

STATE OF INDIANA)
) SS: IN THE TIPPECANOE CIRCUIT COURT
COUNTY OF TIPPECANOE)

JOHN DOE 79C01-0710-PL-00059

vs.

TIPPECANOE COUNTY PROSECUTOR et al

ORDER

This matter being before the Court on the parties’ cross motions for summary judgment, the Court enters the following findings of fact and law.

FINDINGS OF FACT

1. Plaintiff, proceeding under the pseudonym John Doe, filed this suit on August 9, 2007, requesting that the Tippecanoe County Prosecutor, the Tippecanoe County Sheriff, and the City of Lafayette be enjoined from enforcing or threatening to enforce IC 35-42-4-11 and declaring that the actions of these defendants in enforcing and threatening to enforce that law were unlawful.

2. Plaintiff alleges that he is an individual convicted of sex offenses against children, most recently in 1991, and that, until threatened by the Defendants with enforcement of IC 35-42-4-11, he resided in property, owned by him, within 1,000 feet of a school in Lafayette, Tippecanoe County, Indiana. After the Defendants threatened to enforce the law, Mr. Doe moved out of this residence, although he is frequently at the residence to assist his mother, who is aged in ill health.

3. The defendant's do not stipulate that the plaintiff's allegations are true, but the parties and the Court assume that the allegations are true for the purpose of determining the motions for summary judgment filed herein.

4. Specifically, Plaintiff's complaint contends that the non-code provisions of P.L. 173-2006, Sec. 57 and P.L. 216-2007, Sec. 57 (hereinafter "the non-code provisions") prohibit application of the sex offender residency restrictions to those individuals whose conviction of one of the crimes listed in IC 35-42-4-11(a)(2) occurred after June 30, 2006.

FINDINGS OF LAW

5. The non-code language at issue in this case states: "IC 35-42-4-11 as added by (or amended by) this act applies only to crimes committed after June 30, 2006."

6. The plain language of the non-code provisions does not reveal an intent to modify the definition of "offender against children" as specified in IC 35-42-4-11(a) which means a sexually violent predator or a person with past criminal convictions for child molesting, child exploitation, child solicitation, child seduction, or kidnapping a child less than 18 years of age. Rather the plain language of the non-code provisions reveals an intent to limit application of a criminal penalty to those acts of sex offender residency offense that take place after June 30, 2006.

7. The statute specified by the non-code provisions, IC 35-42-4-11, does not modify the crimes of or penalties for being a sexually violent predator or for child molesting, child exploitation, child solicitation, child seduction, or kidnapping a child less than 18 years of age. Instead, IC 35-42-4-11 applies criminal penalties for acts of sex offender residency, meaning the act of spending three or more nights in a restricted area

during any thirty day period. An act of sex offender residency that took place before July 1, 2006 is not actionable. An act of sex offender residency that takes place after June 30, 2006 is actionable.

8. Even if the plain language were not clear, review of statutes enacted by the General Assembly reveals that the language at issue is used almost every time the General Assembly enacts or amends a substantive criminal statute. For example, in the 2007 Acts of the General Assembly alone, see, e.g.: P.L. 7-2007, Sec. 2: “IC 35-46-3-12, as amended by this act, applies only to (1) offenses; and (2) acts that would be a crime if committed by an adult; that are committed after June 30, 2007.

P.L. 69-2007, Sec. 2: “IC 35-44-1-5, as amended by this act, applies to offenses committed after June 30, 2007.”

P.L. 85-2007, Sec. 4: “IC 35-42-2-10, as amended by this act, applies only to crimes committed after June 30, 2007.”

P.L. 112-2007, Sec. 3: “IC 35-45-18-2 and IC 35-45-18-3, both as added by this act, apply only to crimes committed after June 30, 2007.”

P.L. 146-2007, Sec. 22: “IC 35-46-1-21 and IC 35-46-1-22, both as added by this act, apply only to crimes committed after June 30, 2007.

P.L. 164-2007, Sec. 3: “IC 35-42-3-4, as amended by this act, applies only to crimes committed after June 30, 2007.”

P.L. 227-2007, Sec. 71-72: “IC 35-45-5-3 and IC 35-45-5-4, both as amended by this act, apply only to crimes committed after June 30, 2007.” “IC 35-45-5-3.5, as added by this act, applies only to crimes and infractions committed after June 30, 2007.” “IC 35-45-6-1, as amended by this act, applies only to crimes committed after June 30, 2007.”

The fact that this language appears so frequently in criminal legislation supports the proposition that the General Assembly is using it for very basic purposes applicable to most if not all criminal statutes. That basic purpose is to indicate that a criminal penalty

applies to the activity prohibited by the statute only if those actions take place after the statute is enacted. In the case of IC 35-42-4-11, the activity prohibited is the act of residing in a restricted area.

