IN THE SUPREME COURT OF IOWA

No. 19-1721

RONNY FORTUNE,

Appellant,

v.

STATE OF IOWA,

Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR HUMBOLT COUNTY
HONORABLE KURT STOEBE, JUDGE

APPELLANT'S FINAL BRIEF

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

On September 23, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to:

Ronny Fortune

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Humboldt IA 50548

/s/ Philip B. Mears
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ROUTING STATEMENT

The Supreme Court should retain jurisdiction to decide an issue of first impression. See Rule 6.1101(2)(c). The issue concerns Section 692A.128, the section of the Sex Offender Registry Chapter allowing for modification of the registration restrictions.

Section 692A.128(5) sets out certain criteria for modification. The chapter then says that a court "may but is not required to conduct a hearing on the application to hear any evidence deemed appropriate by the court. The court may modify the registration requirements under this chapter."

In the Fortune case, the court seemed satisfied that Fortune had satisfied the criteria identified for modification identified by the statute. The Court then rejected the application for a number of reasons that did not appear to be related to Fortune's risk of reoffending.

The court should retain the case to decide what, if any, discretion the court has in rejecting an application, once an applicant establishes that he satisfies the criteria set by the legislature.

STATEMENT OF THE CASE

Nature of the Case:

This is an appeal from a civil case brought by Ronny Fortune under Section 692A.128 of the Code. Fortune has sought to modify the duration of his sex offender registry, to remove him from the registration requirement.

The case was filed in Humboldt County on August 3, 2018. After a hearing, the Court, Judge Kurt Stoebe, denied relief in an order on August 27, 2019. Appx. p. 6. A Motion to Amend or Enlarge the ruling was then denied on September 12, 2019. Appx. p. 31.

Fortune filed a timely Notice of Appeal on October 11, 2019. Appx. p. 33

Course of Proceeding:

Fortune committed the offense that got him on the Sex offender Registry in 2003. He was sentenced fifteen years in prison in a case in Hamilton County. While in prison he completed Sex Offender Treatment. He was released, first to work release and then to parole. He discharged the parole on January 3, 2011. As a result of that case, he was required to register for life.

In 2018, Fortune started the process under 692A.128 to be modified off the registry. As apparently required by section 692A.128, Fortune obtained a risk assessment report from the Department of Correctional Services (DCS). The report was dated April 23, 2018.

Fortune filed his Application to modify the Sex Offender Registry obligation in Humboldt County on August 3, 2018. Appx. p. 6. Filed on the same day was the report by the Department of Correctional Services (DCS) addressing his eligibility for modification under 692A.128. A Resistance was filed. Appx. p.6.

An evidentiary hearing was held on August 20, 2019. The Judge was Kurt Stoebe. Prior to the hearing, the DCS updated/corrected its assessment- something that had been requested by Fortune.

At the hearing there were two witnesses. Ashley Lappe testified. She was the DCS psychologist who conducted the risk assessment evaluation on Fortune. The second witness was in fact Ronny Fortune. Exhibits were submitted. Fortune's Exhibits primarily had to do with the risk assessment and the method of arriving at its conclusion. The State offered just two exhibits. Both were documents from Ronny Fortune's 2016 Humboldt County criminal case where he received the minimum sentence for failure to comply with a Sex Offender Registry requirement.

Decision dated August 27, 2019

Judge Kurt Stoebe handed down his decision on August 27, 2019 denying relief. Appx. p. 10. After acknowledging that the Department of Correctional Services had concluded that Fortune was low-risk to reoffend, the Judge rejected

the Application for Modification. He identified several reasons where, "any one of these factors justifies the Court's denial."

1. First, he pointed out that Fortune's test scores, as he called them, were not uniformly low (Ruling p.4 Appx. 13).[1]

2. Second, he noted that Fortune had two offenses in the almost ten years since he was released from prison. There had been a registration violation where he received the minimum sentence, and the disorderly conduct conviction.

3. The Court was quite concerned by the fact that Fortune got married originally six or seven years ago "to avoid a Department of Human Services investigation." The Court remarkably concluded that "the reasons for such an investigation are reasonable and to the Court's knowledge, DHS was not able to answer the concerns." (Ruling p.5 Appx 14).

4. The Court said the underlying offense cannot be ignored. The Judge pointed to Fortune's failure to accept blame for the situation. The Court came back to this theme by stating that Fortune had not demonstrated remorse for his underlying offense. (Ruling p.5 Appx. 14).

5. Finally, the Judge questioned Fortune's reasons for wanting to be removed from the Registry. Fortune had testified that he had been an emergency management volunteer for about a year before he was asked to step down for a

[1] Page numbers did not appear on the ruling and have not been added since.

long as he was on the registry (Tr. p. 22 L. 11-23). Additionally, Fortune tried to become a volunteer firefighter during that same time period and was told that he could not volunteer until he was off the registry (Tr. p. 23 L. 9-17).

For the Judge, however, Fortune's reasons "raise more concerns." Here is what the judge said;

> "Fortune's desire to be a first responder could put him into contact with vulnerable children and adults and the opportunity for inappropriate acts on unconscious, injured, frightened, or ill victims is hardly a reason to ignore his history of law violations, attitude of offenses, and murky psychological evaluation." (Ruling p.5-6 Appx 14-15).

Motion to Amend

Fortune filed a timely Motion to Amend or Enlarge the Findings. He asked the Judge specifically to amend or enlarge many of the findings relating to the reasons for denying the application. See Motion to Amend, Appx. 17.

Decision dated September 12, 2019.

The Court answered the Motion to Amend or Enlarge in a ruling dated September 12, 2019. At paragraph three of that Order, the Court responded to Fortune's point that the Registry prevented him from attending school functions for his step-children. The Court noted that attending school functions "would place him in close proximity to young and vulnerable children. It is a cause for concern, not a reason to remove Fortune." Ruling dated September 12, 2019, Appx 31.

STATEMENT OF FACTS

The Facts Regarding the Criminal Case

Ronny Fortune is required to register because of a 2003 conviction from Hamilton County, Iowa in case FECR010447. In that case he was convicted, after a guilty plea, of three counts of Lascivious Acts with a Child, in violation of section 709.8 of the Iowa Code.

The sentencing order actually mentioned 709.8(1), 709.8(2) and 709.8(3), with one count for each subsection. The reference to 709.8(1) was significant because since 1999 that subsection, but not the others, carried lifetime on the registry. [2]

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[2] There was quite a bit of confusion about the crime of Lascivious Acts, Section 709.8, and registration prior to 2005. All subsections of Lascivious Acts prior to 2005 had the same criminal sentence.

In 1999, the Iowa legislature amended Chapter 692A, creating a list of offenses called "aggravated offenses." See 692A.1 (2000 Code) and current section 692A.101(1). Any "aggravated offense" carried lifetime on the Registry, even if it was a first violation requiring registration.

Prior to 1999, the registration was fairly easy to understand. There was ten years of registration for a first offense and lifetime for a second offense.

Subsection 1 of 709.8 was listed as an "aggravated offense" carrying lifetime on the Registry. The other subsections were not aggravated and therefore only carried ten years. It has been Counsel's experience, doing quite a bit of work in this area, that there was very little understanding of the Registration consequences of pleas to Lascivious Acts during that time. It was not unusual for sentencing orders to leave out the subsection entirely.

