NO. 76627-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ALMSEGGETT HABTAI,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LORI K. SMITH

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# BRIEF OF RESPONDENT

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## A. ISSUE PRESENTED

Any offenders convicted of a kidnapping offense involving a minor child who is not their child must register as a kidnapping offender. The sex and kidnapping offender registration statute is regulatory, not punitive. The amendments requiring transient offenders to register weekly and in-person, the international travel notification requirements, and the establishment of a database available to the public, have not transformed the law into a punitive law. Once the defendant was convicted of attempted kidnapping, did the trial court act within its authority in imposing a registration requirement since the defendant's victim was a minor child who was not his child?

## B. STATEMENT OF THE CASE

### 1. PROCEDURAL FACTS

Almseggett Habtai was charged with Attempted Kidnapping in the Second Degree, with a special allegation of sexual motivation. CP 1-2. After a jury trial before the Honorable Lori K. Smith, Habtai was convicted of Attempted Kidnapping in the Second Degree but the jury left blank the special verdict form as to the sexual motivation. CP 101-02. Habtai was sentenced to 15

months in jail. CP 109. He was also ordered to register as a kidnapping offender. CP 114.

## 2. SUBSTANTIVE FACTS

On July 13, 2016, 12-year-old G.S. was attending a summer camp at Seattle Drum School, located at 15th Ave NE and 125th Ave NE in Seattle. RP 137, 198, 323, 369.[1] At lunch, the kids were allowed to go across the street to Subway to get food. RP 201. On this date, G.S., her brother and her friend went to Subway for lunch. RP 328. As they returned to the school, G.S.'s brother and friend went to 7-11 and G.S. waited alone to cross the street to return to the school. RP 328, 330. As she waited for the light, a man in an orange car asked if she wanted a ride. RP 330. She told him no. RP 330. He asked her again and she again said no. RP 331, 336. He then began demanding that she get in the car. RP 331. At that point, she felt uncomfortable and ran across the street and back to the school. RP 331, 338.

G.S. described the car as looking like an orange cab with faded letters on it. RP 335. She described the man as a person of color wearing a collared shirt. RP 335. When G.S. returned to the school, she told another student, S.P., what had happened. RP

[1] The verbatim report of proceedings consists of five consecutively numbered volumes that will be referred to as "RP ____."

339. S.P. told G.S. that they should call 911, which they did. RP 341-42. G.S. told the 911 operator what had happened. RP 342.

Police were dispatched to look for the orange car. RP 267-28. Ofc. Kim found a car matching the description in the parking lot of Safeway at 15th Ave NE and 125th Ave NE. RP 265, 268. A male later identified as Almseggett Habtai was alone in the car, sitting in the driver's seat. RP 159, 269. When Ofc. Anderson approached Habtai, Anderson observed that Habtai's pants were undone and his erect penis was sticking out. RP 170. Anderson told Habtai to put his penis back in his pants and get out of the car. RP 170.

The car was an older orange Ford Crown Victoria with faded letters, with license plate AXZ5677. RP 158-59, 168.

Police responded to the Seattle Drum School and took G.S. to the Safeway parking lot where they conducted a show-up. RP 140, 344. G.S. identified Habtai as the person who had tried to get her into his car. RP 141, 346.

On July 9, 2016, four days before the incident involving G.S., Ofc. Smith came into contact with Habtai in the same orange car, license plate AXZ5677. RP 244, 246. The car was registered to Habtai in the summer of 2016. RP 411, 413.

Det. Gallegos collected surveillance video from the Chevron gas station and the Brown Bear car wash. RP 395. The Brown Bear video showed a female running on the sidewalk toward the drum school at the time G.S. reported running from Habtai. RP 397. The Chevron video showed Habtai's orange car stop at the exit of the strip mall, where G.S. said he called to her. RP 334, 404. The video then showed a female running along the sidewalk toward the drum school. RP 404-05. The orange car then turned into the Safeway parking lot. RP 406.

In Habtai's car, officers found a fixed blade knife, scissors, a bottle of alcohol, and an electrical cord with the ends cut off. RP 273, 419-22.

Habtai did not testify at trial.

