

IN THE
INDIANA COURT OF APPEALS

Case No: 18A-CR-373

Dickie D. Bridges,)	Appeal from the
Appellant,)	Allen Superior Court
)	
vs.)	Case No. 02D05-1708-F5-214
)	
State of Indiana,)	
Appellee.)	
)	

BRIEF OF Appellant

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STATEMENT OF THE ISSUE

Whether Appellant Bridges' ten (10) year registration requirement was tolled as a result of a 2008 amendment to the statute. And further, whether the retroactive application of the amendment violated the Ex Post Facto clause of the Indiana Constitution.

STATEMENT OF THE CASE

This is an interlocutory appeal of an Order in which the Allen Superior Court denied Defendant's Motion to Dismiss and to Remove Defendant from the Sex Offender Registry. Appellant Bridges was charged with failing to register as a sex offender for the period of June 29th, 2017 to July 17th, 2017. Defendant's App. Vol. 2, p. 9. In the Motion to Dismiss and supporting Memorandum, Bridges asserted that his obligation to register ended on May 16, 2016 because the 2008 statutory amendment requiring tolling should not apply to convictions, such as the Defendant's, which occurred before the amendment became effective. Defendant's App. Vol. 2, p. 21. Bridges further asserted that the retroactive application violates the Ex Post Facto clause of the Indiana Constitution. Defendant's App. Vol. 2, p. 21. The State filed a Memorandum in Opposition, and the Court issued an Order or Judgment in favor of the State. Defendant's App. Vol. 2, p. 35, 44. Defendant filed, and the Court certified, an Interlocutory Order for Appeal and for a Stay of Proceedings Pending Appeal. Defendant's App. Vol. 2, p. 45, 49.

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STATEMENT OF FACTS

Appellant Bridges was convicted of two counts of Child Molest, Class C Felonies, on October 7, 2002 and was incarcerated until May 16, 2006. Defendant's App. Vol. 2, p. 17. Bridges committed said offenses between 9-1-2000 and 2-11-2001. Defendant's App. Vol. 2, p. 17. He originally had a lifetime registration requirement, but his registration period was amended to ten (10) years because it was determined that Bridges committed the offenses before the 2008 statute (Ind. Code § 11-8-8-19) requiring lifetime registration was enacted. TR 21. The relevant statute at the date of commission of the offenses, Ind. Code § 5-2-12-13 (repealed), does not provide for tolling of the registration period. Defendant's App. Vol. 2, p. 19. On July 1, 2008, the aforementioned statute was repealed and replaced with a statute adding provisions to toll the registration period, "... during any time that the sex or violent offender is incarcerated." Ind. Code § 11-8-8-19. Bridges was subsequently incarcerated in 2010, 2011, and 2013, for three separate offenses. Defendant's App. Vol. 2, p. 19-20. The Department of Corrections, without clear documentation as to the method, tolled Defendant's registration period during the aforementioned incarcerations, thereby moving his requirement to register from May 16, 2016 to January 4, 2020. Defendant's App. Vol. 2, p. 21. Bridges was then charged with failing to register as a sex offender for the period of June 29th, 2017 to July 17th, 2017., leading to the present cause. Defendant's App. Vol. 2, p. 9.

SUMMARY OF ARGUMENT

The trial court erred by finding that the law is with the State of Indiana. First, Defendant's registration period was tolled in accordance with a statute that was enacted several years after the initial offense. Further, the court erred by implicitly linking the application of the tolling provision to the subsequent commitment of additional offenses requiring incarceration rather than to the initial offense. Tolling is dependent upon two events: 1) initial offense requiring registration; 2) subsequent incarceration during which tolling is appropriate. The commitment of additional offenses cannot exclusively trigger tolling, and as a result, the law at the time of the initial offense, plus any changes in favor of the offender, must control.

Second, the trial court erred in siding with the State that retroactive application of the 2008 amendment is not punishment in effect and therefore does not violate the State's Ex Post Fact clause. Five of the seven factors used to analyze the punitive effects of statutes favor the conclusion that retroactively applying the tolling provision is punishment that violates the Indiana Constitution.

