No. 16-1898

IN THE UNITED STATES COURT OF APPEAL
FOR THE EIGHTH CIRCUIT

A.W., et al.,
Plaintiffs-Appellees,

v.

PAUL WOOD, et al.,
Defendants-Appellants.

APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA
(Hon. Richard G. Kopf, Senior U.S. District Judge; No. 8:14cv256)

BRIEF OF APPELLEES A.W., et al.

Submitted September 20, 2016, by:

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SUMMARY OF THE CASE

Appellees filed this 42 U.S.C. § 1983 and 28 U.S.C. § 2201 action against Appellants Nebraska Attorney General Doug Peterson, Nebraska State Patrol Colonel Bradley Rice, Red Willow County Attorney Paul Wood, and Red Willow County Sheriff Gene Mahon, in their official capacities, (hereinafter "State") seeking a declaration that Neb. Rev. Stat. § 29-4003(1)(a)(iv), as applied to Appellee A.W., a juvenile, is unconstitutional, and a permanent injunction preventing the State from enforcing Neb. Rev. Stat. § 29- 4003(1)(a)(iv) against A.W.

Appellees asserted the Nebraska Sex Offender Registration Act (hereinafter "SORA") does not apply to A.W., and the application of SORA's public registration requirement, if applied to A.W., is unconstitutional. By Memorandum and Order dated March 21, 2016, the district court found, based on a joint set of stipulated facts, SORA does not apply to A.W. and enjoined the State from enforcing Neb. Rev. Stat. § 29-4003(1)(a)(iv) against Appellees. This holding was not in error. Judgment pursuant to the Memorandum and Order was entered March 21, 2016.

Appellees are not requesting oral argument. In the event oral argument is ordered, Appellees are in agreement that 20 minutes of oral argument, equally, divided is appropriate.

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JURISDICTIONAL STATEMENT

Appellees' claims arose under 42 U.S.C. § 1983 and alleged violations of Appellee A.W.'s rights under the Constitution of the United States. The district court therefore possessed subject matter jurisdiction to hear Appellees' claims under 28 U.S.C. § 1331. Following a joint stipulation of facts and cross-motions for summary judgment the district court entered a Memorandum and Order on March 21, 2016, finding SORA does not apply to A.W. and enjoined the State from enforcing Neb. Rev. Stat. § 29- 4003(1)(a)(iv) against Appellees. Judgment pursuant to the Memorandum and Order was entered March 21, 2016. The State filed a notice of appeal on April 8, 2016. This Court possesses jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The only issue on appeal is whether the district court erred in determining that Neb. Rev. Stat. § 29-4003(1)(a)(iv) does not apply to Appellees, and in granting Appellees' motion for summary judgment, entering judgment in favor of Appellees and enjoining Appellants from enforcing Neb. Rev. Stat. § 29-4003(1)(a)(iv) against Appellees. Pursuant to 8th Cir. R. 28A(i)(2), the most apposite cases are:

1. Neb. Rev. Stat. § 29-4003(1)(a)(iv)
2. *State v. Norman*, 808 N.W.2d 48, 59 (Neb. 2012)
3. Neb. Rev. Stat. § 43-280

STATEMENT OF THE CASE

Appellees filed this 42 U.S.C. § 1983 and 28 U.S.C. § 2201 action against the State of Nebraska, Nebraska State Patrol, and Appellants Nebraska Attorney General Doug Peterson, Nebraska State Patrol Colonel Bradley Rice, Red Willow County Attorney Paul Wood, and Red Willow County Sheriff Gene Mahon, in their official capacities, seeking a declaration that Neb. Rev. Stat. § 29-4003(1)(a)(iv), as applied to A.W., is unconstitutional, and a permanent injunction preventing the State from enforcing Neb. Rev. Stat. § 29-4003(1)(a)(iv) against Appellee A.W. J.A. 23-31.

A joint stipulation of facts was entered, the record was undisputed and cross-motions for summary judgment were submitted. J.A. 401. Those undisputed facts show that On October 13, 2013, a petition was filed in the District Court of Anoka County, Minnesota, Juvenile Court, alleging that A.W. committed the offense of "Criminal Sexual Conduct in the First Degree" occurring between July 1, 2013, and August 8, 2013, at which time A.W. was eleven years old. J.A. 402. Since August 23, 2013, A.W. has resided in Red Willow County, Nebraska, with his grandparents and guardians, the plaintiffs John and Jane Doe. *Id.*

On July 18, 2014, A.W. was adjudicated delinquent in the District Court of Anoka County, Minnesota, Juvenile Court, placed on probation for two years, and ordered to comply with Minnesota's predatory offender registration. *Id.* That same day, an "Application for Services and Waiver" was filed pursuant to the Interstate

Compact for Juveniles to transfer probation supervision from Minnesota to Nebraska J.A. 403.

