

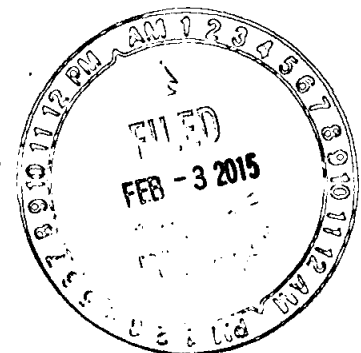


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APPELLANT'S BRIEF

~~CONFIDENTIAL~~



IN THE
INDIANA COURT OF APPEALS

No. 49A05-1410-MI-00463

STATE OF INDIANA,
Appellant,

v.

SCOTT ZERBE,
Appellee.

Appeal from the Marion Superior
Court, Civil 13,

No. 49D13-1403-MI-009780,

Hon. Timothy W. Oakes,
Judge.

BRIEF OF APPELLANT

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STATE OF INDIANA

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Appeal from the Marion Superior
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Hon. Timothy W. Oakes,
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BRIEF OF APPELLANT

STATEMENT OF THE ISSUE

Whether, as applied to Scott Zerbe (“Zerbe”), the subsection of Indiana’s Sex Offender Registration Act (“INSORA”) requiring Zerbe to register as a sex offender in Indiana because he chose to voluntarily move to Indiana while under a twenty-five year sex offender registration requirement in Michigan is a violation of the Ex Post Facto Clause of Indiana.

STATEMENT OF THE CASE

Nature of the case. Appellant, State of Indiana, appeals from the trial court’s ruling that Zerbe was no longer required to register as a sex offender.

Course of proceedings. On March 27, 2014, Zerbe filed a Verified Petition to Remove Designation as Sex Offender (App. 1). On July 7, 2014, the State filed a Response in Opposition to Verified Petition to Remove Designation as Sex Offender and on July 17, 2014, Zerbe filed a reply to the State’s response (App. 3). The trial

court held a hearing on Zerbe's petition on September 4, 2014 (App. 3). On September 5, 2014, the trial court issued an order granting Zerbe petition (App. 37).

On Monday, October 6, 2014, the State filed a timely notice of appeal (Docket). On November 5, 2014, the notice of completion of the clerk's record was issued noting that the transcript was not yet completed (Docket). On December 31, 2014, the notice of completion of transcript was issued (Docket).

STATEMENT OF FACTS

In Michigan, throughout the six months from March through August 1991, Zerbe committed criminal sexual conduct with a 14 year-old victim (App. 19). Zerbe was charged with felony criminal sexual conduct in the third degree (App. 19). Michigan Compiled Laws Annotated § 705.520d (1992). On September 11, 1992, Zerbe pled guilty and was convicted of felony criminal sexual contact in the second degree in the State of Michigan (App. 16, 19). M.C.L.A. § 705.520c (1992). On October 21, 1992, Zerbe was sentenced to a minimum of eight years (App. 16). Zerbe was released from incarceration of April 12, 1999 (App. 19). Under Michigan Law Zerbe is required to register as a sex offender (App. 20-21). When Zerbe was released from incarceration on April 12, 1999, he was required to register as a sex offender within ten days, and for twenty-five years thereafter.¹ M.C.L.A. §§ 28.725(1)(c), (3) (1999). In 2010 in Michigan, Zerbe was convicted of violating Michigan's sex offender registrations laws by residing within 1000 feet of school property (App. 20).

¹ If Zerbe registered as a sex offender on the day he was released from incarceration on April 12, 1999, his registration requirement would continue until April 12, 2024.

Zerbe chose to move to Indiana in December 2012 to seek work (App. 18). When Zerbe moved to Indiana in 2012, he was a sex offender under Indiana Code Section 11-8-8-4.5(b)(1) (2012), and, by statute, he is required to register as a sex offender in Indiana for the remainder of the period required by Michigan. Ind. Code § 11-8-8-19(f) (2012).