ARGUMENT

1. Defendant's ten-year registration requirement was tolled as a result of a 2008 amendment to the statute.

1.1 Defendant's registration period was retroactively tolled under the provisions of the 2008 amendment, and such tolling is a consequence of the underlying offense.

Bridges contends that the State violated the Indiana Constitution's ban on ex post facto punishment by retroactively applying the tolling provision to his case. Since the incarcerations subject to tolling took place after the tolling provision was enacted and the initial offense before, an ex post facto claim must show that tolling is a punishment for the underlying offense, was done so retroactively, and that the subsequent incarceration periods were actually and properly tolled.

It is thus necessary to establish a) that tolling took place, b) that the tolling calculation was performed pursuant to a statute enacted after the commission of the underlying offense, and c) that if tolling is a punishment, it is a punishment for the underlying offense rather than the commitment of subsequent criminal acts requiring incarceration.

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- a) Parties agreed that Defendant's registration period was tolled during his subsequent incarcerations.**

Whether tolling occurred in this case is not at issue, as both parties indicated in their respective trial court memorandums that tolling occurred. Defendant's App. Vol. 2, p. 24, 35. Due to lack of proper documentation, there is some question as to whether the Department of Corrections properly calculated the tolling of Defendant's registration period. *Id.* at 6. This hints at an unresolved issue—whether the accuracy of a tolling calculation must be shown in order to enforce registration. While not currently on appeal, an affirmative finding on that issue, along with the lack of evidence to support an accurate calculation, would moot the *ex post facto* issue presently on appeal.

- b) Parties agreed that the tolling calculation was performed pursuant to a statute enacted after the commission of the underlying offense.**

That Bridges was convicted of the underlying offenses in 2002 is not in dispute. Defendant's App. Vol. 2, p. 22, 35. Also not in dispute is that the statute explicitly containing the tolling provisions applied to Defendant's registration period during his subsequent incarcerations was enacted in 2008. Defendant's App. Vol. 2, p. 24, 35.

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- c) Retroactive tolling is a consequence of the underlying offense rather than the subsequent commitment of crimes resulting in incarceration.**

Bridges committed the offenses between 9-1-2000 and 2-11-2001. Defendant's App. Vol. 2, p. 17. At the time he committed the offenses, the controlling statute required Bridges to register for ten years but did not have a tolling provision. Before Bridges was convicted in 2002, the statute was amended to require lifetime registration for like offenses. Bridges was then convicted of the offenses in 2002, released from prison in 2006, and was required to register for life. Defendant's App. Vol. 2, p. 22. Then our Supreme Court, in Gonzalez v. State, ruled that retroactively increasing the length of the registration period violated the Ex Post Facto clause of the Indiana Constitution on the basis that it was punitive in effect. The State, without any action by Bridges, applied this ruling to Defendant's case and shortened his registration period back to ten years, thereby correctly acknowledging 1) that the Statute in effect at the time Bridges committed the offense controls the length of the registration period and 2) that an increase in the length of Defendant's registration period represents a punishment in effect.

The State's position with regard to tolling, however, is that 1) the Statute in effect at the time Bridges committed the offense is silent on tolling and does not control, and 2) tolling is not a punishment in effect for the initial offense because

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it occurs as a result of subsequent commitment of additional offenses requiring incarceration rather than the underlying offense. Regarding the latter, it is important to note that, according to Statute, tolling is a result of incarceration, not the subsequent commitment of additional offenses requiring incarceration. This distinction is important because it emphasizes the provision's dependency upon the underlying offense. In other words, because tolling is simply a product of incarceration rather than the subsequent commitment of additional offenses requiring incarceration, it is dependent upon the underlying offense rather than the subsequent offense, and as such, cannot be a punishment for committing subsequent acts.

Regarding the Statute, the State used the 2008 amendment, enacted 8 years after the commission of the underlying offense, to justify tolling the Defendant's registration period during incarceration. This inconsistency sets the tone for whether the retroactive application of the 2008 statute to a crime committed in 2000 violates the State Constitution's Ex Post Facto clause.

1.2 Defendant's registration period was tolled in accordance with statute passed after the commission of the underlying offense.