Sometime in August 2014, the Nebraska probation office notified the appellees that A.W. was required to register pursuant to SORA or else face a criminal referral to the Red Willow County Sheriff and Red Willow County Attorney. *Id.* An action for declaratory and injunctive relief was commenced by the appellees on August 28, 2014, and a temporary restraining order was entered the next day. *Id.* By Memorandum and Order dated March 21, 2016, the district court found SORA does not apply to A.W. and enjoined the State from enforcing Neb. Rev. Stat. § 29-4003(1)(a)(iv) against the appellees. J.A. 401-420. Judgment pursuant to the Order was entered March 21, 2016. J.A. 421. Appellants filed an appeal on April 8, 2016. J.A. 422.

SUMMARY OF THE ARGUMENT

Under Minnesota law, a person who was charged with or petitioned for a felony violation of criminal sexual conduct and convicted of or adjudicated delinquent for that offense is required to register with a corrections agent. By contrast, juveniles adjudicated delinquent of certain SORNA-registrable offenses in Nebraska juvenile courts are not required to comply with SORA, where all registrants are subjected to public notification.

However, in Minnesota, registration data concerning persons who are required to register based solely on a delinquency adjudication are not publicly disclosed

because such persons are not considered "predatory offenders" for purposes of public notification.

Accordingly, neither Minnesota juveniles nor Nebraska juveniles are subjected to public notification and a stigmatizing burden for juvenile adjudications. Nebraska has even forfeited federal funds because Nebraska's notification and registration system does not mandate juveniles adjudicated delinquent with respect to SORNA-registrable offenses to be subject to the sex offender registry.

In this appeal, the State of Nebraska seeks to have a juvenile adjudicated in Minnesota for an act committed at age eleven, subjected to public notification and a stigmatizing burden for having been sent to live with his grandparents in Nebraska. "[I]f A.W. had done exactly what he did in Minnesota but performed that act in Nebraska, he would not have been required to register as a sex offender and he would not be stigmatized as such." J.A. 419 (Judge Kopf Memorandum and Order (March 21, 2016)). "It is simply not possible to draw from the Nebraska statutes a desire to impose a stigmatizing burden on juveniles adjudicated out of state while not doing so to juveniles adjudicated in Nebraska." J.A. 403 (Judge Kopf Memorandum and Order (March 21, 2016)).

STANDARD OF REVIEW

A district court's conclusions of law are reviewed *de novo*. *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). A district court's interpretation of state law is reviewed *de novo*. *David v. Tanksley*, 218 F.3d 928, 930 (8th Cir. 2000).

ARGUMENT

I. Nebraska's sex offender registration law does not apply to juvenile adjudications.

An eleven year-old child committed an act in Minnesota, which resulted in a juvenile adjudication from a juvenile court. "[I]f A.W. had done exactly what he did in Minnesota but performed that act in Nebraska, he would not have been required to register as a sex offender and he would not be stigmatized as such." J.A. 419 (Judge Kopf Memorandum and Order (March 21, 2016)). This fact is uncontroverted. Nebraska's sex offender registration law does not apply to juvenile adjudications from Nebraska juvenile courts. So why would Nebraska's sex offender registration apply to a juvenile adjudication from Minnesota? Simple. It doesn't.

"It is simply not possible to draw from the Nebraska statutes a desire to impose a stigmatizing burden on juveniles adjudicated out of state while not doing so to juveniles adjudicated in Nebraska." J.A. 403 (Judge Kopf Memorandum and Order (March 21, 2016)). Appellants' counsel spends five pages rehashing the same arguments made to Judge Kopf on summary judgment without so much as addressing Judge Kopf's thoughtful and well-reasoned opinion.

"Although the Nebraska Supreme Court has 'not decide[d] whether SORA may ever be applied to juveniles who are adjudicated as having committed a registerable offense under § 29-4003,' *State v. Parks,* 803 N.W.2d 761, 767 (Neb. 2011) (holding SORA applied to adult defendant even though he was a minor at the time the crimes

were committed), the Nebraska Juvenile Code states that '[n]o adjudication by the juvenile court upon the status of a juvenile shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction.' Neb. Rev. Stat. Ann. § 43-280 (West)." J.A. 410 (Judge Kopf Memorandum and Order (March 21, 2016)).

Under Minnesota law, a person who was charged with or petitioned for a felony violation of criminal sexual conduct and convicted of or adjudicated delinquent for that offense is required to register with a corrections agent. By contrast, juveniles adjudicated delinquent of certain SORNA-registrable offenses in Nebraska juvenile courts are not required to comply with SORA, where all registrants are subjected to public notification.

