IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Richard P. Matsch, Senior District Judge

Civil Action No. 13-cv-02406-RPM

DAVID MILLARD,
EUGENE KNIGHT,
ARTURO VEGA,

Plaintiffs,
v.

RONALD C. SLOAN, in his official capacity as Director of the Colorado Bureau of Investigation,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiffs are registered sex offenders under the Colorado Sex Offender Registration Act, ("SORA"), C.R.S. § § 16-22-101 to 115. In this civil action they seek declaratory and injunctive relief, claiming that continuing compliance with the requirements of that Act impacts their lives in ways that extends their punishment beyond the sentences they have served for criminal conduct they committed years ago.

David Millard was convicted of second degree sex assault on a minor in 1999, resulting in a sentence of 74 days work release and eight years probation. He successfully completed sex offense specific treatment and completed his period of probation in October, 2007. He is eligible to petition to be removed from the sex offender registry in 2017.

Eugene Knight was convicted of attempted sex assault on a child in 2007 for conduct occurring in September, 2005, when he was eighteen. He was sentenced to

eight years probation with a requirement that he participate in treatment at Sex Offender Resource Services, a contract provider. He failed to meet that requirement resulting in a revocation of probation and a two year imprisonment which he completed in 2011. He is eligible to petition to be removed from the sex offender registry in 2021.

Arturo Vega was adjudicated a juvenile offender for conduct occurring when he was thirteen years old. He was sentenced to probation with a requirement that he reside in a juvenile treatment facility. His probation was revoked and he was sentenced to two years at the Division of Youth Corrections at Lookout Mountain where he was to participate in sex offender treatment. He was released in May or June, 2000. Vega was convicted of a misdemeanor for failure to register in September, 2001, for which he was fined and he did register as a juvenile sex offender. He has been eligible to petition to de-register for at least ten years, and has unsuccessfully petitioned for that relief in 2006 and 2012.

The plaintiffs assert that continuing on the register and complying with the restrictions applicable to them under the Act and regulations violate the protections afforded by the Eighth and Fourteenth Amendments to the United States Constitution.

The defendant is the Director of the Colorado Bureau of Investigation ("CBI"), the state agency responsible for maintaining the centralized registry of sex offenders and providing information on a state web site.

The defendant has moved for summary judgment of dismissal based on well-established case authority that statutes like SORA are not punitive. Those cases generally arose on claims that application of registration and related requirements for those convicted of crimes before enactment would violate the prohibition of *ex post*

facto punishment under the United States Constitution.

In *Smith v. Doe,* 538 U.S. 84 (2003), the Court held an Alaska statute was not punitive and provided a template for a categorical analysis of sex offender registration legislation enumerating five factors to determine whether the statute is punitive. Federal courts have followed that guidance and the additional two factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

Some state courts disagreed with the result in *Smith v. Doe*, including the Alaska Supreme Court applying that state's constitution to the same statute before the Supreme Court in *Smith v. Doe. Doe v. State*, 189 P.3d 999 (2008); *see also Starkey v. Dept. of Corrections*, 305 P.3d 1004 (Okla. 2013) (holding that the Oklahoma sex offender registration statute was punitive and that *ex post facto* application of its provisions violated the Oklahoma Constitution).

The plaintiffs do not challenge SORA's facial validity and do not dispute the legislative statement of intent in § 16-22-112(1). That section reads as follows:

> The general assembly finds that persons convicted of offenses involving unlawful sexual behavior have a reduced expectation of privacy because of the public's interest in public safety. The general assembly further finds that the public must have access to information concerning persons convicted of offenses involving unlawful sexual behavior that is collected pursuant to this article to allow them to adequately protect themselves and their children from these persons. The general assembly declares, however, that, in making this information available to the public, as provided in this section and section 16-22-110(6), it is not the general assembly's intent that the information be used to inflict retribution or additional punishment on any person convicted of unlawful sexual behavior or of another offense, the underlying factual basis of which involves unlawful sexual behavior.

Despite this expression of legislative intent, the General Assembly has implicitly recognized the punitive effects of registration by permitting courts to exempt a person

who was younger than eighteen years of age at the time of the commission of the offense from the registration requirements if it determines that registration "would be unfairly punitive" and the person "would not pose a significant risk to the community." C.R.S. § 16-22-103(5)(a).

The plaintiffs' claim, rather than challenging SORA's facial validity, is that despite the legislative assertion of non-punitive intent, their individual experience is that they are in effect being punished in ways that are disproportionate to the criminal conduct that occurred years ago, without regard to how their lives have changed over that time and without regard to whether they remain a danger to public safety.

