

**In the**

**INDIANA COURT OF APPEALS**

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No. 05A02-0707-CR-640

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STATE OF INDIANA,

Appellant (Plaintiff below),

v.

ANTHONY W. POLLARD,

Appellee (Plaintiff below).

Appeal from the  
Blackford Superior Court,

Trial Court No: 05D01-0701-FD-047,

Hon. John W. Forcum, Judge.

**BRIEF OF APPELLANT**

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**BRIEF OF APPELLANT**

**STATEMENT OF THE ISSUE**

Whether the trial court erred in finding Indiana Code Section 35-42-4-11 in violation of Article I, Section 24 of the Indiana Constitution where the statute does not impair the right of Defendant, a sex offender, to own property in the vicinity of a public park or school.

**STATEMENT OF THE CASE**

*Nature of the Appeal*

Pursuant to Indiana Code Section 35-38-4-2, the State appeals the trial courts grant of Defendant's motion to dismiss.

### *Course of Proceedings*

On January 26 2007, the State charged Defendant with class D felony sex offender residency offense (App. 1, 5). Defendant filed a motion to dismiss the charge on March 2, 2007 (App. 2, 8). The parties submitted stipulated facts to the court on May 3, 2007 (App. 2, 9). Defendant filed his memorandum in support of his motion on May 16, 2007 (App. 2, 11). The State followed with its memorandum in opposition on May 24, 2007 (App. 2, 14). On June 21, 2007, the trial court found in favor of Defendant and granted the motion to dismiss (App. 3, 18).

The State filed its notice of appeal on July 18, 2007 (App. 3, 21). The trial court clerk issued the notice of completion of clerk's record on July 23, 2007, followed by the notice of completion of transcript on August 17, 2007 (App. 3, 22, 23).

### **STATEMENT OF THE FACTS**

Per the stipulated facts submitted by both parties to the court, Defendant Anthony Pollard has a prior conviction for an offense listed in Indiana Code Section 35-42-4-11(a)(2) prohibiting Defendant from residing within one thousand feet of school property, a youth program, or a public park (App. 10). Defendant resides at 817 North Monroe Street in Hartford City, Indiana, real estate in which Defendant has an ownership interest (App. 9). That residence is within one thousand feet of a school property, a youth program or a public park (App. 9). Defendant owned and resided at the location for at least a year prior to the effective date of Indiana Code Section 35-42-4-11 (App. 10).

The State charged Defendant with class D felony sex offender residency offense for residing at the residence near the school property, a youth program or a public park (App. 1, 5). Defendant filed a motion to dismiss the charge on March 2, 2007, claiming that the statute violated Article 1, Section 24 of the Indiana Constitution because it impaired his right of contract

(App. 8). On June 21, 2007, the trial court found in favor of Defendant and granted the motion to dismiss (App. 3, 18). This appeal ensues.

### SUMMARY OF THE ARGUMENT

Indiana Code Section 35-42-4-11 does not impair the obligations of contract and thus does not violate Article 1, Section 24 of the Indiana Constitution. The statute does not prohibit Defendant's ownership or any other contractual obligation he has in his residence. Rather, the statute only prohibits Defendant's residency at that location.

Furthermore, even if contractual obligations were altered by the statute, there would still be no constitutional violation. The statute prohibits proven sexual offenders from residing in places near locations where children, society's most vulnerable citizens, necessarily congregate. Thus, prohibiting sex offenders from residing near such places, the statute is a reasonable exercise of the State's power to protect the public health, safety, and general welfare.

### ARGUMENT

#### INDIANA CODE SECTION 35-42-4-11 DOES NOT VIOLATE THE INDIANA CONSTITUTION

Indiana Code Section 35-42-4-11 does not impair contractual obligations of sex offenders such as Defendant and thus does not violate Article 1, Section 24 of the Indiana Constitution. Article 1, Section 24 prohibits the State from enacting legislation that impairs the obligation of contracts. IND. CONST. art 1, § 24. Neither does the statute constitute an ex post facto law.