## C. ARGUMENT

### THE KIDNAPPING OFFENDER REGISTRATION REQUIREMENT IS REGULATORY NOT PUNITIVE AND THE SENTENCING COURT ACTED WITHIN ITS AUTHORITY IN ORDERING HABTAI TO REGISTER

Habtai argues that the kidnapping offender registration requirement is punitive and, therefore, the sentencing court acted outside of its authority in imposing it. Specifically, Habtai asserts that amendments to the registration statute since its original

inception, involving homeless offenders,[2] international travel, and the public dissemination of information, has made the statute punitive. Therefore, argues Habtai, the jury was required to make the factual findings that the victim was a minor and not a child of the defendant, not the sentencing judge. This argument should be rejected. The registration requirement is regulatory, not punitive, and the court acted within its authority.

Any adult who has been convicted of a kidnapping or sex offense is required to register with the county sheriff of the county of the person's residence. RCW 9A.44.130(1)(a). A kidnapping offense includes the crimes of kidnapping in the first or second degree, unlawful imprisonment, or any criminal attempt, solicitation, or conspiracy to commit such an offense, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.128(8)(a) and (b).

The sex offender registration law was established in 1990. LAWS OF 1990, ch. 3, § 401 (effective February 28, 1990). In 1997, kidnapping offenders were added to the registration law. LAWS OF 1997, ch. 113, § 1 (effective April 21, 1997). RCW 9A.44.130

[2] There is nothing in the record indicating that Habtai lacks a fixed residence and is having to register weekly as a homeless offender.

governs the procedures for both sex and kidnapping offender registration.

RCW 4.24.550 governs the release of information to the public involving sex and kidnapping offenders. In 2002, the statute was amended to create a sex and kidnapping offender database. LAWS OF 2002, ch. 118, § 1 (effective June 13, 2002). The database is available to the public and consists of information on Level II and III sex offenders and all kidnapping offenders (as well as Level I sex offenders who are not in compliance and transient sex offenders). RCW 4.24.550(5)(a); RCW 9A.44.130(6). The information provided includes name, relevant criminal convictions, address by hundred block, physical description and photograph. RCW 4.24.550(5)(i), (ii), (iii).

Law enforcement agencies are responsible for classification of the offenders after consideration of available information, such as risk level classifications made by the department of corrections, department of social and health services, or the indeterminate sentence review board; the agency's own risk assessment tools; and other information involving aggravating or mitigating factors. RCW 4.24.550(6)(a). Level I are the offenders deemed the lowest risk and Level III the highest risk. RCW 4.24.550(6)(b).

The Washington Supreme Court held in 1994 that the sex offender registration law was regulatory, not punitive. State v. Ward, 123 Wn.2d 488, 510, 869 P.2d 1062 (1994). Two sex offenders challenged Washington's sex offender registration law, arguing it violated constitutional prohibitions against ex post facto laws by imposing greater punishment – registration – than was required at the time the crime was committed. Ward, 123 Wn.2d at 496.

In soundly rejecting this argument, the court first looked at the Legislature's intent, holding that the "Legislature unequivocally stated that the State's policy is to assist local law enforcement agencies' efforts to protect their communities by *regulating* sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in RCW 9A.44.130." Id. at 499 (emphasis in original).

Next, the court examined whether the actual effect of the statute was so punitive as to negate the Legislature's regulatory intent. Id. at 499. The court turned to the factors listed in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963) for assistance in determining whether the effect of the statute was punitive rather than regulatory:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . .

The Ward court rejected the argument that registration is equivalent to a "badge of infamy." Id. at 500. The court also found that the "physical act of registration creat[ed] no affirmative disability or restraint." Id. Sex offenders were free to move "within their community or from one community to another." Id. at 501.

Lastly, the court noted that although the statute requires dissemination of registrant information, the Legislature has limited the disclosure to the public "when the release of information is necessary for public protection." Id. at 502.

In 1999, the statute was amended to require that homeless offenders register monthly. LAWS OF 1999, ch. 6, § 1 (effective June 7, 1999). In 2001, the requirement was changed to require homeless offenders to register weekly and in person. LAWS OF 2001, ch. 169, § 1 (effective July 22, 2001).

In 2015, the statute added the additional requirement that any offenders intending to travel outside of the United States must

provide written notice to the sheriff of the travel plan twenty-one days prior to travel. LAWS OF 2015, ch. 261, § 3 (effective May 14, 2015).

Habtai argues that, although Ward held the statute to be regulatory, the amendments to the statute since Ward regarding homeless offenders and travel have rendered the statute punitive. Additionally, Habtai asserts that the sex and kidnapping offender database is the equivalent of "public shaming."

