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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLIAM LANDRY

Plaintiff and Appellant,

v.

KAMALA D. HARRIS, as Attorney General,

Defendant and Respondent.

D061123

(Super. Ct. No. MCR11032)

APPEAL from an order of the Superior Court of San Diego County, Michael T. Smyth, Judge. Affirmed as modified.

In 1978, a jury convicted William Landry of unlawful sexual intercourse with a person under the age of 18 (Pen. Code,¹ § 261.5; count 1), and unlawful oral copulation with a person under the age of 18 (§ 288a, subd. (b)(1); count 2). As a result, Landry was required to register as a sex offender pursuant to the California Sex Offender Registration Act. (§ 290.) In 2011, the Superior Court granted Landry relief from mandatory

¹ All statutory references are to the Penal Code unless otherwise specified.

registration under *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*), but ordered discretionary registration pursuant to section 290.006.

Landry appeals from this order, contending discretionary registration constitutes punishment within the meaning of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and the ex post facto clauses of the United States and California Constitutions. Landry asserts this punitive effect arises from (1) the lifetime residency restriction applicable to sex offender registrants (§ 3003.5, subd. (b)) and (2) the collective effect of post-1978 amendments to the sex offender registration laws.

Specifically, Landry argues the lifetime residency restriction is punitive because it completely excludes registrants from living in densely populated communities of San Diego County. He asserts the restriction violates *Apprendi* because discretionary registration was imposed as a result of the judge, not a jury, finding he committed the 1978 offenses for sexual gratification. Additionally, Landry argues the post-1978 amendments to the sex offender registration laws collectively result in public stigmatization, shame, diminished privacy, and ostracization, all stemming from the trial court factual findings for purposes of imposing discretionary registration, in violation of *Apprendi* and the ex post facto clauses.

The Attorney General concedes that the residency restriction does not apply to Landry. Without deciding the issue, we accept that concession and modify the trial court's order to add a provision stating that Landry is not subject to the section 3003.5, subdivision (b) residency restriction. We disagree with Landry's remaining contentions and otherwise affirm the order for discretionary registration under section 290.006.

FACTS

The underlying facts concerning the offenses are taken from our prior opinion in the matter. (*People v. Landry* (Sept. 18, 1979, 4 Crim. 11056) [nonpub. opn.].) In April and May 1977, Landry engaged in oral copulation and sexual intercourse on several occasions with his 17-year-old foster daughter, T.H. T.H. testified she had orally copulated Landry at his request since she was six years old. In March 1978, Landry offered T.H. five thousand dollars to drop the charges. In May 1978, a jury convicted Landry of unlawful sexual intercourse and oral copulation with a person under the age of 18, and he was sentenced to three years of probation and required to register as a sex offender pursuant to section 290.

In 2011, the superior court granted Landry *Hofsheier* relief from mandatory registration. At a later hearing on the issue of whether Landry should be subject to discretionary registration, the court found Landry had committed the 1978 offenses for sexual gratification and ordered discretionary registration pursuant to section 290.006. Landry filed this appeal.

DISCUSSION

I. *Legal Principles*

Our review is assisted by a brief overview of *Apprendi* and the ex post facto clauses, the two principles on which Landry bases his claims.

A. *Apprendi*

Under *Apprendi*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a

jury, and proved beyond a reasonable doubt." (*Apprendi, supra*, 530 U.S. at p. 490.) The rule ensures "that the judge's authority to sentence derives wholly from the jury's verdict" (*Blakely v. Washington* (2004) 542 U.S. 296, 306), and thus proscribes legislative schemes that in effect reclassify elements of an offense as sentencing factors to allow a judge to impose a penalty beyond the statutory maximum without a jury finding or admission by the defendant that the factors exist. (*Blakely*, 542 U.S. at pp. 303-307.) To trigger the *Apprendi* jury trial requirement, the consequence imposed on the defendant must (1) be punitive (*People v. Picklesimer* (2010) 48 Cal.4th 330, 344; *People v. Presley* (2007) 156 Cal.App.4th 1027, 1031-1032 (*Presley*)), and (2) exceed the maximum punishment for the offense prescribed by the statute. (*Cunningham v. California* (2007) 549 U.S. 270, 274-275, 289-293.)