Most confusion about Lascivious Acts was removed with the code revisions to sex offenses in 2005. After July 1, 2005, subsections 1 and 2 were C felonies carrying lifetime on the Registry and a lifetime special. The remaining subsections were D felonies carrying ten year special sentences and ten years on the Registry.

Fortune was sentenced on October 10, 2003 to five (5) years in prison for each of the three counts to be served consecutively. There was also an additional two year term of work release/parole. This applied to all Lascivious Acts sentences to prison at the time.[3]

The sentencing order did not mention any particular length of registration for sex offender registration.

Fortune served time in prison, completed sex offender treatment, and was released to Work Release on June 9, 2009. That became a parole on December 16, 2009. Fortune successfully completed parole, discharging the full sentence while on parole on January 3, 2011.

Registration Requirements

Ronny Fortune has registered since he was released in 2009. Because of his conviction in 2003, Ronny Fortune is a Tier III sex offender. That means he has to report four times a year.

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[3] After Fortune was released from prison, there was a question about the additional two years that was given with Lascivious Acts sentences prior to 2005. The legislature provided that there would be an additional two years of parole or work release after the five years. The question was if you had consecutive Lascivious Acts counts, did you get two years or six. The District Court found it was just two years. On appeal the Iowa Court of Appeals agreed. State vs. Iowa District Court for Hamilton County. 2011 WL 5877016 (Iowa Court of App. 2011)

Because Ronny Fortune had a victim who was a minor, he is subject to the “safe zone” restrictions found in 692A.113.

Ronny Fortune is required to register for life. That is because one of the Counts is regarded as an "aggravated offense" under current 692A.101(1)(a).

Discussion of Risk assessment

There are three recognized and validated tools or scoring methods generally used by Departments of Correctional Services (DCS) across the state. These are the STATIC99R, the ISORA and the STABLE2007. See Exhibit 1 which is the Department policy on modification. Ex. 1; Appx.p. 36. These are the tools that are "validated" and used by the "Department of Corrections." See 692A.128(1)(c).

In fact the DOC policy, which is followed by the DCS, requires all three tests to be used in these modification assessments. See Exhibit 1. Appx.p. 36.

There are also 'validated' methods for combining the tests to produce a "combined" score. The STATIC99R test can be combined with the two other tests.

This means there are a total of five “test” results that are usually used in the assessments in these cases.

Scoring Summary

The DCS written assessment for Fortune is Exhibit 3. Appx. p. 6. Here were Fortune's reported risk scores from the different tests, or combination of tests.

STATIC 99-R Average risk

ISORA	Low risk
STATIC 99-R/ ISORA combined	Low risk
STABLE 2007	Low risk
STATIC 99-R/ STABLE 2007 combined	Low risk

STATIC 99-R

The first tool mentioned in the assessment is the STATIC 99-R. This is a nationally developed and validated scoring system for determining risk for sexual reoffending.

The STATIC 99-R test instrument, in 2016, switched from using the terms "low," "Low-moderate," "moderate-high," or "high" to five levels relative to "average". The questions did not change. The scoring did not change. How that score was described is what was changed. See Exhibits 11 and 12, Appx. p.69-70. It would seem that "low" is now "Below average" or "Well below Average".

The change in scoring resolved some confusion about the use of the terms "high" and "low." It turns out that those terms were always about the relationship of the score to the "average". A person was "high" if the risk was greater than the "average." If the average risk was only 10%, for example, then a high risk would be greater than 10%. It would not mean 51%.

Obviously, to understand the score requires a knowledge of what is 'average."

Low risk turns out to be quite low, given the fact that the “average” score on the test itself is quite low.

There was another change in 2016 with the STATIC. The makers of the tool made clear at that time that the STATIC 99R score is measured from the point the person is released from prison, or begins probation. It is not measured from the time the assessment is done. For that reason the score itself it does not take into account behavior since that initial point.

This is true for factor #1, age of offender, as well as for factor #2, whether the person has 'lived with a lover for more than 2 years.

Fortune scored 3 on the STATIC test. That is "average risk". Before they changed the names that went with the scores, that would have been "moderate-low". See Ex. 4, Appx. p. 9.

Annotation to his STATIC score

Several comments are appropriate with regard to the scoring on the STATIC99, particularly in Fortune’s case.

Age (factor #1)

Fortune got a point on risk factor one. The assessor noted that he was between the ages of 18-34.9. The appropriate date to consider is the release date

from prison, which was June, 2009. On that date, he was 34 years and two months old.

Prior to 2016, the DCS interpreted that age factor to be age when the test was being given. See Exhibit 8; Appx. p. 14. The revision to the STATIC test in 2016 clarified that this first scoring factor is measured from the point when the person got out of prison or was placed on probation.

When you compare the score from the assessment in 2019 with the score from 2014, you can see they scored him as zero on the first factor, noting that he was in the second age group. That is because he was 39 years old in 2014 when that test was administered.

If DCS had not changed the scoring in 2016, he would actually have scored a -1 in 2019 on the age factor. That is because he was 44 at that time of the test. His overall score would have been a '1'.

Risk factor number 10:- sex of the victim

Fortune got one point for the fact that the victim was male. This is not in dispute. It should be noted that when the Iowa DOC developed the ISORA test in about 2010, they did not use the sex of the victim as one of the factors that they felt relevant. Nevertheless, the factor is still in the STATIC99 and has not changed, giving Fortune a point.

Time free in the community

Recent research by the authors of the STATIC99-R indicates that the way to update the risk for the passage of time is to consider behavior and offenses since release from prison. See Exhibit 9; Appx. p. 43. For every 5 years without a new sex offense, the risk % is cut in half. This, essentially means that if the risk was 3.9% percent upon release, it would be half that after five years of offense free behavior. See Hanson, R.K., Harris, A.J.R., Letourneau, E., Helmus, L.M., & Thornton, D. (2017, October 19). Reductions in Risk Based on Time Offense Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender. *Psychology, Public Policy, and Law.* Advance online publication. http://dx.doi.org/10.1037/law0000135

Figure 3 from that article appears as Exhibit 9. Appx. p. 43. It shows how a particular risk level goes down over time where there is offense free time in the community.

According to the chart, Fortune remains in Risk Level III after seven years.

Another mathematical way to look at time free in the community is that for every year of offense free behavior, the risk goes down about 8%. In the event that there are some non sexual offenses during that time, 3 years is subtracted from the number of years. (Tr. pg. 17 L. 3-10).

If the measured risk in the STATIC was 4-8%, that number should be cut in half after 5 years, reducing the rate to 2-4%.

ISORA

The second assessment used is the Iowa Sex Offender Risk Assessment (called the ISORA). The ISORA is another validated scoring tool for measuring sex offender risk. The Validation study appears as Exhibit 10.

It was developed by the Department of Corrections and the Iowa Division of Criminal and Juvenile Justice Planning in 2010. It was based on a sample of over 1,000 sex offenders required to register on the Iowa Sex Offender Registry. The results were then cross validated against the STATIC 99. At the same time, a composite score was developed and validated, essentially being a combination of both the ISORA score and the STATIC 99.

The ISORA test, like the STATIC test, uses fairly objective information, which is subject to verification through DOC/DCS documents.

