

NOV 20 2013

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

STATE OF OKLAHOMA,)
)
 Appellant,)
 v.)
 MARK ANTHONY HERFURTH)
)
 Appellee.)

NOT FOR PUBLICATION

Case Nos. S-2013-413 & 415

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellee Mark Anthony Herfurth was charged in the District Court of Cleveland County in Case No. CF-2011-225 with Failure to Register as a Sex Offender (Count 1) and Sex Offender Living within 2000 feet of a School (Count II), both offenses After Former Conviction of Two or More Felonies. Preliminary Hearing was held on August 24, 2011, and on September 14, 2011, Appellee was formally arraigned and bound over for trial. On January 23, 2012, Appellee filed a Motion to Quash and Dismiss on the grounds that no crime had been committed. On February 23, 2012, the State filed a response. The case was set for hearing on April 24, 2013, before the Honorable Tom Lucas, District Judge.

Appellee was also charged in Case No CF-2011-1332, with Providing False/Misleading Registration Information, After Former Conviction of Two or More Felonies. On September 8, 2011, Appellee was arraigned on the charge and the case was assigned to Judge Lucas. On January 23, 2012, Appellee filed a Motion to Quash and Dismiss on the basis that no crime had been committed.

The disposition of the case was held until resolution of Appellee's motion. After the filing of the State's response, the motion hearing was set for April 24, 2013. The cases were combined for the hearing and after hearing argument, the District Court sustained the Motion to Quash in each case and dismissed both cases. The State announced its intent to appeal and lodged this appeal.

The State now appeals from the District Court's decision pursuant to 22 O.S.2011, § 1053(4) and raises the following proposition of error:

- I. The trial court abused its discretion and erroneously ruled that the Department of Corrections assigned the Appellee to a "Level 3" status without authority after he was originally sentenced and 57 O.S. 583 does not apply retroactively and the change to the statute was substantive and dismissed the charges against Appellee.

As each case raises this same proposition of error, we have combined the cases for purposes of appeal. After thorough consideration of this proposition of error and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we find the ruling of the District Court granting the motions to quash and dismiss the cases should be affirmed.

The State asserts that on August 25, 1995, Appellee pled guilty to one count of Indecent Exposure and was ordered to register as a sex offender upon his release from the Department of Corrections (hereinafter DOC). Appellee was released from DOC in May 1998 and registered as a sex offender consistent with the Sex Offender Registration Act, 57 O.S.Supp.1995, § 582 *et. seq.*, which required him to register with DOC for ten years and with local law enforcement for five years. 57 O.S.Supp.1995, § 583(C) & (D). Appellee's ten year registration period was to expire May 5, 2008.

On November 1, 2007, the Sex Offender Registration Act was amended to provide for assignment of defendants to a risk level, 1, 2, or 3, with an accompanying mandatory registration period of 15 years, 25 years or life, respectively. 57 O.S.Supp.2007, §§ 582.5; 583. In 2007, Appellee was assigned to Level 3 and required to register for life.

On November 12, 2010, Appellee registered with the Cleveland County Sheriff's Office as a sex offender residing at 7631 125th S.W., Noble, OK. On December 6, 2010, Appellee registered with DOC the same address. A police investigation revealed that Appellee had not been living at the Noble address but at 1026 Biloxi Drive, Norman. This address was approximately 1300 feet away from Kennedy Elementary School. Appellee never registered with the Norman police department.

The current charges were filed as a result. The cases were combined for hearing on the defense Motions to Quash and Dismiss. After hearing argument, the trial court found that DOC did not have the authority to assign Appellee to a Level 3 status, that 57 O.S. § 583 was not in effect at the time of the plea, that it is not retroactive and therefore not applicable to the defendant. The court granted the motion to quash and dismissed both cases. The State announced its intent to appeal and lodged this appeal.

Now on appeal, the State challenges only the District Court's finding that the 2007 Amendment to § 583 of the Sex Offender Registration Act does not apply to Appellee. The State requests this Court find the District Court's dismissal of the charges due to the erroneous ruling by Judge Lucas was not

supported by the evidence or the law and therefore must be reversed and the charges against Appellee reinstated.

In appeals brought to this Court pursuant to 22 O.S.2011, § 1053 this Court reviews the trial court's decision to determine if the trial court abused its discretion. *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Id.*

In support of its argument, the State relies on *Smith v. Doe*, 538 U.S. 84, 123 S.Ct.1140, 155 L.Ed.2d 163 (2003) where the United States Supreme Court reviewed the State of Alaska's sex offender registration act and determined that its retroactive application was non-punitive and did not violate the *Ex Post Facto* Clause. The State argues that pursuant to *Smith*, and as the Oklahoma Legislature intended for the Oklahoma Sex Offender Registration Act to be a civil regulatory scheme designed to protect the public, and as Appellee was registering at the time the amendment became effective, the Sex Offender Registration Act does apply retroactively to Appellee. The State further asserts that as Appellee has not met his burden under 22 O.S. § 504.1, he is subject to prosecution for failing to register in accordance with the Sex Offender Registration Act.