B. *The Ex Post Facto Clauses*

Article I, section 10, clause 1 of the federal Constitution states, in pertinent part: "No state shall . . . pass any . . . ex post facto law. . . ." Article I, section 9 of the California Constitution similarly states an "ex post facto law . . . may not be passed." The California provision is analyzed in the same manner as its federal counterpart. (*People v. Grant* (1999) 20 Cal.4th 150, 158.) The ex post facto clauses of the federal and state Constitutions prohibit enactment of laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." (*Collins v. Youngblood* (1990) 497 U.S. 37, 43; see also *Grant*, at p. 158.)

To determine whether a particular law or statutory scheme is punishment for purposes of the Sixth Amendment and ex post facto analysis, we apply the two-part test

of *Smith v. Doe* (2003) 538 U.S. 84. (See *Presley, supra*, 156 Cal.App.4th at p. 1032.) Under *Smith*, a court first determines whether the Legislature intended to impose punishment. "If the intention of the legislature was to impose punishment, that ends the inquiry." (*Smith*, at p. 92.) However, if the court determines the Legislature intended to enact "a regulatory scheme that is civil and nonpunitive," then we must determine whether the statutory scheme is " 'so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil." ' " (*Ibid.*) To analyze the effects of the statute, we consider several factors set out in *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144. (*Smith*, at p. 97.) These factors, which are " 'neither exhaustive nor dispositive,' " include whether the provision imposes what has been viewed traditionally as punishment, creates 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 the nonpunitive purpose. (*Ibid*; *Presley*, at p. 1032.)

II. *Discretionary Sex Offender Registration, Standing Alone, is Not Punitive*

The threshold question for both Landry's *Apprendi* and ex post facto claims is whether he was punished, either by the actual imposition of the discretionary registration order, or by the effect of the order.

The lifetime sex offender registration requirement imposed under section 290 is mandatory for a defendant convicted of a statutorily-specified sex offense (§ 290, subd. (c)), and is discretionary for a defendant convicted of any other offense. (§ 290.006.) To impose the discretionary registration requirement, the trial court must find that the

defendant "committed the offense as a result of sexual compulsion or for purposes of sexual gratification." (§ 290.006.²)

Landry seems to acknowledge that it is now established that the discretionary sex offender registration requirement, at least apart from the section 3003.5 residency restriction, does not give rise to *Apprendi* or ex post facto violations because it does not impose a punitive consequence. (*People v. Castellanos* (1999) 21 Cal.4th 785, 795-796 [no ex post facto violation due to nonpunitive nature of registration requirement]; *In re Alva* (2004) 33 Cal.4th 254, 260-262 [no cruel and unusual punishment for misdemeanor sex offense due to nonpunitive nature of registration requirement]; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061 [no *Apprendi* violation due to nonpunitive nature of registration requirement]; *Presley, supra*, 156 Cal.App.4th at pp. 1033-1035 [no Sixth Amendment violation due to nonpunitive nature of registration requirement]; see generally *People v. Picklesimer, supra*, 48 Cal.4th at pp. 343-344 [sex offender registration is not considered a form of punishment under the state or federal Constitution]; *Hofsheier, supra*, 37 Cal.4th at p. 1197.) We turn to Landry's more

² Section 290.006 provides: "Any person ordered by any court to register pursuant to the [Sex Offender Registration] Act for any offense not included specifically in subdivision (c) of Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration." "[D]iscretionary registration does not depend on the specific crime of which a defendant was convicted. Instead, the trial court may require a defendant to register . . . even if the defendant was not convicted of a sexual offense. . . . [U]nder the discretionary provision [citation], it may require lifetime registration if it finds the crime to have a sexual purpose." (*Hofsheier, supra*, 37 Cal.4th at pp. 1197-1198.)

specific challenge, which is whether particular provisions of discretionary registration separately or cumulatively render discretionary registration punitive in effect.