However, in State v. Enquist, 163 Wn. App. 41, 49, 256 P.3d 1277 (2011), issued subsequent to the amendments about homeless offenders and the creation of the database, the Court of Appeals held that the sex and kidnap offender registration law was regulatory, not punitive. In Enquist, a sex offender argued that the requirements for homeless sex offenders violated ex post facto laws. Id. at 44. The offender also argued that the statute violated his constitutional right to travel. Both arguments were rejected.

The Enquist court noted that the Ward court had relied on four characteristics of the registration statute to conclude it was not punitive: (1) registration does not overly burden or restrain the offenders because it requires they provide only limited information to law enforcement and it does not significantly limit their

movements or activities; (2) registration has not been historically regarded as punishment; (3) registration is not primarily designed to deter future crime, which is a traditional purpose of punishment, it is designed to aid law enforcement agencies' efforts to protect communities by providing increased access to necessary and relevant information; and (4) registration is not excessive in relation to the important community interest served by having law enforcement know the presence and location of sex offenders in the community. Enquist, 163 Wn. App. at 48 (citing Ward, supra, 123 Wn.2d at 501). The Court of Appeals stated that "for the reasons articulated in Ward, the transient registration requirements are not punitive." Id. at 49. Specifically, the court noted that "inconvenience alone does not make the statute punitive" and the burdens are "an incident of the underlying conviction and are not punitive for ex post facto analysis." Id.

The Enquist court further rejected the argument that the statute violated Enquist's right to travel. Enquist objected to the statute's requirement that he register within 24 hours if he travels to a new county. Id. at 50-51. The right to travel is a "fundamental right subject to strict scrutiny under the United States Constitution" and regulations limiting those rights "may be justified only by a

compelling state interest." Id. at 50. "A state law implicates the right to travel when it actually *deters such travel and when impeding the travel is its primary objective."* Id. (emphasis added). The court held that "impeding travel has never been [the statute's] primary goal" so Enquist's claims that his right to travel had been impeded are unfounded. Id. at 51.

Although Enquist does not address the international travel requirement, as it had not yet been added to the statute, the same reasoning applies. The statute does not deter travel; it requires an offender to file a travel plan for international travel. And, as noted in Enquist, the statute's primary objective is not to impede travel. Habtai's argument that the international travel requirement has rendered the statute punitive should be rejected.

In a recent opinion of the Court of Appeals, Division 1 concurred with the analysis and conclusion from Enquist, holding that Washington's registration statute was not punitive and did not violate the prohibition against ex post facto laws. State v. Boyd, ___ Wn. App. ___, ___ P.3d ___, WL 6884137 (Dec. 11, 2017). The Boyd court, similar to Ward, supra, went through the Mendoza-Martinez factors and concluded that the effect of the statute was regulatory not punitive.

The United States Supreme Court has rejected Habtai's argument that the creation of an offender database has rendered the statute punitive. Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2002). In Smith, the Court examined whether the Alaska Sex Offender Registration Act violated the ex post facto clause of the United States Constitution. Id. at 89. Alaska's law requires the registration of any sex offender or child kidnapper. Id. at 84. Similar to Washington's statute, the Alaska law contains two parts: a registration requirement and a notification system. Id. at 90. For the notification component, information on the offender is forwarded to the Alaska Department of Public Safety, which maintains the database. Id. The following information is made available to the public in the database: the offender's name, aliases, address, photograph, physical description, license, identification of motor vehicles, places of employment, date of birth, crime for which convicted, data of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender is in compliance with the registration requirements. Id. at 91.

The Court rejected the argument that the "compulsory registration and notification" resembled historical punishments from

colonial times in which offenders were shamed. Id. at 97-98. "Our system does not treat the dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." Id. at 98. The Court noted that although the "publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism. . . . the State does not make the publicity and resulting stigma an integral part of the objective of the regulatory scheme." Id. at 99.

The Court specifically rejected the argument made by Habtai that the limitless reach of the Internet has transformed the statute to punitive:

> The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.

Id.

Washington's statute actually disseminates less information publicly than does Alaska's. RCW 4.24.550(5)(i). For the reasons

articulated in Smith, the creation of the offender database and the wider geographic reach of the public dissemination has not rendered the statute punitive.

The amendments to the statute referenced by Habtai have not rendered it punitive and, therefore, the court was permitted to order registration without a jury making factual findings as to the victim's age and whether Habtai was her parent. The court should reject Habtai's arguments and affirm the registration requirement.

## D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm the kidnapping registration requirement imposed on Habtai.

DATED this 22nd day of January, 2018.

Respectfully submitted,

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