SUPREME JUDICIAL COURT OF THE STATE OF MAINE

Sitting as the Law Court

Law Court Docket Number: KEN-24-482

STATE OF MAINE

v.

DANIEL GANTNIER

On Appeal from Unified Criminal Court sitting in Kennebec County.

Brief for Appellee – The State of Maine

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STATEMENT OF THE ISSUES

I. Whether 34-A M.R.S. § 11222(1) violates the Ex Post Facto Clause of the United States and Maine Constitutions.

II. Whether the fact that the erroneous notation appeared on a judgment and commitment is dispositive on whether it is a part of the criminal sentence.

III. Whether the only means of correcting an erroneous notation of the Defendant's length of SORNA registration is a M.R. Crim. P. 35 motion.

IV. Whether 34-A M.R.S. § 11222(1) violates the Double Jeopardy Clause of the United States and Maine Constitutions.

PROCEDURAL AND FACTUAL HISTORY

In 2006, the Defendant was convicted and sentenced as a result of a guilty verdict on one count of unlawful sexual contact. (A. 29.) The judgment and commitment indicated that the Defendant was required to register with SORNA for ten years. (Id.) However, at the time of sentencing, the offender was required to be a lifetime registrant of SORNA. 34-A M.R.S. § 11203(7)(A), 11203(8)(A). The sentencing judge had no authority to deviate from the Legislature's clear mandate that all convictions under this statute require a defendant to comply with SORNA for life. *State v. Haskell*, 2001 ME 154, ¶ 27, 784 A.2d 4. At the time of sentencing, the legislative scheme did not tie SORNA registration requirements to sentencing. Subsequent to sentencing, the Defendant's SORNA registration requirements were corrected by the State Bureau of Investigations (SBI) pursuant to 34-A M.R.S. 11222(1). (A. 30.)

SUMMARY OF THE ARGUMENT

For defendants, such as the Appellant, who were sentenced after July 30, 2024, their requirements under the Sex Offender Registration and Notification Act (SORNA) are not a part of their criminal sentence. Therefore, the Ex Post Facto clause of both the United States and Maine Constitutions are

not implicated. For that same reason, the Double Jeopardy Clause is also not implicated. Given that the requirements are not a part of the criminal sentence, it would also have been improper to attempt to correct this with a M.R. Crim. P. 35 motion because those motions are meant to correct criminal sentences, not civil or regulatory consequences of a conviction.

ARGUMENT

I. Because the Defendant was sentenced after July 30, 2004, registration requirements under SORNA are not a part of the criminal sentence and, therefore, the Ex Post Facto Clause is not implicated and the statute is constitutional.

A legal determination regarding whether a statute is valid is reviewed de novo. *State v. Letalien*, 2009 ME 130, ¶ 15, 985 A.2d 4 (internal citation omitted). "A statute is presumed to be constitutional and the person challenging the constitutionality has the burden of establishing its infirmity." *Letalien*, 2009 ME 130, ¶ 15, 985 A.2d 4 (citing *Kenny v. Dep't of Human Servs.*, 1999 ME 158, 740 A.2d 560.). This Court "assume[s] that the Legislature acted in accord with constitutional requirements if the statute can reasonably be read in such a way, notwithstanding other possible unconstitutional interpretations of the same statute." *Letalien*, 2009 ME 130, ¶ 15, 985 A.2d 4 (citing *State v. Haskell*, 2001 ME 154, 784 A.2d 4.).

The Ex Post Facto clause of the United States Constitution states "No State shall . . . pass any . . . ex post facto Law." U.S. Const. art. I, § 10, cl. 1. The State of Maine's Constitution's Ex Post Facto Clause is coextensive with the United States Constitution's. *Letalien*, 2009 ME 130, ¶ 25, 985 A.2d 4. The clause has been interpreted to prohibit laws that "retroactively alter the definitions of crimes or increase the punishment of criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990).

When certain requirements or restrictions are "deemed civil rather than criminal in nature, . . . they do not implicate the Ex Post Facto Clause" *State v. Haskell*, 2001 ME 154, ¶ 7, 784 A.2d 4. "Sex offender registration [is] no longer tied to sentencing." *State v. Proctor*, 2020 ME 107, ¶ 16, 237 A.3d 896 (citing *State v. Anderson*, 2015 ME 3, 108 A.3d 378.); *Letalien*, 2009 ME 130 ¶¶ 61-63, 985 A.2d 4. The requirements under SORNA are intended to be "civil and regulatory in nature." *Proctor*, 2020 ME 107, ¶ 16, 237 A.3d 896. After July 30, 2004, SORNA registration is no longer a part of the criminal sentence. *State v. Johnson*, 2006 ME 35, ¶ 14, 894 A.2d 489 ("a separate order that is not part of the criminal sentence."); *Letalien*, 2009 ME 130, ¶ 61, 985 A.2d 4 (pursuant to the 2003 amendment to SORNA, offenders sentenced on or after July 30, 2004 are required to register as a part of a separate order and "not a part of the underlying sentence.").

As this Court is well-aware, the constitutionality of the SORNA statutes has been extensively discussed in its jurisprudence.