The question of whether a statute is constitutional on its face is a question of law, and this Court reviews such questions de novo. *State v. Moss-Dwyer*, 686 N.E.2d 109, 110 (Ind. 1997); *Foreman v. State*, 865 N.E.2d 652, 655 (Ind. Ct. App. 2007). When considering the constitutionality of a statute, this Court must begin with the presumption of constitutional validity. *Moss-Dwyer*, 686 N.E.2d at 112. Furthermore, it is well-settled that statutes should be

interpreted so as to avoid constitutional issues. *Gomez v. United States*, 490 U.S. 858, 864 (1989); *City of Vincennes v. Emmons*, 841 N.E.2d 155, 162 (Ind. 2006). The party challenging the statute “labors under a heavy burden to show that the statute is unconstitutional.” *Id.* This Court must resolve all reasonable doubts in favor of the statute's constitutionality. *State v. Lombardo*, 738 N.E.2d 653, 655 (Ind. 2000).

**A. *The statute does not impair contractual obligations.***

The criminal statute at issue here easily can be read to avoid any determination of unconstitutionality. The State charged Defendant with violating Indiana Code Section 35-42-4-11, a statute that prohibits convicted “offenders against children” from residing within one thousand feet of school property, a youth program center, or a public park. This statute does not run afoul of Article 1, Section 24 of the Indiana Constitution because it does not affect or impair in any way a sex offender’s contractual obligations. Nothing in the statute forbids any contractual obligation or real estate holding by an offender against children. Such a person may own, lease, or rent any real estate in accordance with Indiana’s laws just as any other citizen. The only limitation is that the sex offender may not *reside* within proximity of the protected locations. This residence limitation does nothing concerning a person’s contractual obligations and thus there is no violation of Article 1, Section 24.

Furthermore, even if this Court were to read the sex offender residency statute as hindering contractual rights, such limitations would be within the police power of the State to do so. As noted by our Supreme Court in *Clem, et al v. Christole*, the prohibitions contained in Indiana’s constitutional contract clause do not necessarily restrict the exercise of the State’s power to protect the public health, safety, and general welfare. *Clem, et al v. Christole*, 582 N.E.2d 780, 782 (Ind. 1991). The police power of the State is the inherent power of the

government to “enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society.” *Id.* at 782-83 (quoting *Bruck v. State ex. Rel. Money*, 228 Ind. 189, 198, 91 N.E.2d 349, 352 (1950)). The State, of course, must exercise this authority reasonably and the police power must not be construed too broadly, lest it operate to eviscerate the constitutional protection. *Id.* As stated by our Supreme Court:

The law must not be arbitrary, unreasonable or patently beyond the necessities of the case. The legislature may not under the guise of protecting public interests arbitrarily interfere with private business or impose unnecessary restrictions upon lawful occupations. If the law prohibits that which is harmless in itself, or if it is unreasonable and purely arbitrary, or requires that to be done which does not tend to promote the health, comfort, morality, safety or welfare of society, it is an unauthorized exercise of power.

*Id.* at 783. Legislation which does invade the freedom of contract “can only be sustained as a valid exercise of the police power if it both relates to the claimed objective and employs means which are both reasonable and reasonably appropriate to secure such objective.” *Id.* (quoting *Department of Financial Institutions v. Holt*, 231 Ind. 293, 305, 108 N.E.2d. 629, 635 (1952)).