SUMMARY OF THE ARGUMENT

Zerbe committed criminal sexual conduct with a 14 year old in Michigan. When he was released from prison in Michigan in 1999, Michigan required him to register as a sex offender for twenty-five years. Zerbe subsequently chose to move to Indiana in 2012, while still under his registration requirement in Michigan. When Zerbe moved to Indiana in 2012, current Indiana law required him to register as a sex offender in Indiana for the remainder of his twenty-five year registration period. The imposition of a registration requirement in Indiana at the time that Zerbe chose to move to Indiana in 2012 is not a violation of Indiana's constitutional prohibition of ex post facto laws. Zerbe's Indiana registration requirement is not retroactive, and his expectations at the time that he completed his action which subjected him to the registration requirement in Indiana, moving to Indiana, were that he was required to register. The fundamental principle behind the Ex Post Facto Clause is that a person has a right to fair warning of the result of their conduct. An as-applied constitutional challenge requires thorough considerations of the specific facts of the circumstances. Zerbe knew or should have known that when he moved to Indiana, while still under his registration requirement in Michigan,

Indiana law required him to register for the duration of the twenty-five year registration period. This Court should reverse the decision of the trial court, consider the specific facts of Zerbe's circumstance, and hold that INSORA is constitutional as applied to Zerbe.

ARGUMENT

Standard of Review

A sex offender may file a petition to be removed from the sex offender registry on claims that the enforcement of INSORA is unconstitutional as applied to them as ex post facto punishment. I.C. § 11-8-8-22(j). The petitioner has the burden of proving that he should be removed. I.C. § 11-8-8-22(h). Indiana's Constitution prohibits ex post facto laws. *See* Ind. Const. Art. 1, § 24 ("No ex post facto law...shall ever be passed"). Whether a statute is constitutional is a question of law, which this Court reviews *de novo*. *Minton v. State*, 802 N.E.2d 929, 933 (Ind. Ct. App. 2004). Under *de novo* review, this Court owes no deference to the trial court's determinations. *Bowling v. State*, 960 N.E.2d 837, 841 (Ind. Ct. App. 2012).

When a statute is challenged as an alleged violation of the Indiana Constitution, the party challenging the statute bears the burden of proof. *Wallace v. State*, 905 N.E.2d 371, 378 (2009). All doubts are resolved against that party. *Id.* "If two reasonable interpretations of a statute are available, one of which is constitutional and the other not, we will choose that path which permits upholding the statute because we will not presume that the legislature violated the constitution unless the unambiguous language of the statute requires that

conclusion.” *Id.* (quoting *State Bd. of Tax Comm’rs v. Town of St. John*, 702 N.E.2d 1034, 1037 (Ind. 1998). When analyzing an as-applied challenge to the constitutionality of a statute, the court considers the specific statutory language being applied to the individual and decides whether under the specific facts of the situation the statute is unconstitutional. *Martin v. Richey*, 711 N.E.2d 1273, 1279 (Ind. 1999).

In Zerbe’s particular circumstances, the registration requirement is not retrospective and thus not an ex post facto violation.

Zerbe knew, or should have known, that when he voluntarily moved to Indiana in 2012 he would be required to register as a sex offender for the duration of his Michigan registration requirement. The fundamental principle behind the Ex Post Facto Clause is that a person has a right to fair warning of the result of their conduct. *Wallace*, 905 N.E.2d at 377. In considering Zerbe’s as-applied challenge to the constitutionality of INSORA as applied to him this Court must consider the specific facts of Zerbe’s situation. See *Martin*, 711 N.E.2d at 1279.

Zerbe lived in Michigan in 1991 (App. 19). Over the six months from March through August 1991, Zerbe committed criminal sexual conduct with a 14 year-old victim (App. 19). Zerbe was convicted of felony criminal sexual conduct, sentenced to a minimum of eight years in prison, and was incarcerated until April 12, 1999 (App. 16, 19). When Zerbe was released from incarceration on April 12, 1999, he was required to register as a sex offender within ten days, and for twenty-five years thereafter. M.C.L.A. § 28.725 (3) (1999). Presuming that Zerbe registered within ten days of being released from prison as is required by Michigan law, M.C.L.A. §

28.725(1)(c)(1999), the earliest day that he could be relieved of his registration requirement is April 12, 2024.²