Ronny Fortune got an ISORA score of 2, putting him in the low risk range to reoffend. See Ex. 5, Appx. p. 10.

It is particularly important to understand that the DOC study found that the individuals in this risk category had a less than 1% recidivism rate for new sexual convictions. See Exhibit 10, pg. 4; Appx. p. 50.

STABLE 2007

The third scoring method used in the 2019 assessment was the STABLE-2007. The STABLE test is intended to consider “stable dynamic risk factors.” A dynamic risk factor in the trade is essentially a clinical impression based on talking with the person. This is in contrast with "static" information, which is objective information, usually taken from court or prison/probation records.

DCS protocol calls for administering the STABLE test in addition to the two different "static" tests, those being the STATIC 99R and the ISORA. The consideration of dynamic factors by definition involves self reporting. That is what the whole test is about.

Ronny Fortune scored 3, which is low. See Ex. 6, Appx. p.11.

What do Combined scores mean

The 2010 Validation Study by the Iowa DOC looked at both the ISORA and the ISORA/STATIC 99-R combined. The study concluded that the combined score more effectively determines risk levels for males. See Exhibit 10, pg. 22, Appx. p. 68. Essentially, the idea is that different assessments cover slightly different risk factors. Therefore, combining the scores creates a more complete picture of an individual’s overall risk level.

At the hearing, Ashley Lappe testified that the combined score of two validated assessments carries more weight than the score of just one assessment. (Tr. p. 12, L. 14-18).

STATIC 99-R/STABLE 2007 Combined Score

Fortune's combined score was low. See Ex. 3 p. 2, Appx. p. 7.

ISORA/STATIC 99-R Combined Score

Fortune's combined score was "low". See Ex. 7, Appx. p. 13.

These combined scores are important when the 2 tests are not the same. They are essentially validated tie breaking methods. A person, such as Fortune, with an average STATIC and a low ISORA should have a combined low score.

A low risk is really low

Predicting reoffending rates has been an incredibly developed statistical science. For over twenty years, Iowa, like about half of the states, has civilly committed individuals with certain "mental illness" where a judge or jury can determine that the person is more likely than not to reoffend. See generally Chapter 299A.

Tests have been developed, using both objective and subjective data, to predict such recidivism. These models have been statistically "validated". That is a scientific word meaning that you use statistics to create a model and match that with certain predictive factors and test for correlation. These models actually

produce numbers for probabilities given the presence of certain characteristics or scores on these validated instruments.

For years, people who used these instruments put the scores into categories such as low, medium, and high. What was not immediately clear from these pigeon-holed scores was what these terms meant.

It turns out they always have meant that someone is low or high as compared to the 'average'.

This of course requires you to think about and measure the average. If the average temperature of a person is 98.6, a high temperature is 100 degrees; a low temperature might be 97 degrees. In the world of sex offender reoffending, we now know that the average rate is actually what many people would think of as quite low.

For the STATIC-99 purposes, the average rate is 4-8%. For the ISORA, the average rate is closer to 3%. To put those numbers in perspective someone with the ISORA average rate of reoffending is going to reoffend one time out of every 33. That is pretty low. It is significant that if someone is low risk to reoffend, they really are incredibly low-risk to reoffend. Under those circumstances, the

justification for the Registry and its significant disruption of a person's life, is quite small.[4]

Testimony of witnesses at hearing

The two witnesses who testified at the hearing were Ashley Lappe and Ronny Fortune.

Ashley Lappe was the psychologist for the First Judicial District who prepared the assessment for the DCS. She testified about the assessment. The criterion that she used in these assessments comes from the DOC policy. See Exhibit 1; Appx. p. 36. She meets with the client and then verifies information through the available DOC records system. Records from both prison time as well as time on parole are reviewed (Tr. p. 6 L. 14-25).

She administered three tests. The STATIC-99 (Exhibit 4) and ISORA (Exhibit 5) are objective tests (Tr. p. 7. L. 6-7). The STABLE measured subjective factors.

In 2016, the STATIC test changed its terms from low-high to well below average-well above average. There was also a change in the assessment with regard to the criteria of "age of the valuation." Fortune lost a point on the STATIC

[4] Recidivism for the STATIC 99-R and ISORA tests is measured in three ways: 1) new conviction for a sex offense or other violent crime; 2) new conviction for sex offense – strict definition; and 3) new conviction for sex offense or crime with sexual element. For the ISORA assessment, the low risk group has a 0.3% recidivism rate for new sex offenses – strict definition. For the STATIC 99-R, the low risk group has a 1.2% recidivism rate for new sex offenses – strict definition. See Exhibit 10, p. 17, Appx. p. 63.

between 2014 and 2019, as the assessment tool in 2019 only looked at age at the time of release rather than age at the time the assessment was being done. (Tr. p. 9. L. 1-14).

Lappe testified Fortune's score on the STATIC was a 3, having been changed from a 2. This was average risk (Tr. p. 10 L. 5-12). She testified that average risk turns out to be a risk of 4-8% (Tr. p.10 L. 19-20).

Fortune's ISORA score was 2, which is low-risk. This has a 2.8% recidivism rate for sex offenses or other violent offenses, and a 0.3% recidivism for strict definition sex offenses. (Tr. p. 11 L. 19-25 – p. 12 L. 2-5).

The ISORA and STATIC scores can be combined. This combination was validated by the DOC when they did the ISORA study. Lappe testified that the combined score carries more weight (Tr. p. 12 L. 9-12).

His combined score, as shown in Exhibit 7, is low (Transcript p.12 L. 24-25 – p. 13 L. 1).

She then talked about the time free chart (Exhibit 9). Her report indicated that risk in general is cut in half for every five years without sexual reoffending (Tr. p.13 L. 11-14).

On cross examination, Lappe testified that the STABLE assessment is based on information just from Fortune (Tr. p. 14 L. 7-14). He scored 2 on that test, getting points for deviant sexual preference, based on the age of his victim, and

number of acts. A test in 2014 indicated an interest in pre-pubescent females (Tr. p. 16 L. 1-8).

She testified that Fortune told her he married his wife quickly because Department of Human Services was looking into their relationship (Tr. p 15 L. 9-18). She said the registration violation concerned her "to some degree" because she thought that being able to follow the stipulations of the Registry would indicate a pro-social individual (Tr. p. 15 L. 24-25 – p. 16 L. 2-3).

Even on cross-examination she acknowledged that Fortune is ultimately a low-risk person (Tr. p.16 L. 4-7). On redirect she testified that a non-sexual conviction, such as a registration violation, does not change the scores on the ISORA or STATIC (Tr. p.16 L. 22-24). The time free chart would have a three year adjustment which would be subtracted because of the Registration violation, or for that matter, any other criminal offense (Tr. p.17 L. 3-6). Whether you have 1 or 4 of those offenses does not matter if the offenses are not sexual.

The other witness was Ronny Fortune. He testified about parts of his life that were not discussed in the DCS assessment.

Since his release from prison he has gotten educational degrees in criminal justice, being a paramedic, and a degree in culinary arts and hospitality management (Tr. p. 18 L. 12-18).

He has been married since 2013 and has four step-children with his wife. (Tr. p.18 L. 23-25 - p.19 L. 1-7).