Because there is no dispute that tolling occurred and that such tolling was calculated according to a statute enacted after the commission of the underlying offenses, Bridges submits the Court should find that these prerequisites for an ex

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post facto clause violation exist such that an actual examination of whether said violation took place is warranted. In addition, because tolling is triggered by subsequent incarceration rather than the commitment and conviction of crimes requiring incarceration, Bridges desires a finding that tolling is necessarily dependent upon the underlying offense requiring registration. Such findings lead into whether there is an ex post facto violation.

2. Retroactive application of the 2008 amendment violated the Ex Post Facto clause of the Indiana Constitution.

2.1 Legal Foundation and Standard of Review.

The Court of Appeals reviews questions of law and constitutionality de novo. Tyson v State, 51 N.E.3d 88,92 (Ind. 2016). Every statute is constitutional until clearly overcome by a contrary showing by the challenging party. Wallace v. State, 905 N.E.2d 371, 378 (Ind. 2009). "Statutes are to be construed as having prospective operation unless legislative language clearly indicates the statute was intended to be retrospective." Shelton v. State, 390 N.E.2d 1051 (Ind. Ct. App. 1979). "The Court of Appeals will generally apply statute which is in effect when crime is committed." *Id.* at 181. "This rule is constitutionally required in the case that a penalty is increased ex post facto by amendment after the commission of the crime." Wolfe v. State, 362 N.E.2d 188, 189 (1977).

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“No ex post facto law... shall ever be passed.” Ind. Const. art. 1, § 24. “The policy underlying the Ex Post Facto Clause is to give effect to the fundamental principle that persons have a right to fair warning of that conduct which will give rise to criminal penalties.” Gonzalez v. State, 980 N.E.2d 312, 316 (Ind. 2013) (quoting Armstrong v. State, 848 N.E.2d 1088, 1093 (Ind.2006). “This prohibits, in relevant part, the passage of any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.” Id. at 316 (quoting Weaver v. Graham, 450 U.S. 24, 28, (1981)) (internal quotation marks omitted).

This Court applies the “intent-effects” test to determine the validity of an ex post facto claim under the Indiana Constitution. Wallace, 905 N.E.2d at 383. The first prong of the test examines whether it was the Legislature’s intent to impose punishment. Id. If the Legislative purpose was not punitive, civil or regulatory, or not discernable, then the Court analyzes the “effects” prong of the test. Id. In assessing a statute's effects, this Court uses the seven Mendoza-Martinez factors: 1) Whether the sanction involves an affirmative disability or restraint, 2) whether it has historically been regarded as a punishment, 3) whether it comes into play only on a finding of scienter, 4) whether its operation will promote the traditional aims of punishment-retribution and deterrence, 5) whether the behavior to which it applies is already a crime, 6) whether an alternative purpose to which it may rationally be connected is assignable for it, and 7) whether it

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appears excessive in relation to the alternative purpose assigned. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963). These factors are neither exhaustive nor dispositive; they provide a framework for the analysis. McVey v. State, 56 N.E.3d 674, 680 (Ind. Ct. App. 2016) (quoting Tyson, 51 N.E.3d at 88).

2.2 Parties Agree that the Legislature did not Intend the 2008 amendment to impose punishment.

Like Wallace and the subsequent authority on point, neither Bridges nor the State contends that the 2008 amendment is punitive in nature. Defendant's App. Vol. 2, p. 28, 38. As such, it is appropriate to analyze whether the law had a punitive effect.

2.3 The Mendoza-Martinez test favors the conclusion that tolling has a punitive effect.

- a) **The tolling provision involves an affirmative disability or restraint by requiring registration even though the initial 10-year registration period lapsed (Mendoza-Martinez Factor #1).**

Our Supreme Court in Wallace found that, with regard to this factor, the Indiana Sex Offender Registration Act, in which tolling provisions were present at

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the time Wallace was published, generally “imposes significant affirmative obligations and a severe stigma on every person to whom it applies.” Wallace, 905 N.E.2d at 380. When the applicable provisions of the Act are considered together, the first Mendoza–Martinez factor clearly favors treating the effects of the Act as punitive when applied to Wallace. *Id.* at 379 (emphasis added). In reaching this conclusion, the Wallace court cited to the significant intrusive affirmative duties placed on registrants as well as the profound humiliation and ostracism registrants experience. *Id.*

As in Wallace, this Court in Jensen, Harris, Gonzalez, and Flanders held that, with regard to the obligation to register, the effects of the Act were punitive. Defendant’s App. Vol. 2, p. 28. In Gonzalez, particularly, the Court found that the extension of the registration period was an additional restraint. Gonzalez, 980 N.E.2d at 317.