Zerbe lived in Michigan until December 2012, when he chose to move to Indiana to seek work (App. 18). In these particular circumstances, Zerbe's continuing expectation under Michigan law was that he had a registration requirement. Zerbe was still under his registration requirement in Michigan when he chose to move to Indiana (App. 20-21). A sex offender from another state that moves to Indiana while under a registration requirement is a sex offender in Indiana. I.C. § 11-8-8-4.5(b)(1) (2012). A sex offender such as this is required to "register for the period required by the other jurisdiction or the period described in this section, whichever is longer." I.C. § 11-8-8-19(f). Zerbe knew or should have known that he would be required to fulfill his full registration period imposed in Michigan. See *Dewald v. State*, 898 N.E.2d 488, 493 (Ind. Ct. App. 2008) (holding ignorance of the law is no excuse and that every man is presumed to know the laws of the place in which he dwells); *Supreme Lodge K.P. of the World v. Knight*, 20 N.E. 479, 483 (1889) (holding "[a] person who enters an association must acquaint himself with its law, for they contribute to the admeasurement of his rights, his duties and his liabilities"). By choosing to move to Indiana in 2012, Zerbe assented to be subject to the laws in effect at the time that he moved. See *W. & S. Life Ins.*

² Michigan, following federal precedent and the precedent of most other states, does not consider the retroactive imposition of a registration requirement on sex offenders to violate its constitution's prohibition on ex post facto laws. *People v. Temelkoski*, __ N.W.2d __ (Mich. App. No. 313670 Oct. 21, 2014) (citing *People v. Pennington*, 610 N.W.2d 608, 610-11 (Mich. App. 2000)).

Co. v. State Bd. of Equalization of California, 451 U.S. 648, 660, 101 S. Ct. 2070, 2079, 68 L. Ed. 2d 514 (1981) (holding that a corporation “assents to all state laws in effect at the time of its entry”).

Zerbe became subject to Indiana law and his Indiana registration requirement when he voluntarily chose to move to Indiana in December of 2012. Because an ex post facto analysis is fundamentally concerned with Zerbe’s expectation at the time that he completed the act which subjected him to the punishment, this Court must use December 2012, the date which he completed his move and subjected himself to a registration requirement under Indiana law, as the controlling date for an ex post facto analysis. This Court has held that the date of the residency decision is the significant date in an ex post facto analysis. *Sewell v. State*, 973 N.E.2d 96 (Ind. Ct. App. 2012). In *Sewell*, the sex-offender committed his crime in 2000. *Id.* at 102. In 2006, a provision of INSORA took effect that prohibited a sex offender from taking up residence within 1,000 feet of an existing youth program center. *Id.* The *Sewell* Court found that because the provision of INSORA was dependent on Sewell’s residency decision, which occurred after the statute was enacted, it was not a violation of Indiana’s Ex Post Facto Clause. *Id.* at 103. When a “residency decision occurred after the enactment of the statute,” application of that statute “does not violate state or federal ex post facto provisions.” *Id.* Zerbe’s decision to move to Indiana in 2012 occurred after Indiana Code Section 11-8-8-4.5(b)(1) was enacted, and his resulting registration requirement in Indiana does not violate Indiana’s Ex Post Facto Clause.

It is additionally persuasive that the Seventh Circuit has held that the act of moving after the federal Sex Offender Registration and Notification Act (“SORNA”) was enacted does not violate the federal constitution’s prohibition of ex post facto laws. *United States v. Leach*, 639 F.3d 769 (7th Cir. 2011). Before the Seventh Circuit reached the question of whether a registration requirement is penal (an issue at which federal and Indiana jurisprudence part ways), the court found that the application of the federal registration requirement was not retroactive because it hinged on conduct taken after SORNA was passed. *Id.* at 773. The court held the federal statute is not retroactive because “[a] sex offender violates the statute when, at any time *after* SORNA was enacted, he travels in interstate commerce and then fails to register... Because the law targets only the conduct undertaken by convicted sex offenders after its enactment, it does not violate the Ex Post Facto Clause.” *Id.* (emphasis added). Likewise, Zerbe’s decision to move to Indiana, which was the decision that subjected him to his Indiana registration requirement, was undertaken after the relevant provisions of INSORA went into effect. The application of INSORA to Zerbe is not retroactive and thus not a violation of Indiana’s Ex Post Facto Clause.