When he first started dating his wife, he made sure that she understood the rules of the Registry and interactions with children. Her ex-husband found out he was on the Registry and threatened to report them for abuse. Fortune and his soon to be wife met with a lawyer. They decided to get married, which would seem to satisfy DHS. The concern was the definition of child endangerment found in 725.4. That provision makes it an automatic child endangerment offense if the parent allows a person on the Registry to have care or control over any of their children. The Statute, however, specifically exempts people who are married. So they got married (Tr. p. 19 L. 13-25 - p. 20 L. 1-6).

Fortune testified he had been working full-time since his release from prison. He worked at a glove factory and then a farm ranch connection. He went back to school, studying culinary arts, and was hired as a full-time staff member after he completed his AA degree (Tr. p. 20 L. 18-25 – p. 21 L. 1-18).

He volunteered as a paramedic for a year (Tr. p. 22 L 6-23). During that time, he also tried to become a volunteer firefighter.

Partly due to the publicity surrounding his registration violation, he was told he should wait for those community contributions until he was off the Registry (Tr. p. 23 L. 14-17).

Because of the safe zone restrictions in 692A.113, he had to make arrangements with the school to attend school events for his step-children (Tr. p. 2 L. 14-25). He was allowed to do attend events until after the publicity surrounding his registration violation (Tr. p. 25 L. 8-12).

He did have a Sex Offender Registry violation in 2017. He pled to one count and received the minimum fine with no jail time (Tr. p. 26 L. 1-5).

He had a Facebook account in his own name. His wife's ex husband reported him to Facebook, and Facebook deleted the account. He then created a Facebook profile using his mother's maiden name. He was charged for not reporting that new Facebook account to the Sheriff (Tr. p. 26 L. 7-25 – p. 27 L. 1-6).

On cross-examination, there were a number of questions about this Facebook violation. The guilty plea and judgment from that registration case were admitted as State Exhibits A and B; Appx. p. 75-81.

ARGUMENT

I

SINCE RONNY FORTUNE WAS CLEARLY LOW-RISK TO REOFFEND, ON THE DEPARTMENT'S OWN ASSESSMENT TOOLS, THE COURT SHOULD HAVE MODIFIED HIM, REMOVING HIM FROM THE REGISTRY.

Standard of Review:

As in any civil case there were facts considered before the District Court and there were conclusions made by the Judge on certain things as a matter of law.

With regard to matters of law, appellant review is for errors of law. Appellate review of rulings on statutory construction is for correction of errors at law. Schaefer v. Putnam , 841 N.W.2d 68, 74 (Iowa 2013)

To the extent that the legal argument touches on a constitutional claim, the review would be *de novo*. Lewis v Iowa Dist. Ct., 555 N.W. 2d 216, 218 (Iowa 1996)

With regard to factual matters, review would be for sufficiency of evidence. State v. Wallace, 2016 WL 6636681 *2 (Iowa Ct. App. 2016).

If there is discretion involved, the standard would be "abuse of discretion." But that is not a toothless standard. Here is what the Iowa Supreme Court recently said about that standard:

> If the sentence imposed is within the statutory limits, as it is here, we review for an abuse of discretion. *Roby*, 897 N.W.2d at 137. As we explained in *Roby*,
> A discretionary sentencing ruling, similarly, may be [an abuse of discretion] if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.
> *Id.* at 138 (alteration in original)

State v. Majors, 940 N.W.2d 372, at *9 (Iowa, March 6, 2020)

One of the issues presented in this case is what is the standard for reviewing the decision below to deny an Application for Modification. That issue is discussed in this brief.

Preservation of Error:

Fortune preserved error by making his arguments, both in person at the hearing, and in his trial brief. He then lodged objections to the Courts decision in a Motion to Amend or Enlarge the record.

Summary of Argument

The record made before the District Court showed that Ronny Fortune clearly established that he was low-risk to reoffend. The preparer of the DCS Report said this in her testimony. The Judge, after some initial qualifications, also made this finding.

Fortune clearly satisfied the other 'criteria' for modification found under Chapter 692A.128. He had been on the Registry for over five years. He had successfully completed all required sex offender treatment. He was not incarcerated.

The justification for the Sex Offender Registry is to protect the public from certain individuals who have been found guilty of a sexual offense, who might reoffend. The Courts have said many times that this is a civil consideration, not a

punitive measure. If it were punitive there would be *ex post facto* considerations as well as potentially double jeopardy issues.

Section 692A.128 sets out the criteria for modification. It then uses the term "may" in describing what the Court should do after a hearing. This suggests that a Court in considering a request under the statute has some discretion.

The issue presented in this case is what kind of discretion there is –if any- when a person clearly establishes the listed criteria, particularly the requirement that the person show he is low-risk to reoffend.

The District Court decided that there was almost complete discretion, even in the face of the factual finding that Fortune was/is low-risk to reoffend. This case is, to some extent, all about what discretion exists under these limited circumstances.

Fortune argues that establishment of the required criteria, particularly the fact that the person is low-risk to reoffend, establishes essentially a presumption that the person should be modified off the Registry. Where there is no longer any real risk for reoffending, there should not be any legal justification for continuing on the Registry.

Given this presumption, the considerations described by and relied upon by the Judge should be rejected.

Overview of 692A.128

Section 692A.128 was added to the Code in 2009, when the legislature substantially rewrote Chapter 692A, the Sex Offender Registration chapter. Subsection 692A.128(2) sets out the requirements or prerequisites for modification. There are four such requirements for persons who are not on supervision.

1. A Tier III offender, such as Fortune, must have been on the registry for five years.

2. The applicant must have successfully completed all required sex offender treatment programs.

3. A risk assessment has to be completed and the sex offender has to be low risk to reoffend. The risk assessment used shall be a validated risk assessment approved by the Department of Corrections for sex offenders.

4. The applicant must not be incarcerated when the application is filed.

There are several procedural sections under 692A.128. Subsection 692A.128(3) requires the application to be filed in the county of principle residence. That is why Fortune's application was filed in Humboldt County, which is where he lives.

Notice has to be given to (1) the County Attorney in the county of residence and (2) the County Attorney in the county of conviction, which is Hamilton County, and (3) the Sex Offender Registry Office in Des Moines. 692A.128(4)

With that limited understanding of procedure and the criteria required, here is what 692A.128(5) says:

> "the Court may, but is not require to, conduct a hearing on the application to hear any evidence deemed appropriate by the Court. The Court may modify the registration requirements under this chapter".

In this case, Fortune sought and obtained an assessment by the Department of Correctional Services (DCS). That assessment was amended after it was determined that there had been a scoring error in the original report.

The case was filed in Humboldt County. Notice was given to the appropriate parties. A hearing was held.

Cases from Iowa

There is not a lot of law regarding Chapter 692A.128. The Section was added to Chapter 692A when the legislature rewrote the Chapter in 2009. It became more widely available in 2014 with State v. Iowa District Court of Story County, 843 N.W.2d. 76 (Iowa 2014).

There are three cases about waivers of modification that are helpful for this appeal. The first case is the Story County case. That was the case that held that

692A.128 could be used by registrants with adult convictions, who were no longer on any form of supervised release, such as probation or parole.

The second case worth discussing is In the interest of A.J.M, 847 N.W. 2d 601 (Iowa 2014). That case addressed the discretion of a juvenile court to waive the registration requirement for a person adjudicated of a sexual offense. The Court's analysis of the discretion in that context is helpful in understanding what the Court would say about discretion under 692A.128.