This Court in McVey tolled the offender’s registration period for a probation violation even though the underlying offense occurred before the 2008 amendments requiring tolling were enacted. McVey, 56 N.E.3d at 679. However, in *McVey*, whether the retroactive application of the tolling provisions violated the ex post facto clause of the Indiana Constitution was not on appeal. This Court did not examine the Legislative intent or effect of tolling provisions, including any of the factors, and as such the fact that the Court tolled McVey’s registration period

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during a subsequent incarceration weighs as much as the fact that Defendant's registration period was also tolled during the subsequent incarcerations.

In Defendant's case, the issue is not whether tolling is an affirmative disability or restraint. Instead, the issue is that, as a result of the retroactive application of tolling provisions, Defendant's obligation to register extended beyond 10 years from his initial release. In other words, if the tolling provisions were never passed or not applied to Defendant's case, then Defendant's obligation to register would have ended in 2016, before the failure to register charge leading to this case, instead of in 2020.

The effect of retroactively applying the law is that Bridges spent nearly four years on the registry without receiving credit for it, which lengthens the obligation to register, which, like Gonzalez, creates an affirmative disability. Non-enforcement of the obligation to register during incarceration does not warrant an extension of enforcement post-incarceration unless the tolling provision applies, and the tolling provision should only have a prospective operation. Furthermore, Defendant's profile remained on the registry even during incarceration, so even in effect Bridges completed his ten-year obligation to register before being charged for failure to register.

For these reasons, this factor favors treating the law's effects as punitive.

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b) The effect of tolling Defendant's registration period is historically regarded as a punishment (Mendoza-Martinez Factor #2).

Our Supreme Court in Wallace found that having to register resembles the punishment of shaming. Wallace, 905 N.E.2d at 380-81.

Furthermore, the Act's reporting provisions are comparable to supervised probation or parole, which standing alone support treating the Act as punitive. *Id.*

Likewise, in Gonzalez, our Supreme Court held that "extending the duration of the registration requirement from 10 years to life...increases the shame on the defendant, which weighs in favor of punitive treatment." Gonzalez, 980 N.E.2d at 317-8.

At issue is the effect of applying the tolling provision to cases where 1) the underlying offense was committed before the tolling provision was enacted, and 2) the offender was subsequently incarcerated after the tolling provision was enacted. In such cases, the effect is an extension of the offender's registration period, which is historically regarded as punishment.

Tolling the registration period during subsequent incarcerations when the underlying offense was committed before the tolling provision was enacted results in a longer registration period. Just like in Wallace, Bridges having to register resembles the historical punishment of shaming, and just as in Gonzalez, extending the duration of Defendant's registration requirement increases

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Defendant's shame and weighs in favor of punitive treatment. For the above reasons, this factor also favors treating the law's effects as punitive.

c) Scierter is not required for the strict liability offenses of which Bridges was convicted, and as a result this factor supports a non-punitive conclusion (Mendoza-Martinez Factor #3).

"The existence of a scierter requirement is customarily an important element in distinguishing criminal from civil statutes." Wallace, 905 N.E.2.d. at 381. The ISORA act "overwhelmingly apples to offense that require a finding of scierter for there to be a conviction." Id.

Here Bridges is strictly liable for his offenses, and as such a finding of Scierter was not required in his conviction. As such, this factor weighs against concluding that the retroactive application of tolling provisions created a punitive effect.

d) The operation of the tolling statute as applied retroactively promotes the traditional aims of punishment-retribution and deterrence (Mendoza-Martinez Factor #4)

"The penal code shall be founded on principles of reformation, and not of vindictive justice." Wallace, 905 N.E.2d at 381 (quoting Ind. Const. art. I, § 18).