In *Johnson*, the Court held that the only means of correcting a prior sentence which erroneously omitted a registration requirement is a Maine Rules of Criminal Procedure Rule 35 Motion to Correct Sentence. *Johnson*, 2006 ME 35, ¶ 14, 894 A.2d 489. The Court reasoned that, because the registration was a part of the sentence, the only means of augmenting that sentence is Rule 35 motion. *Id*. ¶¶ 12-14. The Court specifically noted that, at the time of sentencing, the relevant statute read "*as part of a sentence*, the court shall order [a registration requirement]." *Id*. ¶ 12 (emphasis in original). The Court went on to note that the State was correct in its assertion that "pursuant to the subsequent amendment [that went into effect July 30, 2004], registration is now a separate order that is not part of the criminal sentence." *Id*. ¶ 14. *Johnson* clearly leads to the conclusion that, for those sentenced after July 30, 2004, a Rule 35 motion is not appropriate nor necessary because the registration requirement is no longer a part of the sentence.

The Court subsequently analyzed whether the Legislature could change registration requirements for those sentenced prior to the enactment of a new SORNA statute in *Letalien,* 2009 ME 130, ¶ 1, 985 A.2d 4. There, this Court reviewed a version of SORNA which made defendants who were convicted of particular crimes register for a longer period of time than they were required to

under the relevant statute at the time of sentencing. *Id*. The Court reasoned that given the onerous nature of the SORNA requirements and the language that indicated that SORNA registration was "a part of the sentence" at the time of sentencing, the requirements were a part of the underlying sentence and could not be increased retroactively without violating the Ex Post Facto Clause. *Id*. at ¶¶ 3, 61. Further, the State's only way of changing a SORNA registration requirement was through a Rule 35 motion, as had previously been held in *Johnson*. *Id* at ¶ 61. However, the Court also explicitly noted that there was a clear distinction between convictions before and after July 30, 2004. *Id.* For offenders sentenced on or after July 30, 2004, in accordance with the 2003 amendment of SORNA, their sex offender registration requirement is separately ordered and not a part of the underlying sentence. *Id.*

It is worth noting that the circumstances in *Letalien* and *Johnson* are plainly distinguishable from the facts in this case – namely, that at the time of sentencing the Defendant was required to register with SORNA for life and it was not a part of his sentence. The statute at issue does not increase the registration requirements required by law at the time of sentencing. The statute merely creates a new mechanism of correcting an error in the length of the registration requirement.

It is also worth highlighting that this Court has never held that the registration requirements under SORNA are a part of the criminal sentence for those sentenced on or after July 30, 2004.

The statute at issue in this case, 34-A M.R.S. § 11222(1), simply allows the State Bureau of Identification (SBI) to correct the term of registration that was erroneously assigned to an offender. The statute does not allow SBI to make a sentence harsher than what was required by law at the time of the sentencing, such as was the case in all prior cases where this Court has invalidated the retroactivity of a SORNA statute. Additionally, this is not a case of the Legislature increasing requirements under SORNA greater than they were at the time of the offender's sentencing.

This Defendant at the time of his conviction was required to register for the rest of his life. *See Haskell*, 2001 ME 154, ¶ 27, 784 A.2d 4; 17-A M.R.S. § 255-A(1)(E); 34-A M.R.S. § 11203(7)(A), 11203(8)(A). The sentencing court had no authority to deviate from the statutory requirements. *See Haskell*, 2001 ME 154, ¶ 27, 784 A.2d 4. This was merely an erroneous box checked on a court form. At the time of his sentencing, SORNA registration requirements were "a separate order that is not part of the criminal sentence." *Johnson*, 2006 ME 35, ¶ 14, 894 A.2d 489. This clearly indicates that Defendant's registration requirements are not a part of his criminal sentence and, instead, were civil and regulatory in nature.

Therefore, the Ex Post Facto clause does not apply in this case and the statute is constitutional. *Haskell*, 2001 ME 154, ¶ 7, 784 A.2d 4.

At the time of sentencing, the Defendant was required to register with SORNA for the rest of his life which is clearly distinguishable from the circumstances outlined in *Letalien*, and *Johnson*. Additionally, that lifetime registration requirement is not a part of his sentence so it can be retroactively corrected by operation of a statute. This Court's analysis need not go further. It is worth highlighting, again, that this Court has never held that SORNA registration requirements are a part of the criminal sentence for offenders sentenced after July 30, 2004. In fact, it has indicated just the opposite. *See Proctor*, 2020 ME 107, ¶ 16, 237 A.3d 896 ("Sex offender registration [is] no longer tied to sentencing," and that the requirements are intended to be "civil and regulatory in nature."); *Letalien*, 2009 ME 130 ¶¶ 61-63, 985 A.2d 4; *Johnson*, 2006 ME 35, ¶ 14, 894 A.2d 489 (SORNA registration requirements are "a separate order that is not part of the criminal sentence."); *Letalien*, 2009 ME 130, ¶ 61, 985 A.2d 4 (pursuant to the 2003 amendment to SORNA, offenders sentenced on or after July 30, 2004 are required to register as a part of a separate order and "not a part of the underlying sentence.").

