No. 217P13 **FIFTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

****

IN THE MATTER OF	**)**	
	)	
	)	**From New Hanover**
	)	
KEVIN MCCLAIN	**)**	

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STATE'S RESPONSE TO PETITIONER'S PETITION FOR DISCRETIONARY REVIEW

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA.

NOW COMES the State of North Carolina, by and through Roy Cooper, Attorney General, and John J. Aldridge, III, Special Deputy Attorney General, and, responding to Petitioner's Petition for Discretionary Review under N.C.G.S. 7A-31 respectively moves this Court to deny Petitioner's Petition.

In support of this response, the State shows the following:

PROCEDURAL HISTORY

On 31 May 2012, Petitioner Kevin McClain initiated this proceeding by filing his petition for termination of sex offender registration. (R p. 17) See

N.C.G.S. § 14-208.12A (2011). The matter came on for hearing at the 13 June 2012 Criminal Session of the Superior Court, New Hanover County, the Honorable Walter H. Godwin, Jr. presiding. (R p. 1) By order entered 13 June 2012, the trial court denied the relief requested by Petitioner. (R p. 18) Petitioner now petitions to this Court from the Court of Appeals affirmation of the trial court's order. (R p. 25) Through a unanimous decision, the North Carolina Court of Appeals issued a published opinion that the action taken by the court, referencing the federal sex offender registration standards, was not an unconstitutional delegation of authority and further finding that the trial court had the authority to deny petitioners request to be removed from the registry.

STATEMENT OF THE FACTS

On 29 January 2001, Petitioner entered a plea of guilty in the Superior Court, New Hanover County to, *inter alia*, the felony offense of indecent liberties with a child in violation of N.C.G.S. § 14-202.1. (R pp. 5-8) On the same date, judgment was entered accordingly. (R pp. 11-12) On 7 August 2001, Petitioner reported for initial county registration under the North Carolina Sex Offender and Public Protection Registration Programs pursuant to N.C.G.S. § 14-208.7. (R p. 17) Petitioner is not a lifetime registrant under Part 3 of the Registration Programs. Cf. N.C.G.S. §§ 14-208.20 to -24 (2011). Petitioner was convicted of a

felony after his initial county registration;[1] consequently, he would not meet the "clean period" requirement for reduction of his registration period under federal law from 15 years down to 10 years. (T pp. 2, 9-10) See 42 U.S.C. §§ 16911, 16915. The trial court's refusal to make Finding of Fact Number Seven appears to have been based on these grounds.

REASONS WHY THIS COURT SHOULD DENY PETITIONER'S PETITION FOR DISCRETIONARY REVIEW

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE REFERENCE IN G.S. § 14-208.12A (a1)(2) TO FEDERAL STANDARDS APPLICABLE TO THE TERMINATION OF SEX OFFENDER REGISTRATION IS NOT AN UNCONSTITUTIONAL DELEGATION OF AUTHORITY.

In his petition, Petitioner argues N.C.G.S. § 14-208.12A(a1)(2), referencing federal sex offender registration standards, is an unconstitutional delegation of legislative authority, relying on Bulova Watch Co. V. Brand Distribs. Of N. Wilkesburrough, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974). However, the present case is distinguishable, being that N.C.G.S. § 14-208.12A(a1)(2) does not delegate any of the North Carolina legislatures lawmaking authority to an administrative agency of the government and certainly not to a private corporation

[1] This conviction was apparently for failure to register, presumably in violation of one of several provisions set forth in N.C.G.S. § 14-208.11(a), and resulted in an active sentence of imprisonment being imposed against Petitioner. (T p. 2)

as G.S. § 66-56 did in Bulova. See Id. at 474-75. This argument is without merit and the Petitioner's petition should be denied.

This Court "give[] acts of the General Assembly great deference, and a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute." Rhyne v. K-Mart Corp., 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004) (citation and internal quotation marks omitted). Moreover, "'[w]here a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter.'" Guilford County Bd. of Educ. v. Guilford County Bd. of Elections, 110 N.C. App. 506, 511, 430 S.E.2d 681, 685 (1993) (citation omitted). As the Court in Guilford County Board of Education stated:

> Because the Constitution is a restriction of powers, and those powers not surrendered are reserved to the people to be exercised by their representatives in the General Assembly, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision. Therefore, the judicial duty of passing upon the constitutionality of an act of the General Assembly is one of great gravity and delicacy. This Court presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality.

Id. at 511-12, 430 S.E.2d at 684 (citations omitted).

Petitioner specifically argues that the incorporation of the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act) and the federal Sex

Offender Registration and Notification Act (SORNA) into G.S. 14-208.12A (a1) (2) is an unconstitutional delegation of authority. The Court of Appeals properly held to the contrary.

The most sound and reasonable interpretation of subsection 14-208.12A(a1)(2) is also the interpretation which renders the provision constitutional. That is, the language "the provisions of the federal Jacob Wetterling Act, as amended," was intended to incorporate the standards promulgated through Title I of the Adam Walsh Act, which was enacted contemporaneously. Therefore, this part of subsection 14-208.12A(a1)(2) was not a "delegation" of State legislative authority to future acts of Congress.

Petitioner places considerable emphasis on the fact that North Carolina has not substantially complied with the Adam Walsh Act for purposes of receiving federal funding. This emphasis is misplaced. To the contrary, however, it is well within the authority of the General Assembly to adopt in part the provisions of the Adam Walsh Act, even if the federal law is not adopted *in toto*. As found by our Court of Appeals, the evolution of the federal sex offender registration program clearly shows the Adam Walsh Act was intended to expand on and replace the Jacob Wetterling Act. In the Matter of McClain, No. COA12-1258, slip op. at 5 (26 April 2013).