However, in Minnesota, registration data concerning persons who are required to register based solely on a delinquency adjudication are not publicly disclosed because such persons are not considered "predatory offenders" for purposes of public notification. In Nebraska all SORA registrants are publicly disclosed.

Accordingly, despite the differences in statutory schemes, neither Minnesota juveniles nor Nebraska juveniles are subjected to public notification for juvenile adjudications. Nebraska has even forfeited federal funds to protect juveniles from the stigmatizing effect of the sex offender registry. The Legislature has been silent on the issue other than to make clear that the registry is not to be applied to juvenile adjudications.

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Registration Act, see 42 U.S. C. § 14071 et seq. (2000), which conditioned certain federal funding on a state's adoption of sex offender registration laws within 3 years. In response, Nebraska's Legislature enacted SORA in 1996.

As originally enacted, with an operative date of January 1, 1997, SORA did not contain a provision comparable to subdivision (1)(a)(iv). See Laws 1996, LB 645, § 3. Also, subdivision (1)(a)(ii) (formerly subdivision (1)(b)) applied to any person who on or after the operative date "[e]nters the state and has pleaded guilty to or has been found guilty of any offense in another state, territory, commonwealth, or other jurisdiction of the United States that is substantially equivalent to the offenses listed in subdivision (1)(a) of this section." *Id.* In 2002, convictions in federal court or by court martial were added to this list. See Laws 2002, LB 564, § 3.

Subdivision (1)(a)(iv) was added in 2006 (as former subdivision (1)(d)). See Laws 2006, LB 1199, § 18. As noted by Judge Kopf, there is "scant" legislative history concerning subdivision (1)(a)(iv) of section 29-4003. Judge Kopf noted:

> It was a relatively minor provision in a bill that amended numerous statutes relating to sex offenses and also adopted the Sexual Predator Residency Restriction Act and the Sex Offender Commitment Act. See Laws 2006, LB 1199.

The bill's introducer, Sen. Patrick Bourne, informed the Judiciary Committee that "LB 1199 clarifies that a person required to register in another state is required to register here in Nebraska ...." The then-superintendent of the Nebraska State Patrol, Col. Bryan Tuma, testifying in favor of the bill, similarly stated that "LB 1199 clarifies that individuals would be required [to] register in Nebraska, including lifetime registration, if they are required to do so in another jurisdiction" Colonel Tuma indicated this feature of the proposed legislation was intended to "prevent[ ] people from moving to Nebraska to avoid lengthy registry requirements imposed by other states" (id.). There was no further discussion regarding this "clarifying" proposal during the committee hearing.

During floor debate, Senator Bourne again stated that LB 1199 "clarifies that a sex offender who is required to register in another state but lives in Nebraska must register with the Nebraska State Patrol. There was no further discussion about this aspect of the bill during floor debate.

Although Colonel Tuma did not elaborate upon his statement to the Judiciary Committee that one purpose of LB 1199 was to prevent people from moving to Nebraska to avoid lengthy registry requirements in other states, he presumably had in mind the proposed amendment to former section 29-4005(2). Prior to the passage of LB 1199, only persons

sentenced to certain registerable offenses under section 29-4003 were subject to lifetime registration. Thus, even though a person was convicted of a "substantially equivalent" offense in another state, under former section 29-4005(1) upon entering Nebraska he or she was only required to register "during any period of supervised release, probation, or parole" plus a "period of ten years after the date of discharge from probation, parole, or supervised release or release from incarceration, whichever date is most recent." Laws 2006, LB 1199 § 20. Also, persons who were required to maintain registrations in other states based upon convictions occurring prior to 1997 would not have been subject to registration under SORA when entering to Nebraska.

About the only useful insight that can be gleaned from the legislative history of LB 1199 is that subdivision (1)(a)(iv) of section 29-4003 was adopted because SORA, as originally enacted, may have had an unintended consequence of encouraging especially dangerous sex offenders to relocate to Nebraska. There is no indication in the legislative history that the Legislature gave any consideration to the meaning of "sex offender" as used in subdivision (1)(a)(iv), or that there was any intention to require the registration of persons who are adjudicated delinquent in another state while continuing to exclude persons who are adjudicated

delinquent in Nebraska from the Act's registration and public notification requirements.

J.A. 417-419 (citations omitted).

