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IN THE
COURT OF APPEALS OF INDIANA

No. 18A-PL-2334

STATE OF INDIANA, *Appellant-Defendant*, v. DOUGLAS KIRBY, *Appellee-Plaintiff*.	Appeal from the Howard Superior Court 4, No. 34D04-1805-PL-334, The Honorable George A. Hopkins, Judge.

CORRECTED STATE'S BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE

Kirby committed the crime of child solicitation and pled guilty in 2010. In 2015, the legislature enacted a prohibition on "serious sex offenders," including those convicted of child solicitation, entering school property if they are required to register as a sex offender. Is this statute an unconstitutional ex post facto law as applied to Kirby, where it excludes him from schools because he was convicted of soliciting a child between 14 and 16 years old for sexual intercourse?

STATEMENT OF THE CASE

Nature of the Case

The State appeals the trial court's declaratory judgment that Indiana Code section 35-42-4-14, the unlawful entry onto school property by a serious sex offender statute, is an unconstitutional ex post facto law as applied to Kirby.

Proceedings Below

On May 15, 2018, Kirby filed a complaint for declaratory judgment seeking a declaration that Indiana Code section 35-42-4-14 is an unconstitutional ex post facto law as applied to him because he finds his inability to attend his children's school events to be further punishment (App. 3, 5–7). The State answered the complaint on June 19, 2018, and amended its answer on July 19, 2018 (App. 3, 9–12). On July 30, 2018, Kirby asked the trial court to take judicial notice of certain documents from his earlier cases that underlie this action (App. 3, 14–116). On August 1, 2018, a hearing on the pleadings was held and no evidence was taken (App. 3). Without discovery or any dispositive motions having been filed, on August

28, 2018, the trial court summarily issued its ruling declaring the statute unconstitutional as applied to Kirby and authorized Kirby to "enter onto school property and attend his school functions and sporting events" [*sic*] (App. 3, 117–119).

Appellate Proceedings

The State filed a timely notice of appeal on September 27, 2018. The Clerk filed a notice of completion of the Clerk's Record on October 1, 2018, and no transcript was requested.

STATEMENT OF THE FACTS

Kirby pled guilty to Class D felony child solicitation in 2010 for soliciting children between age 14 and 16 for sexual intercourse (App. 80–81, 90–91). He was given a suspended sentence of 18 months (App. 92–93), and as a term of probation Kirby was prohibited from being present at a school "except for any activities involving his son and grandchildren participation" [*sic*] (App. 96). In 2015, the trial court granted his motion to reduce the felony to a Class A misdemeanor (App. 82, 102).

The Indiana General Assembly enacted Indiana Code section 35-42-4-14, the unlawful entry onto school property statute, in 2015 and amended it in 2016. This statute provides:

> (a) As used in this section, "serious sex offender" means a person required to register as a sex offender under IC 11-8-8 who is:
>
> > (1) found to be a sexually violent predator under IC 35-38-1-7.5; or

(2) convicted of one (1) or more of the following offenses:

(A) Child molesting (IC 35-42-4-3).

(B) Child exploitation (IC 35-42-4-4(b) or IC 35-42-4-4(c)).

(C) Possession of child pornography (IC 35-42-4-4(c) or IC 35-42-4-4(e)).

(D) Vicarious sexual gratification (IC 35-42-4-5(a) and IC 35-42-4-5(b)).

(E) Performing sexual conduct in the presence of a minor (IC 35-42-4-5(c)).

(F) Child solicitation (IC 35-42-4-6).

(G) Child seduction (IC 35-42-4-7).

(H) Sexual misconduct with a minor (IC 35-42-4-9).

(I) A conspiracy or an attempt to commit an offense described in clauses (A) through (H).

(J) An offense in another jurisdiction that is substantially similar to an offense described in clauses (A) through (I).

(b) A serious sex offender who knowingly or intentionally enters school property commits unlawful entry by a serious sex offender, a Level 6 felony.