The trial court did not provide case cites or analysis to support its conclusion (App. 37), but in briefing below Zerbe relied on three Court of Appeals cases to argue that INSORA was unconstitutional as applied to Zerbe, namely: *Andrews v. State*, 978 N.E.2d 494 (Ind. Ct. App. 2012); *Burton v. State*, 977 N.E.2d 1004 (Ind. Ct. App. 2012); and *State v. Hough*, 978 N.E.2d 505 (Ind. Ct. App. 2012). In these

three cases, this Court based its decision on the Indiana Supreme Court's decision in *Wallace*, which analyzed the constitutionality of a different subsection of Indiana statute. Such reliance on *Wallace* in this case would be misplaced. *Wallace* does not stand for the proposition that Indiana's ex post facto protection extends in a similar way to offenders who committed their offenses in other states and then move to Indiana with full knowledge, at least imputed, that Indiana requires registration in such situations.

In *Wallace*, the offense was committed in Indiana before INSORA was enacted. *Wallace*, 905 N.E.2d at 373-74. Wallace did not commit his crime in another state, nor did he relocate to Indiana following his conviction. Wallace was subject to Indiana's laws from the time he committed the crime through the time that Indiana attempted to impose a registration requirement on him. It was the commission of his crime alone that required Wallace to register as a sex offender. "The critical question in evaluating an *ex post facto* claim 'is whether the law changes the legal consequences of acts completed before its effective date.'" *Sewell*, 973 N.E.2d at 102 (quoting *Weaver*, 450 U.S. at 31). For Wallace, the acts which subjected him to his registration requirement were completed before 1988, when he was charged with two counts of child molestation. *Wallace*, 905 N.E.2d at 373. Thus, Wallace's expectations at the time that his acts which subjected him to Indiana law were completed are the relevant consideration in his case.

The same standard should be applied to Zerbe. It was Zerbe's act of moving to Indiana in 2012 that subjected him to his registration requirement. His

expectations in 2012 and the then-applicable laws are what should be considered for this ex post facto analysis. The facts here are distinguishable from *Andrews* and *Hough*. In *Andrews*, the offender did not have a registration requirement in Massachusetts when he moved to Indiana, a fact which the State conceded as a matter of law. *Andrews*, 978 N.E.2d at 498. Likewise, *Andrews* moved to Indiana in 1997, when statute required that only out-of-state offenders who were convicted of equivalent crimes after June 30, 1994, must register as sex offenders. *Id.* at 495; I.C. § 5-2-12-4(3) (1997). Because *Andrews* was indicted in 1984 and discharged from probation in 1989, *Andrews* was not required to register in Indiana at the time that he moved here. *Andrews*, 978 N.E.2d at 495.

The offender in *Hough* similarly moved to Indiana before the laws required him to register upon moving to Indiana. *Hough*, 978 N.E.2d at 506. *Hough* was convicted of rape in 1993 in Pennsylvania and moved to Indiana in 1998. *Id.* at 505. In 1998, the statute still only required those offenders who were convicted after June 30, 1994 to register in Indiana. I.C. § 5-2-12-4(4)(A) (1998). Additionally in 1998, there was not yet a statute that required an individual moving to Indiana who had a registration requirement in another jurisdiction to register as a sex offender in Indiana. Conversely, such a statute was in effect when *Zerbe* moved to Indiana in 2012. I.C. § 11-8-8-4.5(b)(1) (2012). While the law at the time that *Hough* and *Andrews* moved to Indiana did not require them to register, the law in effect when *Zerbe* moved to Indiana plainly required *Zerbe* to register as a sex offender.

In *Burton*, the offender was convicted of aggravated criminal sexual assault in Illinois in 1987. *Burton*, 977 N.E.2d at 1006. In 1996, Illinois amended its sex offender registry act to require sex offenders like Burton to register for ten years. *Id.* Burton was subsequently convicted of sex offender registration violations in 2003 and 2007. *Id.* When Burton moved to Indiana in 2009 he was still under a registration requirement in Illinois. *Id.* He was twice convicted of failure to register as a sex offender in Indiana. *Id.* at 1006-07. The *Burton* Court reversed his second conviction, finding that the application of INSORA in his case was a violation of Indiana's ex post facto prohibition. *Id.* at 1006.