III. *Section 3003.5's Residency Restriction*

The Sexual Predator Punishment and Control Act (hereafter Jessica's Law), which California voters enacted into law on November 7, 2006, provides: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290, to reside within 2000 feet of any public or private school, or park where children regularly gather." (§ 3003.5, subd. (b).) The statute also allows local governments to enact ordinances that impose additional residency restrictions on persons required to register as sex offenders. (§ 3003.5, subd. (c).)

In *In re E.J.* (2010) 47 Cal.4th 1258, 1278-1280 (*E.J.*), the California Supreme Court concluded that, as to the paroled registered sex offender petitioners involved in that case, section 3003.5's residency restriction does not constitute an ex post facto violation because it was not imposed retroactively on the petitioners as additional punishment for the sex offense, but only prospectively in response to the offenders' conduct during the parole period: "Although they fall under the new restrictions by virtue of their *status* as registered sex offenders who have been released on parole, they are not being 'additionally punished' for commission of the original sex offenses that gave rise to that status. Rather, petitioners are being subjected to new restrictions on where they may reside while on their *current parole*—restrictions clearly intended to operate and protect the public *in the present*, not to serve as additional punishment for past crimes." (*E.J.*, at p. 1278.) The court explained, "[T]he new residency restrictions apply to events

occurring *after* their effective date—petitioners' acts of taking up residency in noncompliant housing upon their release from custody on parole after the statute's effective date. It follows that section 3003.5[, subdivision] (b) is not an ex post facto law if applied to such conduct occurring after its effective date because it does not additionally punish for the sex offense conviction or convictions that originally gave rise to the parolee's status as a lifetime registrant under section 290." (*E.J.*, at p. 1280.)

Relying on *E.J.*, *supra*, 47 Cal.4th 1258, the Attorney General maintains that because Landry is not on parole, the residency restriction does not apply to him and cannot violate any of his constitutional rights. But the issue of whether the statute applies to all sex offender registrants, regardless of parole or probation status, date of conviction, or date of release from incarceration, was left undecided by *E.J.* (See *E.J.*, at p. 1271, fn. 5 ["The further question whether section 3003.5 [, subdivision] (b) also created a separate new misdemeanor offense applicable to all sex offenders subject to the registration requirement of section 290, irrespective of their parole status, is not before us"]; accord, *E.J.*, at p. 1285 (conc. opn. of Werdegar J.) ["We thus also have no occasion here to address whether the 2,000-foot residency limit might apply to those who completed their paroles before the effective date of [Jessica's law] . . . ; to those whose parole period began before, but is scheduled to terminate after, [the effective date of Jessica's Law] . . . ; or even to the thousands of persons subject to sex offender registration who, for whatever reason, are not currently on parole."].) These questions, as well as the specific question of whether section 3003.5's residency restriction constitutes punishment for *Apprendi* purposes, are currently pending before our Supreme Court.

(See *People v. Mosley* (2010) 188 Cal.App.4th 1090, review granted Jan. 26, 2011, S187965; see also *In re J.L.* (2010) 190 Cal.App.4th 1394, review granted March 2, 2011, S189721; *In re S.W.* (December 20, 2010) [2010 Cal. LEXIS 13417], review granted Jan. 26, 2011, S187897 [residency restriction is not punitive and hence not subject to *Apprendi* rule].)

Without deciding the point, we accept the Attorney General's concession that the residency restriction only applies to parolees and thus Landry is not subject to the requirement. (See *In re James F.* (2008) 42 Cal.4th 901, 911 [accepting party's concession without deciding underlying issue].) We do not address Landry's collateral contention that various specified local ordinances suffer from the same *Apprendi* and ex post facto defects, in part based on the Attorney General's concession, and in part because, as Landry admits, they are not at issue in the case. We only reach the question of whether the collective effect of the sex offender registration amendments constitute punishment violating *Apprendi* and the ex post facto clauses when imposed by a judge through a discretionary registration order.

IV. *The Collective Effect of the Sex Offender Registration Amendments is Not Punitive*

A. *General Overview of the Sex Offender Registration Amendments*

Since Landry's 1978 conviction, the sex offender registration laws have been amended to enhance registration requirements, create a public notification and inquiry system, require DNA collection and sampling, and impose residency restrictions as well as GPS monitoring.