The third case worth discussing is State v. Wallace , 2016 WL 6636681 (Iowa Court of Appeals, November 2016). Wallace was the only appeal from an actual denial of modification.

Story County case

State v. Iowa District Court of Story County, 843 N.W.2d. 76 (Iowa 2014) involved an attempt to use the modification statute by an individual who was on the registry because of an adult conviction. Since he had completed his sentence, there was no longer any form of supervision. The question was how to interpret the statute to address that situation.

The Supreme Court interpreted the term "adjudication" in 692A.128(6) to include 'convictions' in adult court. For that reason, modification was available for adults with completed sentences.[5]

What is important about this case what rules of construction the Court used in interpreting the meaning of Section 692A.128.

First the Court talked about avoiding "assessing isolating words and phrases when construing statutory provisions." Here is specifically what the Court had to say.

> We have not yet had occasion to interpret the modification provision. We have often explained we avoid assessing isolated words and phrases when construing statutory provisions. *See, e.g., In re Estate of Melby*, 841 N.W.2d 867, 879 (Iowa 2014). In interpreting provisions of the prior version of the registration enactment lacking relevant statutory definitions, we have examined the statutory structure and considered the contexts in which words are used in construing provisions in a manner best achieving the statutory purpose. *See, e.g., In re S.M.M.*, 558 N.W.2d 405, 407–08 (Iowa 1997). We have explained the purpose of the registry is protection of the health and safety of individuals, and particularly children, from individuals who, by virtue of probation, parole, or other release, have been given access to members of the public. *See State v. Seering*, 701 N.W.2d 655, 667 (Iowa 2005); *S.M.M.*, 558 N.W.2d at 408.

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[5] Modification statistics were provided by DPS to the legislature earlier this year. The statistics showed that from 2009 to 2013 there were eleven successful modifications in Iowa. From 2014 to 2019 there were 245 successful modifications. The numbers for the last four years were consistent at around 50 per year.

This is to be compared with a total of around 6,057 individuals on the webcite for the Registry today. People currently being modified are a relatively small percentage of all people on the Registry.

> State v. Iowa Dist. Court ex rel. Story County, 843 N.W.2d 76, 81 (Iowa,2014)

This rule of interpretation is important. Just because the word "may" appears in the statute that does not mean the Court is given unlimited discretion. The word "may" has to be interpreted in the context of the purpose of the registration statute.

Second, the Court noted a statutory construction principle called the "doctrine of constitutional avoidance." Here is specifically what the Court had to say.

> The interpretation favored by the State could, as Buchwald has argued, raise questions as to whether a distinction between individuals subject to corrections supervision and individuals no longer subject to supervision comports with relevant constitutional principles. The doctrine of constitutional avoidance suggests the proper course in the construction of a statute may be to steer clear of "constitutional shoals" when possible. Simmons v. State Pub. Defender, 791 N.W.2d 69, 74 (Iowa 2010). Our interpretation of subsection 6 is consistent with our general preference for avoiding constitutional adjudication where possible.
>
> State v. Iowa Dist. Court ex rel. Story County, 843 N.W.2d 76, 84–85 (Iowa,2014)

This principle is important because constitutional problems would be presented by an interpretation that kept individuals who are truly low-risk on the Registry, particularly for what appears to be punitive reasons.

Finally, the Court talked about how identification of a statute's purpose guides statutory interpretation.

> [O]ur repeated identification of the registration statute's purpose of public protection guides our interpretation of subsection 6. *See, e.g.*, *State v. Willard*, 756 N.W.2d 207, 212 (Iowa 2008); *Seering*, 701 N.W.2d at 667; *S.M.M.*, 558 N.W.2d at 408. The modification provision includes various safeguards promoting this purpose: offenders must have completed all sex offender treatment programs that have been required; offenders must have completed a risk assessment and have been classified as low risk to reoffend; the district court may gather "any evidence deemed appropriate" to its determination and conduct a hearing on any application; and, for purposes of subsection 6, offenders must have completed any required periods of juvenile court and judicial district corrections supervision. An interpretation of subsection 6 rendering individuals in Buchwald's position eligible for modification only after having satisfied each of those requirements balances the registry's protective purpose with our legislature's related recognition—in enacting the modification provision—of an individual's interest in removal from the registry when appropriate.
>
> State v. Iowa Dist. Court ex rel. Story County, 843 N.W.2d 76, 84 (Iowa,2014)

Once again, the Story County case is important in providing a number of statutory interpretation rules for looking at section 692A.128.

A.J.M case

There is a provision in 692A that allows a court in a juvenile delinquency case to waive the registration requirement.692A.103(3). This is a different waiver provision than that which is found in 692A.128.

In the interest of A.J.M, 847 N.W. 2d 601 (Iowa 2014) was an appeal brought by the State, after a District Judge waived the requirement that an adjudicated juvenile register as a sex offender. The case addressed the discretion of a juvenile court to waive the registration requirement for a person adjudicated of a sexual offense. The Court's analysis of the discretion in that case is helpful in understanding what this Court should say about discretion under 692A.128.

First of all, the Court noted that the "paramount purpose of the sex offender registry requirement is to protect society from sex offenders after they have been released back into society following the disposition of their case." See 847 N.W. 2d at 604. This is certainly consistent with any number of cases in state and federal court that have found the registry not to be a punitive statute.

Second, the Court noted that the juvenile waiver provision did not identify specific guidelines for juvenile courts in exercising discretion. The Court noted, however,

> ... the absence of statutory guidelines would not permit the discretion to be based on an erroneous interpretation or application of the
> statute. See In re Estate of Bockwoldt, 814 N.W.2d 215, 222 (Io wa 2012) (noting an abuse of discretion occurs when the exercise of discretion is based on an erroneous application of the law).
> In re A.J.M., 847 N.W.2d 601, 605 (Iowa,2014)

The Court noted that the goal of interpreting a statute is to construe the statute "in light of the legislative purpose." The Court then found that the waiver provision in the juvenile code had as its purpose: "relieving juveniles who are not likely to reoffend of the requirement to register as a sex offender." 847 N.W.2d at p.606.

The Court went on in A.J.M. to conclude that the legal standard for waiver is, essentially, to be guided by that principle of public protection. That is all about determination of risk.

The Court in A.J.M vacated and remanded the case for further proceedings, concluding that the juvenile court had not made a specific finding about likelihood to reoffend.

State v Wallace case

There is only one appellate decision that involves an appeal from a denial of relief under 692A.128. State v. Wallace, 2016 WL 6636681(Iowa Court of App. 2016). In Wallace, the District Court denied relief concluding that Wallace did not satisfy the criteria for modification set out in the statute. The element that was not established was that Wallace was not low risk to reoffend. The Court of Appeals found substantial evidence to support the determination of the District Court that Wallace had not satisfied the criteria. Here is specifically what the Court said:

> These prerequisites to modification of the registration requirements are mandatory. Accordingly, we will review a

> court's conclusion on whether an applicant has satisfied the prerequisites for errors of law and the underlying fact findings for substantial evidence.
> Assuming an applicant has satisfied these conditions, the court "may modify the registration requirements." *See id.* § 692A.128(5). The authority conferred by this provision is clearly discretionary. Accordingly, we will review the district court's ultimate conclusion granting or denying a modification application for an abuse of discretion.
>
> State v. Wallace, 2016 WL 6636681, at *2 (Iowa App.,2016)

In Wallace, the Court of Appeals seems to say that appellate review is for abuse of discretion. At the same time, the Court focused on whether there was substantial evidence in connection with the criteria established. In Wallace, there was substantial evidence to support the Court's finding that Wallace was not low risk to reoffend. For that reason the lower court decision was affirmed.