Pub. L. No. 235-2015, §4, 2015 Ind. Acts 3586, 3589 (SEA 522, §4, eff. July 1, 2015), *amended by* Pub. L. No. 13-2016, §17, 2016 Ind. Acts 99, 126–27 (SEA 14, §17, eff. Mar. 21, 2016). A Level 6 felony carries a potential sentence between six months and two-and-a-half years and a fine of up to $10,000. Ind. Code § 35-50-2-7(b).

Kirby thereafter sought post-conviction relief on the ground that his guilty plea in 2010 was not made knowingly because the unlawful entry statute was enacted in 2015, but he also suggested that the unlawful entry statute is an unconstitutional ex post facto law (App. 29–31). The trial court denied relief and declined to rule on the ex post facto argument as it was not properly before the court

(App. 86–88). Kirby appealed, and this Court reversed as to the constitutionality of the unlawful entry onto school property statute (App. 22–36); but the Supreme Court granted transfer and affirmed, holding that Kirby cannot utilize post-conviction relief to obtain a declaratory judgment on the constitutionality of a collateral consequence to a criminal conviction (App. 16–21). *Kirby v. State*, 95 N.E.3d 518 (Ind. 2018), *vacating* 83 N.E.3d 1237 (Ind. Ct. App. 2017).

Kirby brought this declaratory judgment action to have the unlawful entry onto school property statute declared unconstitutional as applied to him. The trial court granted that relief summarily upon the pleadings and without discovery, evidence, or motions for summary judgment (App. 117–19). The trial court found that Kirby is the father of a son who is a senior in high school and who plays football for the school (App. 117). The reasoning given by the trial court for its judgment was that "The sentencing court allowed [Kirby] to go onto school property to attend his son's school functions and sporting events before the 2015 amendment" (App. 118).

SUMMARY OF THE ARGUMENT

Kirby solicited a school-aged girl for sexual intercourse and was convicted in 2010 of child solicitation; he must register as a sex offender until 2022. In 2015, the legislature enacted the unlawful entry by a serious sex offender statute, Indiana Code section 35-42-4-14, which prohibits "serious sex offenders"—a term defined as a person who has been convicted of one of several of the most serious sex crimes against children, including child solicitation—from entering onto school property

during the time that they are required to register as a sex offender. The statute's purpose is to help protect children while on school property from known sexual predators.

The trial court erred in declaring that the unlawful entry onto school property statute is an unconstitutional ex post facto law as applied to Kirby. When analyzed under the well-established considerations for determining whether a new law is an impermissible ex post facto law, the statute is not punitive and Kirby's ex post facto claim must fail. Kirby's claim is entirely based on 1) his assertion that he merely wants to be on school property so that he can participate in school activities of his children, and 2) that while on probation his sentencing judge granted special permission to attend school functions and activities involving his son. But having formerly received the grace of that probation term does not forever grant a constitutionally protected status to him. Nor does that fact actually inform the question of whether prohibiting serious sex offenders from entering onto school property is punishment under our constitutional understanding of that term.

Kirby committed and was convicted of sex crimes against children, and this statute is specifically designed to keep such children safe from offenders like Kirby while at school. The statute is a proper exercise of the State's regulatory authority, no matter whether it is considered facially or as applied to Kirby alone. The trial court's judgment should be reversed.

ARGUMENT

The unlawful entry statute is not an unconstitutional ex post facto law.

The ex post facto clauses do not prohibit Indiana from applying its unlawful entry statute to Kirby because excluding serious sex offenders from schools is not punitive. Our state and federal Constitutions do not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. *See Smith v. Doe*, 538 U.S. 84, 103 (2003). The unlawful entry statute is part of a broader scheme of sex offender regulation created to ensure public safety and protect unsuspecting potential victims from recidivist sex offenders. *Cf. Pollard v. State*, 908 N.E.2d 1145, 1149 (Ind. 2009) (finding the sex offender residency restrictions to be part of the Sex Offender Registration Act's plan and presuming the legislature intended an overall civil, nonpunitive regulatory scheme).