9. Because the non-code provisions do not reveal an intent to limit the definition of “offender against children” as set forth in IC 35-42-4-11(a) but only an intent to limit the application of sex offender residency offenses to those acts of residency that take place after June 30, 2006, Plaintiff’s complaint must fail as a matter of law.

10. Plaintiff has suggested that, unless the non-code provisions are construed to time-limit the crimes referenced by the “offender against children” definition in IC 35-42-4-11(a), the statute will run afoul of the prohibition against *ex post facto* laws and, therefore, as a matter of statutory construction, the non-code provisions must be construed to so limit that definition. As explained above, the plain language of the non-code provisions and the usage of the same language in a multitude of other statutes both argue against Plaintiff’s proposed construction. In addition, the Court does not believe the statute violates the *ex post facto* prohibitions.

11. While no controlling authority exists in Indiana on whether sex offender residency restrictions violate *ex post facto* prohibitions, the majority view in other jurisdictions has been that they do not. (See *e.g. Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005); *Weems v. Little Rock Police Dept.*, 453 F.3d 1010 (8th Cir. 2006); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005); *People v. Leroy*, 828 N.E.2d 769 (Ill. Ct. App. 2005); *Denson v. Georgia*, 600 S.E.2d 645 (Ga. Ct. App. 2004); *Hyle v. Porter*, 868 N.E.2d 1047 (Oh. Ct. App. 2006). *But c.f. Mikaloff v. Walsh*, 5:06-CV-96 (N.D. Ohio

2007); *Nasal v. Dover*, 862 N.E.2d 571 (Oh. Ct. App. 2006); *Mann v. Georgia Dept. of Corrections*, S07A1043 (GA 2007).)

12. While analyzing the Alaska sex offender registry law, the United States Supreme Court outlined considerations for *ex post facto* analysis. *Smith v. Doe*, 538 U.S. 84 (2003). First the court is required to consider whether the challenged law was intended by the legislature to impose a punishment or to enact a civil regulatory scheme. And, if the intent was not to impose punishment whether, despite the intentions of the legislature, the law was so punitive in effect as to constitute an impermissible retroactive punishment.

13. The Court finds that the legislature intended a civil regulatory scheme designed to exercise the State's police powers to protect the State's children from those with a greater likelihood to do them harm. If the object of legislative concern is thought to be the activity or status from which the individual is barred, the disqualification is not punishment. On the other hand, if the statute appears to be aimed at the person himself, then the disqualification is likely to be seen as a punishment. *Flemming v. Nestor*, 363 U.S. 603, 613-14 (1960). Had the Indiana General Assembly simply sought to penalize sex offenders if they had ever lived near a school or park, that would imply some sort of vendetta against the sex offenders themselves. In this case, the General Assembly simply seeks to prohibit current behavior; that of a sex offender, someone who poses a risk to our children, from residing in zones with greater concentrations of children.

14. In determining whether the civil regulation is so punitive in effect as to constitute impermissible *ex post facto* punishment, the United States Supreme Court has laid out "useful guideposts" to make the determination: "useful guideposts" in making this analysis: whether the law has been regarded in our history and traditions as

punishment, whether it promotes the traditional aims of punishment, whether it imposes an affirmative disability or restraint, whether it has a rational connection to a nonpunitive purpose, and whether it is excessive with respect to that purpose. *Smith v. Doe*, 538 U.S. 84 (2003).

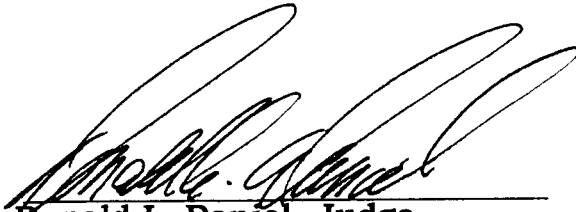
15. The residency restriction allows greater access to the community than historical punishments such as banishment. And, while the existence of the restriction may promote traditional aims of punishment such as deterrence or have some retributive or restraining effect, the residency restriction is a rational, non-excessive pursuit of the non-punitive purpose of keeping school and similar zones safe.

16. The Court therefore concludes that the residency restriction is not punitive in intent or so punitive in effect as to violate the state and federal constitutional prohibitions on *ex post facto* laws.

WHEREFORE, Summary Judgment is hereby entered in favor of the Defendants and against the Plaintiff and Plaintiff's Complaint is hereby dismissed with prejudice.

Entered this 19th day of February, 2008.

Copy to counsel. al



Donald L. Daniel, Judge
Tippecanoe Circuit Court