The General Assembly cannot delegate its authority to make law to departments of government or administrative agencies. N.C Const., art II, § 1. As elaborated on by the Court of Appeals in the case *sub judice*, such an improper delegation does not occur when particular conduct is merely defined by reference to an external standard, such as a reference here to federal sex offender registration standards. See State v. Rhoney, 42 N.C. App. 40, 43, 255 S.E.2d 665, 667 (1979).

The Court of Appeals found the intent of the North Carolina legislature was not to delegate its authority through compliance with the federal statute, but rather for the state and federal statutes to exist "side by side" without one taking legislative precedent over the other. Thus, the Court of Appeals was correct in its holding that "Rather than abdicating or delegating legislative authority to make new guidelines to the federal government, the North Carolina legislature is attempting to bring its program in line with the external federal standards with which it needs to comply in order to receive federal funding." In the Matter of McClain, No. COA12-1258, slip op. at 8 (26 April 2013). The court held that "this action by the North Carolina legislature is not an unlawful delegation of its authority . . . ." In the Matter of McClain, No. COA12-1258, slip op. at 9 (26 April 2013). Because this action was not unlawful, the court reviewed the trial court's

denial of the petition for removal from the registry using the framework in *In re Hamilton*, which it found to be in compliance with. In the Matter of McClain, No. COA12-1258, slip op. at 9 (26 April 2013).

Petitioner relies heavily on this Courts decision in Bulova Watch Co. v. Brand Distributors of North Wilkesboro, Inc., 285 N.C. 467, (1974), to support his argument. This reliance is misplaced. The issue before the court in Bulova, was whether N.C. Gen. Stat. § 66-56 was unconstitutional because it delegated legislative power to a private corporation in violation of North Carolina Constitution Article II § 1 and because it deprived the non-signer of a liberty interest contrary to the law of the land in violation of North Carolina Constitution Article I § 19. Bulova 285 N.C. at 473-74. This Court held that the non-signer portion of the fair trade act was unconstitutional because "[b]y the Fair Trade Act the Legislature has undertaken to confer upon the plaintiff the authority to fix the price at which the defendants, with whom it has no contract, may sell an article produced by the plaintiff but lawfully acquired by the defendants in legitimate channels of trade." Id. at 481. Moreover, the court went further to explain its reasoning by stating that "[t]here [was] no restriction placed by the Act upon this authority," that "[t]he plaintiff [was] free to set the price at whatever figure pleases it" and finally that "[t]he defendants [did not have an] opportunity to be heard and

no right to judicial review." Id.

In the present case, however, through N.C. Gen. Stat. 14-208.12A (a1) (2), the General Assembly has not delegated to the federal government, sole power to create registry laws in which the State must comply. It merely authorizes the State to use federal standards to define conduct and also to receive federal funds. Additionally, there are constitutional restrictions on the federal government in its enactments of federal laws, where there were no such restrictions on private corporations to fix prices in Bulova. Id. Therefore, the reasons that this Court in Bulova felt that N.C. Gen. Stat. § 66-56 was unconstitutional, are not present in this case.

II. THE TRIAL COURT WAS WITHIN ITS DISCRETIONARY AUTHORITY TO DENY THE PETITIONERS REQUEST TO BE REMOVED FROM THE SEX OFFENDER REGISTRY.

Assuming *arguendo* the mandatory condition imposed by subsection 14-208.12A(a1)(2) must fail it is well within a trial court's discretion to deny relief on the basis of federal standards. See Hamilton, N.C. App. at , 725 S.E.2d at 399 (noting "the ultimate decision of whether to terminate a sex offender's registration requirement still lies in the trial court's discretion" (citing N.C.G.S. § 14-208.12A(a1)). The Court of Appeals unanimously agreed with this argument. In its opinion the court cites to *In re Hamilton,* __ N.C. App. at __, 725 S.E.2d at 399,

stating "'after making findings of fact' the trial court is 'free to employ its discretion in reaching its conclusion of law whether [p]etitioner is entitled to the relief he requests' because N.C.G.S. § 14-208.12A(a1) states that the trial court 'may' grant the petitioner relief if the terms of the statute are met." In the Matter of McClain, No. COA12-1258, slip op. at 10 (26 April 2013). Being that the petitioner admitted to a felony conviction for failing to register as a sex offender within the past ten years, the Court of Appeals rightly held that the trial court was well within its explicit inherent authority to use its discretion and deny the petitioners request for removal from the sex offender registry.

CONCLUSION

Petitioner has failed to show that any of the issues involves a substantial constitutional question. Further, he has failed to show that the case involved legal principals of major significance to the jurisprudence of the State or that the unanimous decision of the Court of Appeals, conflicts with the decisions of this Court. The State respectfully requests that this Court deny Petitioner's Petition for Discretionary Review.

WHEREFORE, the State moves that Petitioner's Petition for Discretionary Review be denied.

Electronically submitted this 30th day of May, 2013.

Roy Cooper
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing **STATE'S RESPONSE TO PETITIONER'S PETITION FOR DISCRETIONARY REVIEW** upon the **PETITIONER** by placing a copy of same in the United States Mail, first class postage prepaid, addressed to his **ATTORNEY OF RECORD** as follows:

John F. Carella
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This the 30th day of May, 2013.

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