

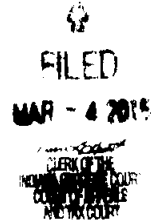


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APPELLEE'S BRIEF

IN THE
INDIANA COURT OF APPEALS
CAUSE NO. 49A05-1410-MI-00463



STATE OF INDIANA,)	Appeal from the Marion Superior Court
Appellant/Plaintiff,)	
)	
v.)	Trial Court No. 49D13-1403-MI-9780
)	
SCOTT ZERBE,)	The Honorable Timothy Oakes,
Appellee/Defendant.)	Judge

BRIEF OF APPELLEE

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Statement of Issue

Did the trial court properly order, in accord with precedent of this Court, that requiring Scott Zerbe to register under the Indiana's Sex Offender Registration Act ("INSORA") would violate the Ex Post Facto Clause of the Indiana Constitution when he committed a sex crime in Michigan in 1992 prior to INSORA?

Statement of Case

Zerbe agrees with and adopts the State's Statement of the Case.

Statement of Facts

Zerbe was convicted of a sex offense in Michigan in 1992 prior to Michigan and Indiana enacting their sex offender registration requirement statutes. Tr. 9-10. In 1994, Indiana passed the INSORA, which requires sex offenders to register upon release from jail. Ind. Code § 5-2-12-1 (1994) (current version at Ind. Code § 11-8-8-7(2015)). In 2001, the legislature amended INSORA to require those with out-of-state convictions to register in Indiana upon residency. Tr. 10. Ind. Code § 5-2-12-4 (2001) (current version at Ind. Code § 11-8-8-5(2015)).

In 2012, Zerbe moved to Indiana. App. 18. He petitioned the trial court to remove him from the Sex Offender Registry. App. 1. On September 5, 2014, the trial court determined that Zerbe should be removed from the Sex Offender Registry because he committed his crime prior to INSORA's enactment. App. 3.

Summary of Argument

In Wallace v. State, the Indiana Supreme Court ruled that application of INSORA to individuals who committed their crime prior to enactment of the statute in 1994 violated the Ex Post Facto Clause of the Indiana Constitution. Zerbe committed his crime in Michigan in 1992. As this Court has held in three recent, similar decisions, the application of INSORA to an out-of-state defendant like Zerbe, who committed his crime prior to INSORA's enactment, violates the Ex Post Facto Clause of the Indiana Constitution under Wallace.

Argument

The trial court properly concluded that requiring Zerbe to register as a sex offender violates the Ex Post Facto Clause of the Indiana Constitution

In Wallace v. State, 905 N.E.2d 371, 384 (Ind. 2009), the Indiana Supreme Court ruled that application of INSORA to individuals who committed their crime prior to enactment of the statute violated the Ex Post Facto Clause of the Indiana Constitution. In Burton v. State, this Court applied Wallace's holding that required registration for an individual convicted of a sex offense in Illinois prior to the

enactment of INSORA, who then moved to Indiana, was unconstitutional under Indiana's Ex Post Facto Clause. 977 N.E.2d 1004, 1008-1009 (Ind. Ct. App. 2014), *trans denied* ("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."). Other cases have similarly held that the date of commission of the out-of-state offense is the relevant fact in assessing an Indiana Ex Post Facto claim. *See, e.g., Hough v. State*, 978 N.E.2d 505 (Ind. Ct. App. 2012), *trans denied* (declaring required registration under INSORA for an individual convicted of a sex offense in Pennsylvania prior to INSORA's enactment violates Indiana's Ex Post Facto Clause); *Andrews v. State*, 978 N.E.2d 494 (Ind. Ct. App. 2012), *trans denied* (finding registration required under INSORA for a crime committed in Massachusetts prior to the enactment of INSORA violates Indiana's Ex Post Facto Clause).

Zerbe committed his sex offense in Michigan in 1992. Tr. 9-10. Indiana enacted the INSORA in 1994. Ind. Code § 5-2-12-1 (1994) (current version at Ind. Code § 11-8-8-1 (2015)). Under Wallace, Burton, Andrews, and Hough requiring Zerbe to register is unconstitutional, as applied, because he committed his crime prior to the enactment of INSORA.

Paddling upstream against this strong current of precedent, the State offers some novel arguments, none of which have merit. Regardless of the expectations of a corporation, the State's focus on the date Zerbe moved to Indiana and Zerbe's

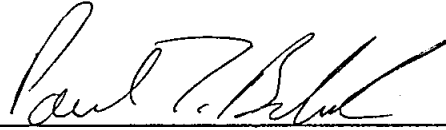
expectations when he moved to Indiana, Br. Appellant at 5-12, fails to acknowledge the central tenant of Wallace and misapplies this court's prior decisions. Id. at 7. Wallace is unmistakable in its holding that the critical question to determine if INSORA, as applied, violates Indiana's constitutional prohibition on ex post facto laws is the crime the date of the commission of the crime in relation to the passage of INSORA. 905 N.E.2d at 384. It does not consider a defendant's expectations.

The State's other arguments similarly fail to acknowledge the date of commission of the offense, as required by Wallace and its progeny. Sewell v. State, 973 N.E.2d 96 (Ind. Ct. App. 2012), does not apply because it addressed the residency requirements of INSORA and not the registration requirements at issue in this case. Nor is United States v. Leach, 639 F.3d 769 (7th Cir. 2011), of any aid because it involved a federal—not Indiana—ex post facto claim.

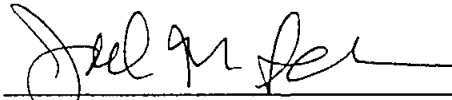
Conclusion

The trial court properly applied the clear line of Indiana Ex Post Facto precedent to this case. Therefore, Scott Zerbe respectfully requests that its order removing his designation as a sex offender be affirmed.

Respectfully submitted,



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Certified Legal Intern



Joel M. Schumm, Attorney No. 20661-49

Counsel for the Appellant

Certificate of Service

I certify that a copy of the foregoing Brief of Appellant^{ee} has been served upon Attorney General Greg Zoeller by personal service at 219 Statehouse, Indianapolis, Indiana 46204 on this 4th day of March, 2015.



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