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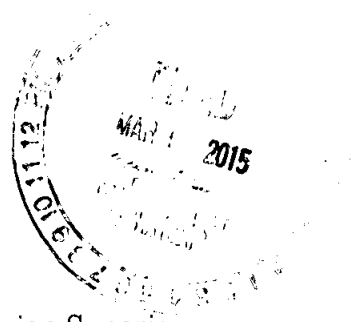
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REPLY BRIEF

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.

REPLY BRIEF OF APPELLANT

GREGORY F. ZOELLER
Attorney General of Indiana
Atty. No. 1958-98

KYLE HUNTER
Deputy Attorney General
Atty. No. 30687-49
Office of Attorney General
Indiana Government Center
South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 234-3502

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SUMMARY OF THE ARGUMENT

Zerbe was not subject to Indiana law until he moved to Indiana in 2012. At the time that he moved to Indiana, Zerbe was required to register as a sex offender in Michigan. Indiana's Sex Offender Registration Act ("INSORA") requires Zerbe to register as a sex offender for the duration of his Michigan registration requirement. The obligation to complete an existing registration requirement is not an additional punishment and cannot violate the Ex Post Facto Clause. An ex post facto law is a law which "imposes additional punishment." *Wallace v. State*, 905 N.E.2d 371, 377 (2009). Here, Indiana is not imposing an additional punishment on Zerbe, but is instead continuing an existing punishment.

Moreover, Indiana's imposition of a registration on Zerbe is not retroactive and therefore cannot be an ex post facto violation. Zerbe's decision to move to Indiana, while under a registration requirement in Michigan, is the act that

subjected him to a registration requirement in Indiana. Indiana is applying the law that was in effect in 2012, when Zerbe moved to Indiana. At the time that he moved, Zerbe knew, or should have known, that Indiana required him to maintain his registration obligations from Michigan when he became a resident of Indiana. Because it was Zerbe's decision to move to Indiana which subjected him to Indiana's registration requirement, the date of his move in 2012 is the proper date to consider when performing an ex post facto analysis. Requiring Zerbe to fulfill his existing punishment of registering as a sex offender is not a violation of the Ex Post Facto Clause of the Indiana Constitution.

ARGUMENT

A challenge under the Ex Post Facto Clause is an as-applied constitutional challenge and requires the Court to consider the specific facts of the case in light of the specific statutory language being challenged. *Martin v. Richey*, 711 N.E.2d 1273, 1279 (Ind. 1999). The law being applied here is Indiana Code Section 11-8-8-19(f), which states, "A person who is required to register as a sex or violent offender in any jurisdiction shall register for the period required by the other jurisdiction..." Under this statute Zerbe is required to complete the twenty-five year registration requirement imposed on him by Michigan. This is not an ex post facto violation because Indiana is requiring Zerbe to complete a punishment imposed by Michigan, not adding an additional punishment.

In his Appellee's brief, Zerbe relies heavily on *Wallace* (Appellee's Br. 2-4). In *Wallace*, the Indiana Supreme Court has interpreted our constitution's prohibition

on ex post fact laws to prevent Indiana from imposing “additional punishment” not prescribed when the act was committed which gave rise to the penalty. *Wallace*, 905 N.E.2d at 377. In *Wallace*, the offender committed his crime in Indiana, Indiana punished him for his crime, and then Indiana sought to add a registration requirement which was not prescribed when he committed his crime in Indiana. The Supreme Court in *Wallace* found that Indiana could not add additional punishment retroactively to the punishment it had already imposed. Here, Indiana is not applying additional punishment, but instead is maintaining the registration requirement imposed by Michigan. Because Indiana is not imposing additional punishment, Zerbe’s registration requirement in Indiana does not violate the Ex Post Facto Clause.

Zerbe argues that the Court’s holding in *Wallace*—that the date that Wallace committed his crime in Indiana is the relevant date for the ex post facto analysis—should be applied wholesale to the present case (Appellee’s Br. 3-4). This suggestion, that the holding in *Wallace* can be applied without consideration of the factual discrepancies between *Wallace* and the specific facts of this case, is contrary to the well-established standard for an ex post facto analysis. See e.g., *Martin*, 711 N.E.2d at 1279. This is the same improper application of *Wallace* that was used in *Burton v. State*, 977 N.E.2d 1004 (Ind. Ct. App. 2012). The *Burton* decision did not provide a full analysis on the facts of that case, but applied *Wallace* as though Burton had committed his crime in Indiana instead of fully considering that Burton committed his crime in Illinois. *Id.* at 1009. The *Burton* Court explained:

Had the qualifying offense and the enactment of the registration requirement occurred in Indiana, *Wallace* would dictate dismissal of the charges. We hold that Burton has the protection of our constitution as to the application of our SORA, without regard to the fact that he was convicted of the qualifying sex offense in Illinois. It is for us, not Illinois, to determine who is required to register under our SORA.

Id. at 1008-009. The *Burton* decision should have fully addressed the important questions of how and why Burton's registration requirement in Indiana actually came about, and this Court should not make the same mistake of applying *Wallace* irrespective of the distinguishing facts. A complete as-applied constitutional analysis, which considers the specific language of the statute being challenged in light of the specific facts of the case, *see Martin*, 711 N.E.2d at 1279, leads to the conclusion that the trial court erred.

