mr. Kinney submits that he has shown by the "clearest proof" that the Act in fact inflicts punishment. *See Smith v. Doe*, 538 U.S. at 92. In light of the changes to SORA since 1999 that have made it punitive, *Ray* and the Idaho Supreme Court's post-*Ray* decisions on whether the Act is punitive are manifestly wrong and should be overturned.

2. The Punishment Imposed By SORA Is Cruel And Unusual

Mr. Kinney asserts the punishment imposed by the Act in his case is cruel and unusual. The State argues, "[e]ven if this Court decides that the long line of Idaho cases holding that the registration requirements of Idaho's SORA are non-punitive should be overturned, requiring [Mr.] Kinney to register under Idaho's SORA does not constitute cruel and unusual punishment." (Resp. Br., p.19.) Because the State's argument on this point is unremarkable, no further reply is necessary. Accordingly, Mr. Kinney would refer the Court to pages 22 to 26 of the Appellant's Brief.[3]

[3] In a footnote, the State contends, "[e]ven if the registration requirements of SORA were found to be unconstitutional [Mr.] Kinney does not explain why such a finding would entitle him to a dismissal of the charge. [Mr.] Kinney does not argue on appeal that the crime, Idaho Code § 18-1508A, itself is unconstitutional. Any potential remedy for an [unconstitutional] punishment would not involve the dismissal of the charge." (Resp. Br., p.19 n.5.)

Assuming the remedy of dismissing the charge were not available, Mr. Kinney would submit the alternative remedy he requested in the motion to reconsider would still be available; namely, that the Court "hold I.C. § 18-8306 unconstitutional as it applies to this case and therefore not order the defendant to register or that his information be collected by law enforcement or submitted to the Idaho State Police and the central registry." (*See* R., pp.155-56.)

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Mr. Kinney respectfully requests that this Court vacate the district court's orders denying his Motion to Dismiss on Proportionality Grounds and his Motion to Reconsider Motion to Dismiss on Proportionality Grounds, and remand the case to the district court for further proceedings.

DATED this 14th day of December, 2017.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of December, 2017, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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