We find the State's reliance on *Smith* not persuasive as the first determination we must make is whether the 2007 amendment to § 583 is

applicable to Appellee. As stated above, Appellee entered his guilty plea in 1995 and at that time agreed to register as a sex offender for ten years upon his release from DOC.

“The general common law rule of statutory construction is that statutes and amendments are to be construed to operate only prospectively unless the legislature clearly expresses an intent to the contrary.” *State v. Watkins*, 1992 OK CR 50, ¶ 5, 837 P.2d 477, 478. “[I]ntervening changes in the law and new legislative enactments should only be applied prospectively from their effective date, unless they are specifically declared to have retroactive effect.” *Salathiel*, 2013 OK CR 16, ¶ 8, ___ P.3d ___.

“[T]he presumption against retroactive legislation is deeply rooted in our nation’s jurisprudence and embodies a legal doctrine centuries older than our Republic.” *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229 (1994). “Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.” *General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 1112, 117 L.Ed.2d 328 (1992).

Id., 2013 OK CR 16, ___ P.3d at ___ (Lumpkin, J., specially concur).

There is no indication that the 2007 amendment to § 583 is to be given retroactive effect. The language of the amendment does not state that it applies to those persons registered as sex offenders in 2007. Therefore, as there is no clear indication the 2007 amendment is to be given retroactive effect, the amendment applies prospectively only.

This Court has adopted the procedural remedial exception to the rule on non-retroactivity for pending cases. *Cartwright v. State*, 1989 OK CR 41, ¶ 11,

778 P.2d 479, 482-483. A remedial or procedural statute that does not create, enlarge, diminish, or destroy vested rights is generally held to operate retrospectively. *Watkins*, 1992 OK CR 50, ¶ 5, 837 P.2d at 478. An amendment is substantive and not procedural or remedial if it alters the right and obligations of the individual. *Cartwright*, 1989 OK CR 41, ¶ 11, 778 P.2d at 482-83.

In the present case, the 2007 amendment to § 583 is substantive. The amendment does not simply alter or clarify the procedure or method of registration. If the amendment was given retroactive effect, it would require Appellee to register for a longer period of time than he agreed when he entered his plea in 1995. As a retroactive application of the amendment would alter Appellee's obligations, the amendment is substantive and, without a clear expression from the Legislature that the amendment is to be given retroactive effect, it must only be applied prospectively.

We find the District Court did not abuse its discretion in determining that the 2007 amendment to § 583 is not applicable to Appellee. *See Landgraf*, 511 U.S. at 265, 114 S.Ct. at 1497 (“[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.”) (quotations and citation omitted). Therefore, it is not necessary to address further the State's argument and determine whether the retroactive application of the amendment

violates the *Ex Post Facto* Clause.¹ The presumption against statutory retroactivity is a separate determination from an *ex post facto* analysis. *Id.*, 511 U.S. at 266-68, 114 S.Ct. at 1498 (discussing the limited scope of the Constitutional restrictions on retroactive legislation in contrast to the requirement that Congress first make clear, its intention that the legislation have retroactive application); *Castillo v. State*, 1998 OK CR 9, ¶¶ 7-8, 954 P.2d 145, 147 (“Petitioner cannot complain that the Act violates the constitutional prohibitions against *ex post facto* laws when the sentencing matrixes of the Act are not retroactive in application.”). The District Court’s order granting the motion to quash and dismissing the cases is affirmed.

DECISION

The ruling of the District Court granting the Motion to Quash and dismissing the cases is AFFIRMED. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the MANDATE is ORDERED issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY
THE HONORABLE TOM LUCAS, DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT APPEARANCES ON APPEAL

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¹ We note that in *Starkey v. Oklahoma Department of Corrections*, 2013 OK 43, ¶ 28, 305 P.3d 1004, 1015 the Oklahoma Supreme Court found the 2007 amendments to the Sex Offender Registration Act were not intended to apply retroactively and that their retroactive application violated the *ex post facto* clause of the Oklahoma Constitution.

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NO RESPONSE NECESSARY

OPINION BY: LUMPKIN, J.
LEWIS, P.J.: DISSENT
SMITH, V.P.J.: CONCUR IN RESULT
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR

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LEWIS, P.J., DISSENTING.