The prohibitions found in Indiana Code Section 35-42-4-11 are not arbitrary and are reasonably appropriate to promote the health, comfort, safety, and general welfare of children, society’s most vulnerable citizens. The statute forbids certain offenders, those who are “offenders against children,” from residing within one thousand feet of those areas where children necessarily congregate, i.e., schools, youth programs, and public parks. This limitation allows a safer zone than if sex offenders were permitted to establish residences near those child-frequented places. Furthermore, the statutory prohibitions are not overly broad because it does not forbid those convicted sex offenders from owning or leasing property, but limits the restriction to maintaining residences within the protected zone. Moreover, the set of sex

offenders is limited to those who have been proven either to be sexually violent predators or to have been convicted of child-related sex offenses.<sup>1</sup> Thus, the legislature took reasonable, limited steps in protecting Hoosier children from being within the sphere of surveillance by those who have been proven untrustworthy to be around children. The statute, therefore, is a legitimate act of police power by the State to promote the health, comfort, safety, and general welfare of children. The statute is not unconstitutional pursuant to Article 1, Section 24 of the Indiana Constitution.

**B. *The statute does not constitute an ex post facto law.***

Although Defendant did not allege the statute to be an improper ex post facto law, the trial court found the law to be such in its ruling (App. 18). The court, however, was wrong. An ex post facto law is one which imposes a punishment for an act not punishable at the time it was committed, or which imposes punishment additional to that prescribed at the time the offense was committed. *Hayden v. State*, 771 N.E.2d 100, 102 (Ind. Ct. App. 2002) (citing *Weaver v. Graham*, 450 U.S. 24 (1981)). The inquiry is not whether a legislative change produced some sort of disadvantage but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable. *Spencer v. O'Connor*, 707 N.E.2d 1039, 1042 (Ind. Ct. App. 1999).

In *Spencer*, this Court considered whether the sex offender registry requirement constituted an ex post facto law where the convictions that caused the defendant to be a “sex offender” occurred before the enactment of the sex offender registry statute. *Id.* at 1041-42. The

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<sup>1</sup> The convicted sex offenders who are forbidden from residing within one thousand feet of the protected areas are those who have been judicially determined to be a “sexually violent predator,” or to have been convicted of child molesting, child exploitation, child solicitation, child seduction, or kidnapping (if the victim is under eighteen years of age). I.C. § 35-42-4-11(a).

Court concluded that it did not. *Id.* at 1046. The Court reasoned that requiring sex offenders to register their residences and to keep law enforcement apprised of any change in residences was not punishment. *Id.* at 1043-44. Rather the requirement was more regulatory and aided the monitoring of sex offenders. *Id.*

Likewise, in *Teer v. State*, this Court considered whether the statute forbidding those deemed to be serious violent felons from possessing firearms<sup>2</sup> was an improper ex post facto law. *Teer v. State*, 738 N.E.2d 283, 287 (Ind. Ct. App. 2000). Again, this Court found no constitutional violation. *Id.* at 288. The statute there governed only Teer's conduct on the date he was found to be in possession of firearms. *Id.* It did not repunish him for his earlier offense; it did not enhance the penalty for that offense. *Id.* Rather, it rendered his later possession of firearms to be a crime. *Id.* As such, it was not an unconstitutional ex post facto law. *Id.*

Similarly, the prohibition found in Indiana Code Section 35-42-4-11 does not repunish Defendant for his earlier conviction which rendered him an "offender against children." Neither does it enhance his punishment for that conviction. Like the statute prohibiting the unlawful possession of a firearm by a serious violent felon, the statute in the present case addresses subsequent conduct by the convicted felon. Here, it focuses on Defendant's conduct on January 12, 2007, not on any criminal offense that occurred earlier. Also like the serious violent felon statute, the sex offender residency offense statute concentrates on restricting that aspect of the relevant felons that sets them apart from other felons. Where Indiana Code Section 35-47-4-5 serves to keep firearms from serious violent felons, Indiana Code Section 35-42-4-11 serves to keep offenders against children away from areas where children congregate. Here, per his stipulation, Defendant was convicted of an offense that renders him an offender against children

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<sup>2</sup> I.C. § 35-47-4-5.

and that on January 12, 2007, he resided within one thousand feet of school property, a youth program center, or a public park (App. 9-10). If later proven beyond a reasonable doubt, it is this act of residing within the prohibited zone that constitutes Defendant's new offense. It does not repunish for his earlier criminal act.