It is the publication and re-publication of the registration information that is the concern of the plaintiffs. There is no doubt that SORA requires the release of information that is, at least in part, not otherwise public or not readily available, and authorizes the release of that information to private parties who can and do disseminate the information further. In this age of the Internet there are commercial web sites that can enhance the information from the state's records and calumniate the character of the registrant.

As stated in the quoted sections, the purpose of public availability of the information contained in the registry is to meet the "public's need to adequately protect themselves and their children from those persons." C.R.S. §§ 16-22-110(6)(f), 16-22-112(I). The latter section states that sex offenders have a "reduced expectation of privacy because of the public interest in public safety."

But aside from the apparent legislative expectation that public safety concerns justify having a central registry of sex offender information for use by law enforcement

agencies, there is a strong and legitimate inference to be drawn that the predictable result of the publication of such information will be the public imposition of affirmative disabilities and restraints on the plaintiffs' liberty that strongly resemble traditional forms of punishment. What else could be the expectation of how the public will act to protect themselves and their children? It is by shunning and ostracizing the offenders as continuing to be a public menace, regardless of the actual facts concerning the severity of their crimes or their behavior since the crimes occurred, years earlier. That is what the plaintiffs have experienced.

This Court can take judicial notice of litigation challenging city ordinances that effectively exclude sex offenders from residing in their communities. In answering a certified question from the Tenth Circuit Court of Appeals, the Colorado Supreme Court upheld an Englewood, Colorado, ordinance having that effect. *Ryals v. City of Englewood,* 364 P.3d 900 (Colo. 2016). As the dissenting opinion notes, six Colorado cities have such ordinances and more may be expected to adopt them after the court's approval.

These ordinances demonstrate that the public, in each of these communities, has adopted laws imposing the ancient punishment of banishment as the means of protection from registered sex offenders. The proliferation of such ordinances also demonstrates the potentially wide-ranging impact on the plaintiffs' individual liberties.

It can be argued with some force that the uncontrolled private web sites' publications amount to shaming and encourage public shunning of the plaintiffs. Public shaming and banishment are forms of punishment that may be considered cruel and unusual under the Eighth Amendment. *See Smith v. Doe*, 538 U.S. at 109 (Souter, J.,

concurring).

The plaintiffs have characterized their liberty interest as a right to privacy. The defendant asserts that the Supreme Court has given only limited recognition of such a right and that it is not a right enumerated in the Constitution. The analysis of the claims in this case should not be restricted to a right of privacy. The question is one of individual liberty–a freedom to live, work, raise a family, and play within social and economic communities. A restriction on such freedom is recognized as punishment for conduct that society has criminalized. Those restrictions must be limited and proportionate to the crime. Moreover, contrary to the defendant's argument, the harmful effects of SORA do not result merely from the fact of the plaintiffs' convictions, in which they may have no right of privacy, but from the registration and dissemination provisions of SORA that both impose significant restrictions and burdens and effectively broadcast those facts to the public.

The justices dissenting from the majority opinion in *Smith v. Doe* did not discuss a right of privacy. Notably Justice Ginsburg observed that the Alaska statute was excessive relative to its nonpunitive purpose, saying:

> ....And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation.

Smith v. Doe, 538 U.S. at 117 (Ginsburg, J., dissenting) (footnote omitted).

A person required to register must do so at least annually with the local law enforcement agency in each jurisdiction in which he resides, as well as whenever he changes or adds a residence. C.R.S. § 16-22-108. The local agency must verify the

offender's residence and report the registration to the CBI. C.R.S. § 16-22-109. Local agencies may also publish certain registration information on their own websites concerning certain categories of offenders. C.R.S. § 16-22-112(2)(a). Apparently, the purpose of such local registration is to enable the police to "round up the usual suspects" when a sex crime is reported.[1] *See People v. Sheth*, 318 P.3d 533, 534 (Colo. Ct. App. 2013) ("The purpose of [sex-offender] registration 'is not to punish the defendant, but to protect the community and to aid law enforcement officials in investigating future sex crimes.'" (quoting *People v. Carbajal*, 312 P.3d 1183, 1189 (Colo. Ct. App. 2012)). As discussed above, however, the effect of SORA's registration requirements is much broader than simply to aid law enforcement. It effectively results in public imposition of punishment. Further, the reporting requirements result in significant government oversight, imposing mandatory conditions on the plaintiffs' abilities to live and work, and requiring them to report themselves to all local law enforcement authorities wherever they may reside. "[T]here is significant evidence of the onerous practical effects of being listed on a sex offender registry." *Smith v. Doe*, 538 U.S. at 109 (Souter, J, concurring).