The Adam Walsh Child Protection and Safety Act of 2006 (SORNA) was signed into law in July 2006. Title I of SORNA required that Nebraska substantially implement SORNA by July 27, 2009. On March 18, 2009, Colonel Bryan Tuma, Superintendent for the Nebraska State Patrol, informed the Judiciary Committee of the cost of not fully implementing the Adam Walsh Act. He testified as follows:

> … Jurisdictions who did not substantially comply with the Adam Walsh Act by July 27, 2009, will face mandatory 10 percent reductions in Byrne Justice Assistance Grant funding and affect future SMART which is an acronym for Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking grants. Nebraska is slated for $1.7 million to $1.9 million in Byrne funds in the federal '09 federal omnibus appropriations bill. The Adam Walsh Act does allow for two separate, one-year extensions. However, they come with one major potential caveat, that being the failure to come into substantial compliance after the extension periods could result in a cumulative 10 percent reduction for all three years to be paid in one specific year. This would be a total loss of over one-half million dollars.

J.A. 295 (Judiciary Committee Transcript at p. 13 (March 18, 2009)).

The State of Nebraska requested two one-year extensions to July 27, 2011. J.A. 78. On December 14, 2011, the U.S. Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) notified the State of Nebraska that the State of Nebraska had not substantially implemented SORNA by the deadline. J.A. 79, 82-88. The SMART Office informed Nebraska that, but for Nebraska's failure to require registration of juveniles adjudicated delinquent of certain SORNA-enumerated offenses, and contingent upon Nebraska's implementation of the Sex Offender Registry Tool, the SMART Office would have granted Nebraska substantial implementation status. *Id.*

The State of Nebraska had an opportunity from March 18, 2009 until July 27, 2011 to come fully into compliance with the Adam Walsh Act after having been informed that non-compliance could cost the State of Nebraska over one-half million dollars, but the State of Nebraska took no legislative action to require juveniles adjudicated delinquent of certain SORNA-enumerated offenses.

The Omaha World-Herald reported on the loss of funds and State Senator Brad Ashford was reported as saying, "For the money we're losing, it's just not worth it." J.A. 359. Nebraska's Governor was quoted in a letter to the Judiciary Committee saying the way juvenile offenders are treated "can have very serious and long-term consequences to the successful rehabilitation." J.A. 360. "Ashford said the focus of juvenile court is rehabilitation, not punishment, and that it was problematic to include

juveniles who were found responsible for offenses deemed not serious enough for prosecution in adult court." J.A. 360.

In 2009, the "enters the state" language was removed from subdivision (1)(a)(ii), and its scope was further expanded to include convictions by a "village, town, city" or "foreign jurisdiction." See Laws 2009, LB 285, § 4. The 2009 also amendment significantly expanded the list of registerable offenses under Nebraska law. *See id.*

Pages 10-16 of Judge Kopf's Memorandum and Opinion, J.A. 410-416, correctly describe why subdivision (1)(a)(iv) of section 29-4003 only applies to a person who is required to register under the laws of another village, town, city, state, territory, commonwealth, or other jurisdiction of the United States as a person who has been *convicted* of a sex offense and why Appellant A.W. is not subject to registration in Nebraska under subdivision (1)(a)(iv).

> "Unlike other state sex offender registry statutes [and SORNA], 'sex offender' is not explicitly defined in SORA." *State v. Norman*, 808 N.W.2d 48, 59 (Neb. 2012) (concluding that "persons who stand convicted of the listed offenses and, as to certain crimes, where the requisite finding of sexual penetration or sexual contact has been made [under § 29-4003(1)(b)(i)(B)] ... are deemed to have committed 'sex

offenses' and are 'sex offenders' for purposes of SORA and the Nebraska State Patrol Sex Offender Registry.")

J.A. 412. Children with juvenile adjudications are not sex offenders.

As Appellants have not raised any issues not previously and thoroughly addressed by Judge Kopf, it is not necessary to clumsily restate that which Judge Kopf has already made abundantly clear. His Memorandum and Opinion speaks for itself and was correctly decided.

II. This court should not consider unreached constitutional issues.

As to Appellants' second argument regarding the Constitutionality of the SORA provisions at issue, Appellees decline to address the issues not reached by the district court. In the event this Court overturns the judgment in this case, the proper remedy would be to remand in order for the district court to decide upon the Constitutional issues that were not reached after the case was decided based upon statutory interpretation.

The judgment in this case should be upheld.

CONCLUSION

Nebraska law does not require kids with juvenile adjudications committed at age eleven to register as sex offenders and it matters not whether the juvenile adjudication is from Nebraska or elsewhere.

Respectfully submitted this 20th day of September, 2016.

A.W. et al, Appellees,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 3,509 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to Microsoft Word.

Pursuant to 8th Cir. R. 28A(h), this brief and its accompanying addendum are virus-free.

BY: /s/ Joshua W. Weir

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2016, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, causing notice to be served on Appellants' counsel of record.

/s/ Joshua W. Weir