Landry points to amendments to section 290 in 2003, requiring a sex offender to reregister within five working days of changing his or her residence or establishing a second residence (former § 290, subds. (a)(1)(A),(B)), and personally inform the local law enforcement agency in writing within five working days of changing residence within or outside of California. (§ 290.013; former § 290, subd. (f)(1), Stats. 2003, ch. 634, §1.3.) He also mentions a 2005 amendment to section 290 imposing a duty to register on "[a]ny person required to register pursuant to any provision of the [Sex Offender Registration Act] . . . , regardless of whether the person's conviction has been dismissed pursuant to Section 1203.4, unless the person obtains a certificate of rehabilitation and is entitled to relief from registration pursuant to Section 290.5."

(§ 290.007.) Landry has not shown that the 2005 amendment to section 290 applies to him. The 2005 amendment will apply to him only if he obtains a certificate of rehabilitation and is entitled to relief from registration pursuant to Section 290.5.

(§ 290.007.) We need not address the effect of the 2005 amendment on Landry.

Another category of amendments Landry challenges is the public access to information and inquiry statutes, sections 290.4 and 290.46. Section 290.4, which became operative on July 1, 1995 (Stats. 1994, c. 867 (A.B. 2500), § 4), requires the Department of Justice to operate a service through which members of the public may ask for a determination whether a specific person must register as a sex offender. (§ 290.4, subd. (a).) Section 290.46, which became effective September 24, 2004 (Stats. 2004, c. 745 (A.B. 488), § 1, eff. Sept. 24, 2004), requires the Department of Justice to make specified information about registered sex offenders available to the public via an Internet

Web site. (§ 290.46, subds. (a)(1), (a)(2)(A).) In California, these statutes have been implemented through the Megan's Law Web site (<<http://www.meganslaw.ca.gov/>> [as of Jan. 11, 2013].)

A third category is the DNA collection and sampling statutes. The DNA and Forensic Identification Data Base and Data Bank Act of 1998, section 295 et seq. (the DNA Act), which added sections 295, 295.1, 296, 296.1, and 296.2 to the Penal Code, requires collection of DNA samples from defendants required to register for a felony sex offense pursuant to former section 290. (See *Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1500.) On November 2, 2004, California voters approved Proposition 69, which amended section 296, subdivision (a) to broaden the scope of persons required to submit DNA samples. (*Good v. Superior Court*, at p. 1503; Initiative Measure (Prop. 69, § III.4, approved Nov. 2, 2004, eff. Nov. 3, 2004).) Proposition 69 added section 296.1 to set forth administrative procedures for collecting DNA samples from various classes of persons, including any person required to register under section 290. (§ 296.1, subd. (a); see also § 296, subd. (a)(2)(A).) Proposition 69 expressly made section 296.1, subdivision (a)(2) through (6) retroactive. (§ 296.1, subd. (b).)

The final amendment, discussed previously, is Jessica's Law, which in section 3003.5, subdivision (b), prohibits registered sex offenders from residing within 2,000 feet of any school or park where children regularly gather. (§ 3003.5, subd. (b).) As stated, however, the attorney general concedes that the residency restriction does not apply to Landry.

B. *Application of Two-Part Smith v. Doe Test*

Using the two-part test from *Smith v. Doe, supra*, 538 U.S. 84, we address whether, collectively, the sex offender registration amendments make discretionary registration punitive. We conclude they were not intended to be punitive and are not punitive in nature and effect. Landry concedes that under *Smith's* first prong, the sex offender registration amendments do not reflect a direct punitive intent. We agree. There is nothing to indicate the Legislature and the voters intended these amendments to collectively constitute punishment. The amendments were made gradually by legislation or by voter initiative between 1998 and 2005 with no obvious coordinated plan for them as a whole to impose additional punishment on sex offender registrants.