The defendant contends that in their response to the motion for summary judgment the adult offender plaintiffs have not shown such adverse effects on themselves as to support a finding of punishment. There is a mixed question of fact and law involved in these claims and there are issues of fact that should be determined at a trial with a full opportunity to present evidence which may include more than what has been explored in the discovery done to this time, such as the testimony of those who

[1] The reference is to an often quoted line from the movie "Casablanca."

have interacted with the plaintiffs, including family and work associates. Although the evidence is contested, the Court draws all reasonable inferences in favor of the party opposing summary judgment, and will not evaluate the credibility of witnesses on summary judgment.

Mr. Millard has presented evidence supporting his allegations that he has experienced vigilantism and harassment as a result of being on the sex offender registry, including harassment by various unknown individuals, having his car vandalized, and being told that his lease would not be renewed after an Arapahoe County Sheriff's representative told the landlord Mr. Millard was a registered sex offender. At a different residence, Mr. Millard's apartment complex was the subject of a 9 News investigative report on sex offenders living there. He has also submitted evidence that landlords have declined to accept his rent applications upon learning he is a registered sex offender. This evidence raises a genuine issue as to whether SORA's punitive effects overcome its stated non-punitive intent.

Mr. Knight has shown that he has been prohibited for at least two successive school years from entering on Denver Public Schools property in order to participate in his children's education. This action was taken by the school's principal after Mr. Knight's sex offender status was apparently reported to the school by a private party, since the evidence shows that DPS itself does not do systematic searches to determine if parents are registered sex offenders. There is no suggestion that Mr. Knight's banishment from his children's school was the result of any actual or threatened misconduct at the school, or anything other than his status as a registered sex offender.

Mr. Knight has also presented evidence that he is unable to obtain employment in certain jobs because he is a registered sex offender. These are significant impacts on Mr. Knight's liberty that result directly from the registration requirements imposed by SORA.

Mr. Vega has presented similar evidence. Registration has impacted his ability to work, including being asked by a supervisor to leave the premises at one job because it had been discovered he was on the sex offender registry, and being informed with respect to other jobs that he was unqualified once it was discovered that he is a registered sex offender.

The plaintiffs' evidence at trial will presumably elaborate on and provide additional depth and detail concerning their experiences as registered sex offenders. The plaintiffs have also tendered evidence of other persons, including former plaintiffs in this action, concerning their experiences in having their housing options extremely limited, being assaulted, and being subjected to other forms of harassment and vigilantism. The Court has not, based on the parties' arguments and the nature of the proffered evidence to date, determined the admissibility of any or all of such testimony. Such evidence of the experiences of people in sufficiently similar circumstances to those of the plaintiffs may be admissible to show the potential adverse consequences of registration requirements and the reasonableness and credibility of the plaintiffs' concerns. In denying summary judgment, however, the Court has not considered this evidence, and finds the evidence of plaintiffs' own experiences to be sufficient.

To grant summary judgment the Court would be adopting the simplistic

statement that these effects of the registration requirements on these particular plaintiffs are not punitive because the General Assembly has generally stated that the statutory requirements are not intended to be punitive. The evidence is sufficient to create genuine issues of fact for trial.

Mr. Vega's case also raises another issue. A juvenile sex offender has the right to petition the sentencing court for an order removing his name from the sex offender registry under C.R.S. § 16-22-113(1)(e). A statutory condition is the successful completion of and discharge from a juvenile sentence. Mr. Vega sought removal under that provision by petitions to the Jefferson County District Court in 2006 and again in 2012. On both occasions his petitions were heard by magistrates. Both magistrates denied his petition and he claims that these denials denied him due process as required by the Fourteenth Amendment.

The statute provides that

> …. In determining whether to grant the order, the court shall consider whether the person is likely to commit a subsequent offense of or involving unlawful sexual behavior….

C.R.S. § 16-22-113(1)(e). It further provides that the court shall base its determination on recommendations from the petitioner's probation or parole officer, treatment provider, the prosecuting attorney for the jurisdiction, recommendations in the presentence report, and any written or oral testimony from the victim(s). *Id.*

The statute does not assign or define a burden of proof, nor does it establish a standard for the court to apply in determining whether to grant a petition to deregister. The Colorado Court of Appeals has observed that "the statute appears to leave to the discretion of the trial court the ultimate decision of whether to grant a petition requesting

discontinuation of sex offender registration, as well as the factors to consider in making that decision." *People v. Carbajal*, 312 P.3d at 1190. In short, the statute and Colorado case law have effectively left the trial courts with unbridled discretion beyond the statutory requirements that a petitioner show (1) "successful completion and discharge from a juvenile sentence or disposition" and (2) that he "has not been subsequently convicted or has a pending prosecution for unlawful sexual behavior or any other offense, the underlying factual basis of which involved unlawful sexual behavior." C.R.S. § 16-22-113(1)(e).