The Wallace court then found that the lower court decision was not an abuse of discretion because it was supported by substantial evidence.

There are two levels of analysis that are possible. The first is whether the criteria in the statute are satisfied. Wallace says the findings about the criteria have to be supported by substantial evidence to avoid an abuse of discretion.

The second level of analysis is what, if any, discretion is there, when all the criteria are established. Wallace does not address this.

There are two possibilities. First, the modification statute could be interpreted so that the District Court should only look at the criteria. If substantial evidence supports all of the listed criteria, modification must be granted.

The other possibility assumes the criteria are established. In that case, the court has some discretion. This appeal addresses that situation.

Entire Legal Basis for the registry is the civil, not punitive, consideration of protecting the community

The Iowa Supreme Court has had the occasion to look at the Iowa Sex Offender Registry any number of times since it was passed in 1995. Various challenges have been mounted requiring the Court to identify the purpose for the Registry and, in particular, whether the Registry is punitive or not.

The Iowa Supreme Court has consistently held that the purpose is, "protection of the health and safety of individuals and particularly children from individuals who by virtue or probation, parole, or other release have been given access to members of the public." State v. Iowa District Court, Story County 843 N.W.2d.76, 81 (Iowa 2014). See also State v. Pickens 558 N.W.2d.396, 397 (Iowa 1997); State v. Seering 701 N.W.2d. 655,667 (Iowa 2005); State v. Aschbrenner 926 N.W.2d. 240 (Iowa 2019).

The Court has made clear in all of these cases that the statute is civil in nature and is not 'punitive'. If it were to be punitive, there would be potential

constitutional issues with its application. See In Interest of T.H., 913 N.W.2d 578 (Iowa, 2018).

What should be the standard for reviewing a court's discretion

It is not clear what precise standard should be used in Fortune's case. Identifying the standard often determines the outcome of an appeal.

Fortune clearly satisfies the identified criteria in the statute for modification. He had been on the registry for almost 10 years. He had completed sex offender treatment. He was low risk to reoffend.

But aside from finding that criteria the judge embarked on an analysis of factors that did not particularly relate to the criteria set out in the statute.

The starting point would be that the statute says that after the hearing the court 'may' grant the modification request. The use of the term, "may", usually means that a court has discretion. *See, e.g.*, Bowman v. City of Des Moines Mun. Hous. Agency, 805 N.W.2d 790, 796 (Iowa 2011) ("The district court's reading of § 982.552(c)(2)(i) as permissive, not mandatory, in construction was reinforced in its view by the definition of 'may' in the Iowa Code which states the word 'may' merely invokes a power, not a duty."); State v. Maghee, 573 N.W.2d 1, 5 (Iowa 1997) ("The first part of the rule is discretionary: the district court *may* order amendment so as to correct errors or omissions that either are or are not

substantive."); Feller v. Scott Cty. Civil Serv. Comm'n, 435 N.W.2d 387, 390 (Iowa Ct. App. 1988) ("The use of the word 'may' in the statute confers a power and places discretion within the one who holds the power.").

The often quoted standard for the exercise of discretion is whether the decision rested on grounds "clearly untenable or to an extent clearly unreasonable". See State v. Oliver 588 N.W.2d. 412, 414 (Iowa 1998)
But what does that mean?

Fortune suggests that the modification statute has to be interpreted in light of the purpose of the statute. The purpose of the statute is to provide for relief from the registry when a person becomes low risk to reoffend. That means persons who are no longer dangerous to the community.

What would make sense in this case would be considering the abuse of discretion standard but with somewhat of a presumption for modification in the event the criteria were established.

Authority for such a standard is found in the world of sentencing, where discretion has been long recognized. Fortune relies on the discretion given to a judge in sentencing a juvenile when considering whether to impose a mandatory minimum sentence. This issue was recently discussed by the Iowa Supreme Court in State v. Majors 940 N.W.2d 372 (Iowa 2020).

Majors quoted from the case of State v Roby, 897 N.W. 2d 127 (Iowa 2017)

> If the sentence imposed is within the statutory limits, as it is here, we review for an abuse of discretion. *Roby*, 897 N.W.2d at 137. As we explained in *Roby*,
>
> A discretionary sentencing ruling, similarly, may be [an abuse of discretion] if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.
>
> State v. Majors, 940 N.W.2d 372, at 385 (Iowa, 2020)

What is important about this?

In the first place, Majors and Roby say it is an abuse of discretion if the Court fails to consider a relevant factor that should have received significant weight. In sentencing a juvenile, important factors can be incomplete brain development or peer pressure, for example.

In the context of modification, "significant weight" should be given to whether the individual is low risk to reoffend. This would be particularly the case since the danger of reoffending is the entire basis for the registry. It was the intent of the legislature to allow people who are low risk to be modified.

Even as a constitutional matter, imposing the registry restrictions on someone who is really low risk would create significant constitutional problems.

You can also conclude that being low risk, along with the other listed criteria, are the legislatively determined factors to be given great weight.

Majors and Roby also say that it is an abuse of discretion to give significant weight to an improper or irrelevant factor. This consideration should also be reviewed in this case.

Application of these principles to Fortune's case

Fortune clearly establishes that he is low risk to reoffend

Section 692A.128 requires that a "risk assessment must be completed" and the "sex offender was classified as a low risk to reoffend. The Risk Assessment used to assess an offender as a low risk to reoffend shall be a validated risk assessment approved by the Department of Corrections".

There are three validated assessment tools used by the Department of Correctional Services as approved by the Department of Corrections. See DOC policy OP-SOP-7, Exhibit 1; Appx. 36. There is the Static 99R. There is the ISORA. There is the STABLE. Some of these scoring tools are then cross 'validated'. That means that they have been statistically compared in pairs with a score being given to that combined analysis.

You will think of the cross validation or combined scoring in two ways. It could be thought of as either a tie breaking concept. Or you can think of it as how Ashley Lappe described it in her testimony as, “being given greater weight”.

Ronny Fortune scored low on all of the tests but the STATIC 99R. As to that test, however, the score of “average” was partially due to a change in how the preparers of the report thought about the age factor.

The 'average' STATIC score should not really matter.

(1) The STATIC score itself is quite close to being below average.

(2) Perhaps more importantly, the STATIC gets combined with the ISORA on the cross-validated score. This apparently is a more accurate way of looking at risk than just looking at the two scores by themselves. On the cross-validated combined score he is low.

(3) He is also low on the STABLE and the STABLE and STATIC combined.

(4)As a final matter, Ashley Lappe concluded that Fortune was overall low-risk. Even the Judge in his discussion of the criteria found that Fortune had established the low-risk criteria.