The *Burton* decision applied *Wallace*, admittedly treating Burton as if he had committed his crime in Indiana instead of Illinois. *Id.* at 1009. But Burton did not commit his crime in Indiana, and he was not subject to Indiana's laws or Indiana's registration requirement until he moved to Indiana. The *Burton* court correctly noted that "[i]t is for us [Indiana], not Illinois, to determine who is required to register under our SORA." *Id.* What is missed in *Burton*, is that the decision by Indiana is not made until the offender subjects himself to its jurisdiction by becoming a resident. At the time that he did so Burton had the expectation that, as someone who had an existing registration requirement in another state, he was required to register in Indiana.

The *Burton* Court used *Wallace* to find that "[o]f importance in determining whether our SORA violates our constitution's prohibition on ex post facto laws is the date of the commission of the crime in relation to the passage of our SORA." *Id.*

As discussed above, the date of the commission of the crime was dispositive in *Wallace*, but it is not here. The Indiana Supreme Court in *Wallace* was performing its constitutional analysis under different facts and on a different portion of INSORA, and that Court did not consider the issue of relocation to Indiana and the expectations of sex offenders who had registration requirements in other jurisdictions. *Wallace*, 905 N.E.2d at 375-377. Thus, to apply *Wallace* without attention to and consideration of this important distinguishing fact does not provide a complete analysis necessary for an as-applied constitutional challenge. This Court should consider the date that Zerbe moved to Indiana in 2012 as the relevant date for the ex post facto analysis.


Moreover, there is no ex post facto violation here. Zerbe knew or should have known that he was required to register in Indiana for the remainder of his twenty-five year registration requirement. He had fair warning that when he chose to move to Indiana its laws required him to register as a sex offender. His Indiana registration requirement was triggered when he voluntarily subjected himself to Indiana law when he became an Indiana resident in 2012. Having made his decision with reasonable warning of the registration requirement, INSORA is not an ex post facto violation as applied to Zerbe. It is unreasonable to think that Zerbe may escape his registration requirement in Michigan by moving to Indiana. This Court should reverse the decision of the trial court and find the INSORA is constitutional as applied to Zerbe.

CONCLUSION

For the foregoing reasons, the State respectfully urges that the trial court's judgment be reversed.

Respectfully submitted:

GREGORY F. ZOELLER
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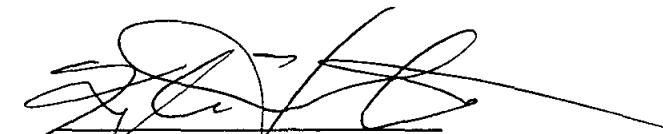


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Certificate of Service

I do solemnly affirm under the penalties for perjury that on January 30, 2015, I served upon the opposing counsel in the above-entitled cause two copies of the Brief of Appellant by depositing the same in the United States mail first-class postage prepaid, addressed as follows:

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STATE OF INDIANA)
)
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT 13
SS:
CAUSE NO.: 49D13-1403-MI-009780

SCOTT A. ZERBE)

Plaintiff,)

v.)

STATE OF INDIANA)

Defendant.)

FILED
SEP 04 2014
Elizabeth A. White
CLERK OF THE MARION SUPERIOR COURT

ORDER GRANTING PLAINTIFF'S PETITION TO REMOVE DESIGNATION AS A SEX OFFENDER

This matter is before the Court on a Verified Petition to Remove Designation as a Sex Offender, ("Petition to Remove"), filed by Plaintiff Scott Zerbe ("Plaintiff").

The Court, having reviewed the Petition to remove, the State of Indiana's Response, and all applicable law, now GRANTS Plaintiff's Petition to Remove.

IT IS THEREFORE ORDERED that Plaintiff's Petition to Remove is GRANTED.

9-4-15
DATE:



Judge, Marion Superior Court

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