For the second part of the test, we ask whether the collective effect of the sex offender registration amendments is so punitive as to constitute punishment. (*Smith v. Doe, supra*, 538 U.S. at p. 92.) In *Smith*, at pages 89-90 and 105-106, the United States Supreme Court upheld an Alaska statute requiring sex offenders to register with law enforcement and making much of the registration information publicly accessible. The Alaska statute allowed law enforcement to make publicly accessible via the Internet a registered sex offender's name, aliases, home address, photograph, physical description, license and identification numbers of motor vehicles, place of employment, crime and date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender was in compliance with registration requirements or cannot be located. (*Id.* at p. 91.) Additionally, the statute provided that a sex offender convicted of an aggravated sex offense or of two or more sex offenses must register for

life and verify his information quarterly, and must notify his local police department by the next working day if he moves or changes any of his Internet communication identifiers. (*Ibid.*)

The Supreme Court concluded the Alaska Legislature intended to create a civil, nonpunitive regulatory scheme and the statute was not punitive in effect. (*Smith v. Doe, supra*, 538 U.S. at pp. 95-96, 105-106.) Concerning public notification, the court explained, "The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender." (*Id.* at p. 99.) "Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment." (*Id.* at p. 105.) Regarding the reregistration and verification requirements, the court stated, "The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. . . . ¶¶ . . . ¶¶ The duration of the reporting requirements is not excessive. . . . ¶¶ . . . ¶¶ . . . The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective. The [Alaska statute] meets this standard." (*Id.* at pp. 103-105.) The court concluded, "The [Alaska statute] is nonpunitive, and its retroactive application does not violate the *Ex Post Facto* Clause." (*Id.* at pp. 105-106.)

Relying on *Smith v. Doe, supra*, 538 U.S 84, the court in *Presley, supra*, 156 Cal.App.4th at page 1035, concluded the public notification requirements of sex offender registration under section 290.46 did not constitute punishment for purposes of the Sixth

Amendment, even when, as is the case here, the facts supporting sex offender registration were found by a judge through a discretionary registration order. The *Presley* court observed, "[The United States Supreme Court's] analysis of the Alaska statute is particularly relevant since California's public notification statutes are quite similar." (*Id.* at p. 1034.) The court compared the two statutes and found that California's public notification statutes were identical to Alaska's, except that California's statutes do not publicize the name and/or address of the sex offender's employer or the person's criminal history other than the specific crimes for which the person is required to register. (*Ibid.*) The court found the analysis and decision in *Smith* on point, and concluded, "Although here the facts supporting sex offender registration were found by a judge, the identity of the trier of fact is immaterial to the question of whether public notification is punishment. [¶] . . . [W]e conclude that the public notification requirements of sex offender registration do not constitute punishment for purposes of the Sixth Amendment." (*Id.* at p. 1035.) We agree with the *Presley* court's application of *Smith's* holding, and conclude the reregistration and public notification requirements are not punitive in effect.

In *People v. Travis* (2006) 139 Cal.App.4th 1271, 1293-1295, the Court of Appeal upheld DNA collection and sampling under sections 296 and 296.1 against an ex post facto challenge, reasoning that "[t]he imposition of a DNA testing requirement under section 296.1 for felony convictions may constitute a disadvantage or burden, but the statute was neither intended to nor does inflict punishment for commission of the crime. . . . Examination of the DNA sample collection law reveals that it was not enacted to punish convicted felons, but instead to establish a DNA database to assist in

the identification, arrest, and prosecution of criminals." (*Id.* at p. 1295.) The appellate court concluded that subjecting a defendant to DNA testing is not punishment, and therefore is not an ex post facto violation. (*Ibid.*) We agree with the reasoning of the *Travis* court and conclude the DNA collection and sampling requirements are not punitive in effect.

Collectively, the purpose and the principal effect of the sex offender registration amendments is to inform and protect the public and make convicted sex offenders readily available for police surveillance at all times. We conclude the collective effect of the challenged amendments does not violate *Apprendi* or the ex post facto laws.

DISPOSITION

We modify the December 9, 2011 discretionary registration order to add a provision stating that Landry is not subject to a Penal Code section 3003.5, subdivision (b) residency restriction. This modification does not alter his duty to register as a sex offender pursuant to Penal Code section 290.006, and the order is in all other respects affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.