Low risk to reoffend is really low risk, in general and also for Fortune

As a general matter, being low risk to reoffend is a very low risk. Low risk on the ISORA is less than 1%. Even the average risk on the STATIC is 4-8%.

In Fortune’s case, he has low risk on the ISORA. Even his 'average' score on the STATIC would be cut in half by time free in the community. That puts him at 2-4%.

While these are only 'validated' tool, they are the tools that the legislature said should be considered in a modification case.

Application of the law to Fortune's facts

This is how the court should interpret section 692A.128.

As an initial matter, an applicant must establish the criterion for as set out in the statute. That would include 1) minimum length of time on the registry, 2) completion of required sex offender treatment and 3) assessment as low risk to reoffend on validated tools.

The use of the term 'may' in the statute suggests there is a degree of discretion in determining whether the applicant satisfies the criteria. What a court should do under this statute is just look at those factors identified by the legislature. The determination of whether the criteria have been satisfied must be supported by 'substantial evidence."

That should end the analysis.

In the alternative, the court could consider the criteria as establishing a threshold prerequisite. Having established that prerequisite, then the court can exercise some level of discretion in assessing the application.

This discretion should first and foremost be guided by whether the person is a risk to reoffend.

Several rules of construction provide a significant limit on the court's discretion under those circumstances.

This Court should interpret the statute in light of the legislative intent, the intent to protect people from people who would reoffend.

There should be recognition that the registry exists as a constitutional matter because it is a civil measure, not a punitive one. Since it is designed to protect the public and particularly children from people who are at risk to reoffend, the primary focus of the court's consideration and its discretion should be on the level of risk. The court should rely on the rule of constitutional avoidance, and construe the statute to maximize the removal from the registry for people with low risks to reoffend.

The AJM case supports the position that risk of reoffending is to rule in considering the juvenile court's discretion to place a person on or off the registry. The same considerations apply in looking at a decision under section 692A.128.

You can think about the availability of discretion through the lens of Roby and Majors. Risk to reoffend should be given significant weight. Improper or irrelevant factors should be given little weight.

With this standard in mind, it is possible to look at the justification the judge gave in this case for rejecting Fortune's application.

The Factors relied on by the judge should be rejected, as showing an abuse of discretion

Judge Stoebe identified five reasons in his decision dated August 27, 2019. The judge said, "there are a number of factors for this decision and any one of these factors justifies the court's denial." Ruling p. 4 Appx. 13. [6]

A. Not uniformly low and DCS not recommend modification

The first reason identified by Judge Stoebe was that Fortune "test scores" were not uniformly low risk. Here specifically is what the judge said:

> The first reason is the Fortune's test scores are not uniformly low risk. The Court does not find this fatal to the application because DCS ultimately determined Fortune was low risk to reoffend despite his score on one of the three standardized which placed him at average risk. However his failure to have a uniform low risk score presents sufficient concern that DCS refused to recommend Fortune's removal from the Sex Offender Registry. The court agrees with this

[6] The judge's opinion did not have page numbers on it.

> determination and finds that it provides sufficient cause to do deny Fortune's request.
> Ruling page 4; Appx.p. 13

Response:

The judge's position on this point is particularly important given the fact that whether the person is low risk or not would seem to be the most important factor. What the judge said does not make a lot of sense in a number of ways. It should be given little weight.

(1)After saying that this reason justifies the denial, the judge says the reason is, "not fatal." He recognized that DCS concluded that Fortune was overall a low risk. He appears to accept that Fortune established this first criterion.

(2) If he had found Fortune was not 'low', there would not have been sufficient evidence to support that position. The STATIC 99 score was the one that was called, "average risk". At the same time, because of time free consideration the score is not too far from 'low'.

Moreover, when all of the scores were combined, the combined scores were low. Ashley Lappe, the psychologist, testified that the combined STATIC and the other two scores produced actually a more accurate measure of risk than just the individual scores by themselves. (Tr. p. 12, L. 14-18).

Finally, the evidence behind these risk scores showed that the risk involved itself was an incredibly low risk. The risks are in the low single digits and in the

case of the ISORA test, the one authored by the Iowa Department of Corrections looking at just Iowa offenders, the risk was less than one percent.

(3) Then there was of course the fact that the judge seemed to find significant that DCS had not recommended removal.

As was pointed out in the Motion to Amend, this was not a case where DCS makes a recommendation. DCS has to make a recommendation for a person who is still on supervision. They never make a recommendation in a case like this.

Judge Stoebe when he responded to the Motion to Enlarge stated that his reference to the failure to recommend was only a discussion of 692A.128(2) . See Order dated September 12, 2019; Appx. p.31. But he had mentioned the failure to recommend modification twice. Once was on page 2 when he was discussing 692A.128(2). But he also mentioned it at page 4. Appx. p. 32-34.

B. Two offenses since release from prison

The second factor that the judge considered disqualifying was that Fortune had two offenses since his release from prison. Ruling p. 4-5, Appx. p. 13-14. Judge Stoebe seemed particularly concerned with the sex offender registry violation. He also mentioned the second case, which was a disorderly conduct charge.

Response:

Certainly Fortune did have those two convictions. But several observations should lead this reviewing court to reject this as a reason for denying the modification.

(1) The sentence imposed for the registration violation was the minimum sentence available under the statute. He received a fine and no jail time. While there was no testimony about the reason for the minimum sentence, Fortune testified that the offense was not intentional. A registration violation appears to be a strict liability offense.

Fortune testified that he had a regular Facebook account. That was taken down by Facebook as a result of reporting by his wife's ex husband. Fortune then opened a Facebook account, not in his own name, and did not tell the sheriff. This action would not have otherwise have been illegal if not for the obligation to identify "internet identifiers" in the registration statute. See 692A.101 definition of "relevant factors."

The United States Supreme Court has recognized the importance of social media for everyone including sex offenders. Packingham v. North Carolina, ___U.S_____, 137 S. Ct. 1730, 198 L.Ed.2d 273 (2017)

(2) Most importantly any kind of non sexual offense does not significantly impact risk. None of the sex offender tools consider post sex offense offenses. The

only impact that a post release offense has, is the impact on the calculation of time free in the community. Fortune had been in the community for nine years. The consequence of any non sex offense or even two is a reduction in three years by the number on the particular chart. (Tr. p.17 L. 3-6). Fortune's sex offender risk is not impacted by the registration violation. He is/was still 'low risk' to reoffend.

(3) Then of course there was the judge's comment about the disorderly conduct charge. The State, who was vigorously objecting to the registration modification request, did not even bother to mention this simple misdemeanor. No information was presented on this offense. It only appeared in the record as being a referenced by the DCS report. See Ex. ___p. ____

The judge's interest in somehow connecting this up to a domestic abuse case and Fortune's, "quick marriage", is entirely unsupported by the record and went well beyond the position of the State's advocate, the County Attorney.

C. DHS and Fortune's 'quick' marriage

A third factor identified by the judge involved Fortune's marriage in 2013. Here specifically is what the judge had to say:

> "Fortune's marriage to avoid a Department of Human Services investigation is alarming especially in light of the numerous juvenile children (now step children) in the home at the time of the marriage. The reasons for such an investigation are reasonable and to the court's knowledge the Department of Human Services was not able to answer the concerns."
> Ruling p. 5; Appx. p. 14.