Thus, the statute that prohibits offenders against children from residing within one thousand feet of area where children gather is not an ex post facto law. The trial court's finding as such is wrong and should be reversed.

### CONCLUSION

For the foregoing reasons, the State respectfully urges that the ruling of the trial court be reversed and this case remanded for trial.

Respectfully submitted,

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Attorneys for Appellant

**CERTIFICATE OF SERVICE**

I do solemnly affirm under the penalties for perjury that on September 17, 2007, I served upon the opposing counsel in the above-entitled cause two copies of the Brief of Appellant by depositing the same in the United States mail first-class postage prepaid, addressed as follows:

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STATE OF INDIANA )  
BLACKFORD COUNTY )

IN THE BLACKFORD SUPERIOR COURT

**FILED**

JUN 21 2007

STATE OF INDIANA )

*Aura Conn* CLERK  
BLACKFORD CO. CIRCUIT - SUPERIOR CTS.

VS )

CASE NO. 05D01-0701-FD-47

ANTHONY W POLLARD)

JUDGMENT ON DEFENDANT'S MOTION TO DISMISS

FINDINGS OF FACTS

1. Comes now the Court and adopts the stipulated facts as filed by Counsel for the Parties on May 3, 2007.
2. The Court finds that the Defendant has challenged the constitutionality of I.C. 35-42-4-11 as it makes it a crime for him to reside in 1000 feet of school property, a youth program center or a public park; and the Defendant raises this challenge pursuant to the Indiana Constitution under Article I Section 24.

CONCLUSIONS OF LAW

1. The Indiana Constitution Article I Section 24 states **Ex Post Facto Laws - Laws impairing obligations of contract.** No Ex Post Facto Law, or Law impairing the obligations of contract, shall ever be passed.
2. The passage of Indiana Code 35-42-4-11, as applied to this Defendant, does affect his ownership and residence in real estate, which the Defendant has had an ownership interest for approximately 20 years.
3. The Court finds that at the time of the disposition of his original criminal case resulting in a conviction under I.C. 35-42-4-11(a)(2), the Defendant was not required to vacate his residence or possibly liquidate his interest in the residential real estate. There clearly was no aspect of this sentence relating to his ownership of

certain property and residence there in.

4. The Court finds that the phrased "Ex Post Facto" has relation to only criminal laws and an "Ex Post Facto Law" is a legislative act relating to criminal matters, retroactive in operation, which alters the situation of the accused to his disadvantage or deprives him of some lawful protection to which he is entitled. The "Ex Post Facto" doctrine prohibits the Court to increase retroactively the punishment for a crime committed. These principals have been well established under Indiana Constitutional Law.
5. It is the conclusion of this Court, that as applied in this case, to prosecute the Defendant for a crime under I.C. 35-42-4-11 which by operation of the statute would have required upon passage that the Defendant vacate from his residence and possibly sell his ownership interest is a further punishment for the crime that the Defendant committed prior to the enactment of I.C.35-42-4-11 on July 1, 2006.
6. The Court further concludes as a matter of law, that if the Defendant were to move from his residence at 817 North Monroe Street to a new location within 1000 feet of school property, a youth program center, or a public park, or establish a residence within 1 mile of the residence of the victim of the offender's sex offense, he could be prosecuted under I.C. 35-42-4-11.
7. The Court further concludes that while I.C. 35-42-4-11 maybe constitutional in many applications, it is in violation of Indiana Constitution Article I Section 24 under this specific application of the facts of this case, wherein the State is applying the statute to a person who has been an owner and resident of a particular piece of the property prior to the adoption of I.C. 35-42-4-11.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the due to the application of I.C. 35-42-4-11 in a manner which violates I.C. Article I Section 24 of the Defendant's constitutional rights, the Defendant's motion to dismiss should be granted,

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the

charge of violating I.C. 35-42-4-11 as filed in the Information of January 23, 2007, in this case, is dismissed.

Dated this 21 day of June, 2007.

  
John W. Forcum, Judge  
Blackford Superior Court