Excluding convicted pedophiles and other child sexual predators like Kirby from school property is a reasonable regulatory judgment, as it protects children from sexual abuse at the hands of pedophiles and requires only that such offenders stay off of school property. It is not inherently punitive, nor does it impact serious sex offenders in ways that are "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Smith*, 538 U.S. at 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

That the legislature does not intend Indiana's sex offender regulation scheme to be primarily a criminal one does not end the inquiry. It may still be possible that

the unlawful entry statute has sufficiently punitive effects for it to be an ex post facto punishment. In *Wallace v. State*, the Indiana Supreme Court adopted the federal intent-effects test of seven non-exclusive, non-exhaustive guideposts to assist courts in determining whether the effects of a particular legislative act are penal rather than regulatory. 905 N.E.2d 371, 378 (Ind. 2009); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963). They are whether,

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

Id. "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) "The factors most relevant to this analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Smith*, 538 U.S. at 97. The *McVey* Court properly analyzed the statute under these factors and determined that the statute is nonpunitive; this Court should do so again here. *McVey*, 56 N.E.3d at 679–81.

Considering the most important factors in turn,[1] the statute cannot be fairly understood as punitive. First, the unlawful entry statute "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Smith*, 538 U.S. at 97 (citing *Hudson v. United States,* 522 U.S. 93, 104 (1997)). It imposes only a minor, indirect restraint and is less harsh than occupational debarment, which was deemed nonpunitive in *Hudson.* There is no question that a school has the right to exclude any sex offender from its property, including Kirby. So his not being able to enter a school to attend activities that the school always has the right to exclude sex offenders from is very minor in comparison to the residency restriction in *Pollard* that would have forced people from their homes. *Cf. McVey*, 56 N.E.2d at 681 (finding that the unlawful entry statute does not pose a significant restraint on a sex offender who wanted to start attending a career development class).

Second, restricting people from schools was not historically considered punishment. The public has no general right to enter school property. They may only enter upon the invitation of the school, whether it be implicit (as with a sporting event) or explicit (as with picking up children or entering to give a presentation to a class). Indeed, schools commonly restrict public access to their facilities through various strict security precautions (including locked doorways

[1] The State acknowledges that the statute's penalty for noncompliance requires scienter, and that the restriction is entirely based on a prior conviction. These factors are not among the most significant to an ex post facto analysis, and so they do not compel a finding of unconstitutionality here.

with cameras)—particularly when children are present. Such restrictions are properly designed to enhance the safety of children and demonstrate the heightened regulatory interest in limiting access to school property. That is quite unlike the residency restrictions at issue in *Pollard*, where sex offenders were prohibited from living close to a school. 908 N.E.2d at 1150–51. Effectively evicting Pollard from his longtime home was punishment, but one's desire to attend sporting events, even when one's child is a competitor, pales in comparison to forceful eviction ex post. There is not even a present, let alone a historical, understanding that excluding convicted child sex offenders from schools is punitive. This factor weighs in favor of the statute's constitutionality.

Third, the statute does not have a significant deterrent or retributive effect on sex offenders. Keeping serious sex offenders off of school grounds is a deterrent only insofar as it achieves its permissible regulatory objective, *i.e.*, to make it more difficult for serious sex offenders to gain access to children, and thereby to protect children from sexual predators. It simply "proves too much" to find a punitive effect merely because a policy deters some people from committing some crimes. *Smith*, 538 U.S. at 102. "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' … would severely undermine the Government's ability to engage in effective regulation." *Id.* There is no additional or special retributive dimension to the statute's policy, so this factor weighs against finding a punitive effect. *Id.*

Fourth, the statute advances the legitimate regulatory purpose of ensuring the safety of schoolchildren from sexual abuse. It is unquestionable that if a serious sex offender does not enter a school, it will be that much more difficult for him to gain access to those children, and will be impossible while the children are at the school. Like even the residency restriction in *Pollard*, the school property restriction advances legitimate alternative public safety and child protection purposes other than punishment. 908 N.E.2d at 1152–53.