I respectfully dissent. The majority's interpretation of the Sex Offender Registration Act (SORA) undermines the Legislature's broad authority under the police power to pass general laws in the public interest. *Holden v. Hardy*, 169 U.S. 366, 391, 18 S.Ct. 383, 42 L. Ed. 780, 790 (1898) (police power extends to regulations for public health, safety, morals, and welfare, and may reasonably limit personal liberty). For similar reasons, I dissented from the Court's recent refusal to enforce the amended felony DUI statute in *State v. Salathiel*, 2013 OK CR 16 against a defendant charged with a second offense DUI after a prior DUI deferred judgment. The Court in *Salathiel* was unable to declare the amended DUI statute an *ex post facto* law, as the entire weight of authority was to the contrary. Still, the Court upheld the dismissal of an alleged violation of the statute committed *after* its effective date, seemingly holding that the statute applied only to defendants who, after the effective date of the statute, *first* sustained a deferred judgment for DUI *and then* committed a second DUI offense. That the Legislature intended this interpretation of the statute "taxes the credulity of the credulous." *Maryland v. King*, 569 U.S. ___, 133 S.Ct. 1958, 1980, 186 L.Ed.2d 1 (2013) (Scalia, J., dissenting).

Today the Court's refusal to apply a 2007 amendment to the SORA shields the defendant from charges that he failed to register under that law (and lied in his registration, and illegally lived within 2,000 feet of a school) in 2010. Again, the Court's ruling cannot rest upon the *Ex Post Facto* Clause, in light of *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 163 (2003); yet

the Court effectively blunts the statute's operation, *Salathiel*-style, relying on the "presumption against retroactive legislation . . . deeply rooted in our nation's jurisprudence."

Granting that this presumption exists, and that retroactive legislation "presents problems of unfairness," the error in the Court's analysis comes more clearly into view: The substantive criminal penalty before us is not really retroactive at all. True, the amended sex offender registration statute "applies to one who *at the time of the enactment* [2007] occupied *a particular status*, viz. the status of a person who *has done* the things enumerated" [i.e., a sex offender, who then failed to register], *Cox v. Hart*, 260 U.S. 427, 43 S.Ct. 154, 67 L.Ed. 332 (1922)(emphasis added). But "[a] statute is not made retroactive merely because it draws upon antecedent facts for its operation." *Id.*

The difference between truly repugnant retroactive laws, and mere antecedent-operative laws, reveals itself in the difficulty of describing why the latter laws are "unfair." There was nothing unfair in charging the defendant in *Salathiel* with a felony for committing his second DUI after a prior deferred judgment for DUI; he was a repeat offender under a law in effect when he committed the crime. The Court there confused the antecedent fact (the deferred judgment) that conditioned the operation of a *current* criminal penalty with a truly retroactive law. In this case, the unfairness of prosecuting the defendant for failing to register, in 2010, under a law enacted in 2007, also proves difficult to grasp, because it involves no truly retroactive law, in the *ex post facto* sense of the word, or any other. *Thompson v. State*, 603 S.E.2d 233

(Ga. 2004) (finding statute prohibiting convicted sex offender from residing within 1,000 feet of area where children congregate created a new crime based in part on sex offender's prior status, but was not retrospective, or *ex post facto*, to defendant whose predicate sex offense conviction occurred before effective date of the law).

The flawed premise at the heart of this decision is that the defendant's obligation to register became fixed for all time at his 1995 guilty plea. The cases cited for this rule govern changes to criminal procedure statutes, not sex offender registration laws. The registration period in effect at the time of a guilty plea, standing alone, carries no enforceable limitation on future obligations. *Watson v. State*, 642 S.E.2d 328 (Ga. App. 2007); *Peters v. Donald*, 639 S.E.2d 345 (Ga. App. 2006)(finding legislative amendment requiring first-time sex offenders to register applied to defendants who were not required to register at the time of guilty pleas, and was not *ex post facto*). Convicted sex offenders must comply with current requirements of Oklahoma law, or face the current penalty for failing to do so, unless those requirements plainly violate constitutional rights. Because no law prohibits this prosecution for violating the SORA registration law then in effect,¹ I would reverse the district court.

¹ I agree with the dissenting opinions of Justices Winchester and Taylor in *Starkey v. DOC*, 2013 OK 43, 305 P.3d 1004, and the overwhelming majority of American courts, that the SORA provisions are non-punitive public safety laws; and that the Legislature may retrospectively alter the registration period. Necessarily, the Legislature may also provide that the failure to register, when required to do so, is a crime.