Contrary to the assumption in *Burton*, it is our General Assembly, not anyone from Illinois or Michigan, that defines who is required to register in Indiana. *See* Ind. Code § 11-8-8-19(f). In this case, Zerbe's registration requirement began when he moved to Indiana in 2012. At the time that he moved, the General Assembly had passed a law that required him to register for the remainder of the duration of his registration requirement in Michigan. I.C. § 11-8-8-19(f). Indiana did not place any additional punishment on Zerbe that he did not already have. In fact, Zerbe's position is that he should be able to decrease his punishment by moving to Indiana. Indiana's requirement that he fulfill his registration requirement from Michigan is not the imposition of an additional punishment and cannot violate the Ex Post Facto Clause.

Not only is there no additional punishment, but application of the then-effective 2012 law is not retroactive. Zerbe was not subject to Indiana's laws until he moved to Indiana in 2012. At that time, it was his requirement to register as a sex offender in Michigan which caused him to have to register in Indiana. Zerbe knew, or should have known, that based on his decision to move to Indiana while under a registration requirement in Michigan he would be required to register for the duration of his Michigan requirement in Indiana. I.C. § 11-8-8-19(f). This Court in *Sewell v. State*, 973 N.E.2d 96 (Ind. Ct. App. 2012), determined that, for a relocating sex offender, the date of the residency decision is the significant date for an ex post facto analysis. *Id.* at 103. The *Sewell* Court held that when a residency decision that subjects an individual to punishment under INSORA occurs after the applicable provision of INSORA has been enacted the provision does not violate the Ex Post Facto Clause. *Id.* Here, the action that subjected Zerbe to a registration requirement in Indiana—moving to Indiana while under a requirement to register as a sex offender in Michigan—occurred after the applicable provision of INSORA had been enacted. Thus, Zerbe's registration requirement does not violate the Ex Post Facto Clause.

Zerbe attempts to address *Sewell* in a single sentence, only arguing that *Sewell* "does not apply because it addressed the residency requirements of INSORA and not the registration requirements at issue in this case" (Appellee's Br. 4). The irony of this assertion is that Zerbe is now arguing that this Court should ignore *Sewell* because it addresses a different part of the sex offender registry statute. But

in the instant case, Wallace's registration requirement was under a different portion of the statute than Zerbe's, and thus follows the importance of applying the specific facts of each case to the specific language of the statute being challenged. The reason that *Sewell* is relevant and persuasive in this case is that it concludes that the relevant date for an ex post facto analysis for a relocating offender is the date of the residency decision. *Sewell*, 973 N.E.2d at 103 (holding that when a "residency decision occurred after the enactment of the statute," application of the statute does not violate state or federal ex post facto provisions). Proper consideration of the facts of this case in context of the statutory provisions being challenged shows that there was no additional punishment imposed and the relevant date for an ex post facto analysis is the date in 2012 when Zerbe became subject to his Indiana registration requirement by moving to Indiana while still under a registration requirement in Michigan.

This Court should consider the specific facts of Zerbe's circumstance in light of the specific language of Indiana Code Section 11-8-8-19(f). Review of the legal question of whether a statute is constitutional as applied is *de novo*. *Minton v. State*, 802 N.E.2d 929, 933 (Ind. Ct. App. 2004). Additionally, the party claiming the statute is unconstitutional carries the heavy burden of showing that in light of the specific facts and the specific statute violates the constitution. *Wallace*, 905 N.E.2d at 378. Zerbe has failed to provide any analysis under the required standard (see Appellee's Br. 2-4), and he did not carry his burden of showing Indiana Code Section 11-8-8-19(f) is unconstitutional as applied to the facts in this

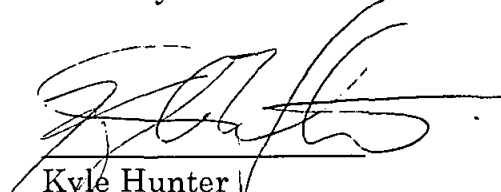
case. Indiana Code Section 11-8-8-19(f) is constitutional because Zerbe's registration requirement in Indiana is neither retroactive nor additional punishment. Zerbe was not a resident of Indiana, nor did any of Indiana's law have any effect on him, until he moved to Indiana in 2012. At that time, Indiana law required him to fulfill the remainder of his twenty-five year registration obligation from Michigan. Zerbe has not been subjected to added or retroactive punishment in violation of ex post facto principles.

CONCLUSION

The trial court erred, and this Court should reverse the decision of the trial court and find INSORA constitutional as applied to Zerbe.

Respectfully submitted,


GREGORY F. ZOELLER
Attorney General of Indiana
Attorney No. 1958-98



Kyle Hunter
Deputy Attorney General
Attorney No. 30687-49

WORD COUNT CERTIFICATE

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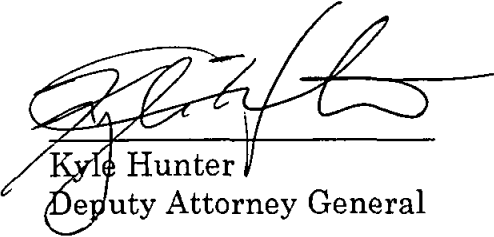


Kyle Hunter
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on March 19, 2015, the foregoing document was served upon the following persons by first class U.S. Mail, postage prepaid:

Joel M. Schumm
Paul T. Babcock, Certified Legal Intern
530 West New York Street #229
Indianapolis, IN 46202



Kyle Hunter
Deputy Attorney General

OFFICE OF ATTORNEY GENERAL
Indiana Government Center South, Fifth Floor
302 West Washington Street
Indianapolis, Indiana 46204-2770
Telephone: 317/234-3502
kyle.hunter@atg.in.gov