If this Court were to hold that the term of registration in this case is a part of the criminal punishment, it would not only be inconsistent with precedent but

would also ignore the Legislature's clear intent. Although prior cases have held that the requirements are a part of the criminal sentence despite the Legislature's intent, in all of those cases the requirements were a part of the criminal sentence *at the time of sentencing*. Turning again to this case, at the time the Defendant was sentenced, the SORNA requirements were not a part of the criminal sentence. Likewise, the requirements were still not a part of the criminal sentence at the time of the correction by SBI.

II. The fact that the box that should have been checked is located on the judgment and commitment is not dispositive on whether it is a part of the criminal sentence.

The Defendant's entire argument apparently rests on the notion that any consequence notated on a judgment and commitment is necessarily a part of the criminal sentence. The existence of a blank box which the sentencing judge was statutorily required to check does not turn an entire civil, regulatory legislative scheme into a criminal punishment.

The Defendant cites *Doe v. Anderson* to support his contention that a notation on a judgment and commitment is dispositive. However, that case squarely aligns with the State's and lower court's view of the Law Court's jurisprudence.

In that case, the Court concluded "that SORNA is punitive as to offenders who were not sentenced to comply with SORNA when SORNA registration was

part of sentencing and who were subjected to SORNA registration when their earlier offenses were added to the statutory list of sex offenses *and registration was removed from sentencing.*" *Doe v. Anderson*, 2015 ME 3, ¶ 2, 108 A.3d 378 (emphasis added). The Court made clear that SORNA registration requirements, after July of 2004, were no longer a part of sentencing. *Doe*, 2015 ME 3, ¶¶ 4-6, 108 A.3d 378 ("When Doe was convicted, SORNA was part of the sentencing process. . . . In July of 2004 . . . the sentencing court was to order compliance with SORNA's registration provisions at the time of sentencing *rather than as a part of a sentence*."). The Court, again, goes out of its way to make this distinction – a finding for the Defendant in this case would mean that the Court was plainly wrong in *Doe* and all other precedent previously cited where there is a clear distinction between sentencings which occurred before and after July of 2004.

III. A M.R. Crim. P. 35 motion would be inappropriate because the SORNA registration requirements are not a part of the underlying criminal sentence.

The State has one year to file a motion to correct an illegal criminal sentence under M.R. Crim. P. 35(a).

Because the Defendant's requirements under SORNA are not a part of the criminal sentence, a Rule 35 motion would be an inappropriate and unnecessary manner of correcting the error. *Johnson*, 2006 ME 35, ¶ 14, 894 A.2d 489. Further,

the case which the Defendant relies on, *Johnson*, was written prior to the statute at issue in this case being enacted. It makes sense that the Court would not elucidate other options to correct SORNA registration requirements when: (1) there was no similar statute at the time and (2) the issue before the Court was an offender sentenced prior to the July 2004 amendment. Even more to the point, the Court also found in that case that the registration requirements were a part of the criminal sentence for that particular offender.

The Defendant's contention is also explicitly refuted in *Letalien* and *Johnson* where the Court held "the exclusive means by which the State could seek to modify the offender's sex offender classification under SORNA of 1999 was through [a Rule 35 motion] . . . . *the same was not true, however, for offenders sentenced on or after July 30, 2004 . . . .*" *Letalien*, 2009 ME 130, ¶ 61, 985 A.2d 4 (emphasis added).

Given the clear precedent on this point, the State was not required to file a M.R. Crim. P. 35 motion within one year of the sentencing.

IV. Because the SORNA registration requirements are not a part of the criminal sentence, the double jeopardy clause is also not implicated.

The Defendant further asserts that the statute violates the double jeopardy clause of the United States Constitution and Maine Constitution. "These provisions

prevent . . . the imposition of multiple punishments for the same offense." *State v. Weckerly*, 2018 ME 40, ¶ 7, 181 A.3d 675 (citing *Ayotte v. State*, 2015 ME 158, 129 A.3d 285.). Said another way, the double jeopardy clause is not applicable when a criminal punishment is not involved.

The out-of-state case cited by the Defendant is not only entirely non-binding on this Court but also, again, deals with changing the underlying criminal sentence. *See Com. v.* Selavka, 469 Mass. 502, 14 N.E.3d 933 (2014). As has been noted above, the Defendant's registration requirements are not a part of his criminal sentence and, for that reason, the Defendant's argument must be rejected.

CONCLUSION

In sum, this Court has made clear two assertions as it relates to this issue. First, the ex post facto clause analysis largely rests on whether the registration requirements are a part of the criminal sentence. Second, that for offenders sentenced after July 30, 2004, the registration requirements are not a part of the criminal sentence. Therefore, the lower court's order must be affirmed.

Dated: _____

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Certificate of Service

I, Jacob Demosthenes, Assistant District Attorney, hereby certify that two (2) copies of the within Brief for Appellee were mailed to Appellant's Attorney addressed as follows:

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The State has sent a native .pdf file for submission to the court (at lawcourt.clerk@courts.maine.gov). The State has also hand filed ten (10) paper copies of the Brief of the Appellee to the Law Court.

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