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The Court in Wallace held that the deterrent effect was substantial. Id. at 381. Our Supreme Court found that laws that merely lengthen the obligation to register do not promote the traditional aims of punishment, whereas laws that create a new obligation to register do promote the traditional aims of punishment. Gonzalez, 980 N.E.2d at 318.

If the retroactive application of the tolling provision were to merely lengthen the obligation to register, then this factor would not weight in favor of finding a punitive effect. However, the operation also fails to credit the approximately four years of offender's time spent on the registry while the offender was incarcerated, and in doing so it distinguishes itself from post-Wallace authority. In Gonzalez and post-Wallace authority, the public enjoyed the benefit of non-punitive, regulatory functions such as providing the public with information related to community safety. But in the instant case, the public was already isolated and protected from the offender such that the offender's presence on the registry cannot provide such regulatory benefits. The operation therefore must promote the traditional aims of punishment, and in doing so weighs in favor of finding the application of law has punitive effect.

- e) Defendant's behavior was already a crime and he experienced a significant change, which weighs in favor of a punitive effect, (Mendoza-Martinez Factor #5).**

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"The fact that a statute applies only to behavior that is already and exclusively criminal supports a conclusion that its effects are punitive." Jensen v. State, 905 N.E.2d 384, 393 (Ind. 2009) (quoting Wallace, 905 N.E.2d at 382). But in Jensen and subsequent cases, the appellate courts have distinguished from Wallace such that the defender must experience a change other than an enhanced registration period in order to weigh this factor in favor of a punitive effect. Id. at 393.

In the case at bar, Defendant's behavior was already a crime, but he did not merely receive an enhanced registration period. He also was deprived of the ability to count time while incarcerated toward his total registry period. This change is more substantial than the post-Wallace cases and should be treated as such. This factor weighs in favor of a punitive effect.

f) Retroactively applying the tolling provision advances a legitimate regulatory purpose, which weighs against finding a punitive effect (Mendoza-Martinez Factor #6).

Authority treats whether the Act itself advances a non-punitive interest. Gonzalez 980 N.E.2d at 319. That the Act advances a non-punitive interest is not in dispute. The Court in Gonzalez held that enhancing the registration period provided to the public additional protection against offenders. Id.

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In the case at bar, retroactively applying the tolling provision adds approximately four additional years of protecting the public, because the public was already isolated and protected during Defendant's incarcerations. For this reason, this factor weighs against finding a punitive effect.

g) Retroactively applying the tolling provision is excessive in relation to the alternative purpose assigned, which weighs in favor of finding a punitive effect (Mendoza-Martinez Factor #7).

The seventh factor asks whether the law appears excessive in relation to the alternative purpose assigned. Wallace, 905 N.E.2d at 383. A number of Courts assign this factor the greatest weight. *Id.* The ability to petition for relief for registration requirements favors treating the law as non-punitive. Jensen v. State, 905 N.E.2d at 393-94. A change in the law that does not allow the offender the ability for future removal is "germane to the determination of whether a statute's effects are excessive." Gonzalez, 980 N.E.2d at 320.

Defendant's original registration period called for a 10-year registration period, which was extended to life and then shortened again to comply with Gonzalez. Like Gonzalez, Bridges would not have had the opportunity to petition for relief. And like Gonzalez and Defendant's previous situation, in the present case Bridges was given no opportunity to petition for relief. Instead, Defendant's

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time incarcerated was not credited toward the registration period. This extended his registration period from ten to fourteen years. Again, he was not given the opportunity to petition for relief. This weighty factor supports the conclusion that the retroactive application of the tolling statute is punitive in effect.

CONCLUSION

The trial court's order that the law is with the state with regard to whether the retroactive application of the 2008 tolling provision violated the Indiana Constitution is erroneous. There is little indication that the findings were based on whether the *retroactive application* of the tolling provisions violated the Indiana Constitution, as opposed to a prospective application. The facts of this case, when applied to the seven Mendoza-Martinez factors, indicate that the tolling provision, when retroactively applied, is a punishment proscribed by the Indiana Constitution. Accordingly, the decision of the trial court should be reversed and remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby duly swears that on June 5, 2018, a true and accurate copy of the above and foregoing was served via the Indiana E-Filing System (Odyssey) or by IEFS, upon the following:

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