Response:

In 2013, Fortune met his current wife. When his wife's ex husband found out she was dating a sex offender, he reported her to the Department of Human Services (DHS). (Tr. p. 19 L. 13-25 - p. 20 L. 1-6). The legal concern at that point had to do with the child endangerment statute and specifically section 726.6(1)(h). Here is what that section says:

> 1. A person who is the parent, guardian, or person having custody or control over a child or a minor under the age of eighteen with a mental or physical disability, or a person who is a member of the household in which a child or such a minor resides, commits child endangerment when the person does any of the following:
>
> h. Knowingly allows a person custody or control of, or unsupervised access to a child or a minor after knowing the person is required to register or is on the sex offender registry as a sex offender under chapter 692A. However, this paragraph does not apply to a person who is a parent or guardian of a child or a minor, who is required to register as a sex offender, or to a person who is married to and living with a person required to register as a sex offender.

Fortune testified that he and his now wife talked to a lawyer. The lawyer explained to them that the issue could be avoided by getting married. That is what the legislature said. So they got married. She had children.

So what was the judge's response? He characterized this as a marriage to avoid a Department of Human Services investigation. The only investigation

suggested in the record was that Fortune might place himself in a position to be in violation of the child endangerment statute.

The legislature provided the way to avoid the legal problem entirely. Fortune and his wife followed the lawyer's advice and got married. The judge said that the investigation was, “reasonable and to the court’s knowledge, the Department of Human Services was not able to answer the concerns”.

There is absolutely nothing in the record about any concerns that were not answered. The only thing in the record is that they met each other, her ex husband made a complaint to DHS based on the child endangerment statute; they consulted a lawyer and got married. The investigation ended based on the fact they did what the legislature said they could do to avoid the statute.

This judge who made these comments about the marriage decided at some point that Fortune was an incredible danger to children. This discolored his analysis of the marriage.

D. The underlying offense was appalling

The fourth reason the judge identified for rejecting the Application was the underlying offense. He found the sexual abuse to be appalling, “to say the least”. The judge went on to say that Fortune exhibited a failure to accept blame. The judge said he demonstrated no remorse.

Response:

The fact that the crime was “appalling” is not a factor that goes into the calculation of risk. All these people who have studied reoffending concluded that reoffending was not affected by how "offensive or depraved" the crime might have appeared.

The nature of the offense does in fact play some role in the validated assessment tools used by DCS. The offense show up in the STATIC assessment with regard to factors 8, 9, and 10. Points are given if the victim is unrelated to the defendant, or a stranger, or even a male. In the ISORA test, the primary victim characterization is whether the victim is a stranger. The Iowa study did not find, for example, that whether the victim was male made a statistical difference.

Beyond these factors the underlying crime can, should and must be ignored in considering risk and therefore in considering modification.

This is consistent with the fact that the Sex Offender Registry is not a punitive measure.

Then there is the fact that the judge said that Fortune expressed no remorse for the underlying offense. Fortune completed sex offender treatment in prison. He had additional treatment after he was released. That treatment requires acceptance of responsibility. There was no discussion about acceptance of responsibility at the

hearing. There was no suggestion of lack of remorse even from the vigorous objections of the prosecutor.

E. The reasons for modification were not compelling.

The final reason for the judge's rejection of the application was that he found Fortune's reasons for wanting off the registry not to be "compelling".

Here is what the judge said:

> Finally, Fortune's reasons for relief from the registry are not compelling. In fact, they raise concerns. Fortune's desire to be a first responder could put him into contact with the vulnerable children and adults and the opportunity for inappropriate acts on unconscious, injured, frightened or ill victims is hardly a reason to ignore his history, law violations, attitude, offenses and murky psychological evaluation. Ruling pages 5-6; Appx. p. 14-15

Here is what the judge added in his denial of the Motion to Amend:

> Fortune is correct that he also desired to be removed from the Sex Offender Registry and its associated restrictions, so that he can attend school functions. This would place him in close proximity to young and vulnerable children. It is a cause for concern, not a reason to remove Fortune from the Registry and the statutory restrictions.
> Order denying Motion, Appx. p. 31.

Response:

First of all, there is nothing in the modification statute that imposes a requirement that a person has to have compelling reasons for modification. The registry is an invasive form of control over people who are otherwise not on probation. The information that you have to give the sheriff 4 times a year is in

many cases even more information than you had to give your parole or probation officer.

The difficulties Fortune had trying to participate in social media are ample support of that position. Aside from that, Fortune testified to the borderline discrimination he encountered by being on the registry. This got worse when he picked up the registration violation, which perhaps broadcasted to the community that he was on the registry. He could no longer attend school functions for his step children. He tried to be a productive citizen in the community by volunteering as a first responder and then as a volunteer fire fighter. He was told that he needed to wait until after he got off the registry.

What did the judge say about these rather real reasons for coming off the registry? He characterized them as being efforts to get contact with "vulnerable children and adults", with an opportunity for inappropriate acts on unconscious, injured and tightened or ill victims."

As to his goal of being able to attend his step children's high school graduation for example, this was also some sort of plot to come "in close proximity to young and vulnerable children."

When you look at all of these factors together and look at their response, one should clearly conclude in this case that the judge's decision was in fact clearly unreasonable and based on a set of facts that were clearly not tenable. The court

should find that the district court in this case abused its discretion by not removing Ronny Fortune from the Sex Offender Registry.

F. Summary of reasons for rejecting the application

If you look at abuse of discretion found as described in Roby and Majors, analysis of the Judge Stoebe's opinion rejecting the application is not difficult.

First, the Judge failed to give significant weight to the most relevant factor; specifically, whether Fortune was in fact low-risk to reoffend.

The judge then went on to give significant weight to improper and irrelevant factors. The original crime is one such irrelevant factor beyond the way the offense shows up in the assessment tools.

Finding that there was something that was almost malevolent about Fortune's marriage and efforts at civic duty, was clearly not supported by the record. Those things would have been an abuse of discretion by themselves.

Even if you consider the traditional definition of abuse of discretion, this Court should find it existed here. Judge Stoebe clearly made his decision on grounds that were "clearly untenable or to an extent clearly unreasonable."

CONCLUSION

Ronny Fortune went to prison in 2004 and served almost six years. After being in the community for about ten years he filed an application for modification under the statute the legislature has made available.

Under the criteria set out by the legislature he qualified.

He qualified in that he was low risk, a conclusion amply supported by the record and apparently even found by the Judge.

The Judge, however, took the record and then made conclusions about the record that were not supported by the evidence and/or were irrelevant to a determination of risk.

Using a number of formulas for abuse of discretion, the Court should reverse the determination by the District Court and find Fortune should have his application for modification granted.

RESPECTFULLY SUBMITTED,

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REQUEST TO BE HEARD IN ORAL ARGUMENT

The Appellant hereby requests to be heard in oral argument in connection with this appeal.

Argument would be helpful as the issue regarding the abuse of discretion standard is complicated. Moreover, the different validated tools used by the Department in assessing people can also be confusing. Counsel has considerable experience with these modification cases and should be able to answer most questions about these cases.

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ATTORNEY'S CERTIFICATE OF COSTS

I, Philip B. Mears, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant's Final Brief was $6.35.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(f)(1) or (2) because:

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/s/ Philip B. Mears ___9-23-2020_____
Signature Date