At the hearing on both of Vega's petitions in 2006 and 2012, the respective magistrates' exercise of their discretion resulted in Vega being put to a burden of proof that was not included in the statute and was, in his case, impossible to meet. It was not disputed in either hearing that Vega had successfully completed his juvenile sentence and been discharged from confinement at DYC and from his subsequent period of parole. It was also undisputed that Vega had committed no additional sex offenses.

The statute requires the court to consider "whether the person is ***likely*** to commit a subsequent offense of or involving unlawful sexual behavior." But neither magistrate made a finding that Vega was likely to commit a subsequent offense involving sexual behavior. Rather, the magistrates put the burden of proof on Vega to show by a preponderance of the evidence that he was ***not likely*** to commit such an offense. This placed a burden on Vega to prove the negative, something the statute does not require, and reverses the constitutional order of the state's burden of proving that an individual is a danger to the community before restricting his liberty.

Further, both magistrates heightened the barrier to Vega's deregistration by holding that Vega had not met his burden because he had failed to submit specific information that is not required by statute and, in this case, was – and always will be – impossible for him to provide. Both magistrates required proof not only of the statutory requirement that Vega had successfully completed his "sentence or disposition" (which was not in dispute) but also that he had "successfully" completed a program of sex offender treatment while serving his sentence. Vega testified at both hearings that he believed he had completed such treatment, and no contrary evidence was presented to either magistrate. Despite this undisputed testimony, both magistrates questioned whether he had really completed treatment and whether it had been "successful" based on some unstated standard applied by the magistrate. One stated, for example, that she "did not get the feeling that you learned the things that you needed to learn in treatment…." Transcript of July 25, 2006 Hearing (Doc. 53-10) at 0824:5-6.

Indeed, in the June 2012 hearing, the magistrate made proof of successful completion of treatment a ***condition*** of the petition being granted, ***in addition*** to the requirement that Vega prove he was not likely to commit another sex offense: "[Y]ou're going to have to show in some form or fashion, not only that you're not going to reoffend but that you successfully completed treatment and your sentence." Transcript of June 27, 2012 Hearing (Doc. 53-11) at 0911:7-9. In December 2012, the same magistrate again appeared to make proof of successful treatment an absolute condition of deregistration, even though that is not in the statute. Transcript of December 12, 2012 Hearing (Doc. 53-12) at 0964:3-4 ("[W]ithout being able to make that finding, I do

not believe I can grant the petition for removal from registry."). To the extent these holdings included suggestions that Mr. Vega might satisfy his burden by getting additional treatment, they also raised a serious question whether the court was retroactively imposing additional punishment – more treatment like that which had been imposed as part of his original sentence – as a condition of being relieved from registration requirements. Such a holding also cuts directly against the notion that the courts have discretion in these matters, if the magistrate felt she had no option but to deny relief absent proof of completion of treatment.

Most egregiously, both magistrates imposed this extra-statutory requirement despite openly acknowledging that the DYC had purged the records which would have contained any available proof corroborating Vega's testimony that he had completed treatment. Thus, Vega was required to submit more than his own undisputed testimony even though the state destroyed the records by which he may have done so.

This evidence at the very least raises issues of fact concerning Vega's due process claims and whether the effect of the registration statute, as it has been and is being applied to Vega under the circumstances of his case, is to impose punishment on him despite the apparent non-punitive intent of the statute.

Given that these hearings were conducted by a magistrate rather than a district court judge, Vega could have appealed these denials under the Colorado Rules for Magistrates. He did not do so. There is no sufficient basis from the present record for a determination that an appeal would have been futile, as Vega's counsel suggested at the hearing on this motion. That may require some additional information concerning

the district court's operations and the relations between the district judges and magistrates under the state statute. Given the close similarity between the holdings of the two different magistrates, in different hearings held six years apart, there is an inference that the two magistrates were following established practices or guidelines. Whether that inference is supported by the evidence is a matter for trial.

In sum, the plaintiffs have shown sufficient support for their claims to warrant further consideration after a trial. It is therefore

ORDERED that the defendant's motion for summary judgment is denied.

Dated: July 7, 2016

BY THE COURT:

s/ Richard P. Matsch

_____

Richard P. Matsch, Senior District Judge