Finally, restricting serious sex offenders from entering school property is not excessive in relation to its legitimate regulatory purpose of preventing child sexual abuse of children while they are at school. If children should be safe anywhere, it is while at a school. Such "rational connection to a nonpunitive purpose is a '[m]ost significant' factor in [a] determination that the statute's effects are not punitive." *Id.* Kirby committed an offense against children, so the statute is necessarily nonpunitive as applied to him. The statute does not restrict all sex offenders from school property, but instead only sexually violent predators and those convicted of specifically committing sex offenses against children. The statute is also limited as to the time that a person must register as a sex offender, which consistently ties it to the period of time that the legislature is most concerned with sex offenders reoffending. And the restriction is narrowly crafted to apply only to school property rather than a more significant geographic area. *Cf. Valenti v. Lawson*, 889 F.3d 427, 430-31 (7th Cir. 2018) (discussing the importance of the statute's public safety and

child protection concerns compared to the particularly narrow tailoring given to the statute by the legislature).

As applied to Kirby specifically, the seventh factor weighs against excessiveness because Kirby committed a sex offense against children and the statute is meant to protect children from such offenders. *McVey*, 56 N.E.3d at 681. As the *McVey* Court observed, this fact is conclusive as to the statute's constitutionality. *Id.*

In point of fact, Kirby's case exemplifies what the legislature intended to prevent by enacting the unlawful entry statute. Kirby was convicted for soliciting a girl between age 14 and 16 for sexual intercourse, yet he feels entitled to go to schools for his children's activities, including his son's high school sporting events. There, he will conveniently have substantial access to children similar in age to his victim. In his testimony in his post-conviction proceeding raising this same ex post facto claim, Kirby admitted to having a sex addiction that led to his crime (Transcript at 28, *Kirby v. State*, 95 N.E.3d 518 (Ind. 2018) (Nos. 18S-CR-79 and 34A02-1609-CR-2060)), so even he cannot guarantee that he will not reoffend against another child.

But even if Kirby earnestly wants only to be able to attend his son's activities, Kirby is among the sort of sex offenders from which the unlawful entry statute is specifically intended to protect children on school property. Given that the public reasonably expects the government to ensure that school property is a

particularly safe zone, the statute is not excessive in relation to its legitimate purpose either on its face or as applied to Kirby specifically.

The only reason that the trial court cited in support of its conclusion, *see* App. 118 ¶10, was that Kirby's terms of probation exempted his son's school activities from the standard probation terms prohibiting a sex offender probationer from being "present at schools, playgrounds, or day care centers unless given permission by the court," and participating "in any activity which involves children under 18 years of age, such as, but not limited to, youth groups, Boy Scouts, Girl Scouts, Cub Scouts, Brownies, 4-H, YMCA, YWCA, or youth sports teams." App. 96. That years before the statute was enacted the sentencing court found such an exception appropriate in Kirby's circumstance during his 18 months of probation does not grant Kirby an extraordinary constitutional right to enter schools for life. The unlawful entry onto school property statute is properly applied to Kirby as it is every other citizen.

* * *

The intent-effects test factors weigh overwhelmingly in favor of a determination—as previously made by this Court in *McVey*—that the effects of this statute are nonpunitive to serious sex offenders generally and Kirby specifically. This Court should reverse the trial court's judgment to the contrary.

CONCLUSION

This Court should reverse the trial court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 1, 2018, I electronically filed the foregoing document using the Indiana E-filing System ("IEFS"). I also certify that the foregoing document was served November 1, 2018, upon opposing counsel via IEFS.

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