

IN THE SUPREME COURT OF IOWA

NO. 19-1721

RONNY FORTUNE,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR HUMBOLDT COUNTY
THE HONORABLE KURT J. STOEBE

APPELLEE STATE OF IOWA'S FINAL BRIEF
AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT REASONABLY FOUND THAT MODIFICATION OF FORTUNE’S SEX OFFENDER REGISTRATION REQUIREMENT POSED AN UNDUE RISK TO PUBLIC SAFETY DESPITE HIS ASSESSED LOW RISK TO REOFFEND?

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ROUTING STATEMENT

This case may be summarily resolved through the application of existing legal principles. Therefore, transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

Applicant-Appellant Ronny Fortune [Fortune] appeals from a ruling denying his request for modification of his sex offender registration imposed upon him after his 2003 conviction on three counts of lascivious acts with a child, in violation of Iowa Code section 709.8(1) (2001).

II. COURSE OF PROCEEDINGS AND DISPOSITION.

On August 3, 2018, Fortune filed in the Iowa District Court for Humboldt County an application for modification of sex offender registry requirements pursuant to Iowa Code section 692A.128. (Application; App. 6-9). The State subsequently answered and resisted Fortune's application. (Answer). Hearing on the merits of Fortune's application was held on August 20, 2019. (*See generally* 8/20/2019 Transcript).

The District Court issued a ruling on August 27, 2019, denying Fortune's request for modification. (*See generally* 8/27/2019 Ruling; App. 10-16). Fortune's subsequent motion to reconsider, enlarge, or amend findings was denied on September 12, 2019. (*See* Motion to Reconsider; 9/12/2019 Ruling; App. 17-30; 31-32). Fortune now appeals. (Notice of Appeal; App. 33-34).

III. STATEMENT OF FACTS.

Fortune was convicted in 2003 of committing three counts of lascivious acts with a child in violation of Iowa Code section 709.8 and was sentenced to three consecutive five-year prison terms plus a two-year term of work release/parole. (Application at ¶¶ 3, 4; App. 7); *see State v. Iowa Dist. Court for Hamilton Cnty.*, 11-0043, 2011 WL 5877016 (Iowa Ct. App., Nov. 23, 2011); *State v. Fortune*, Hamilton Co. No. FECR010447. Although he entered an *Alford* plea to these criminal charges, Fortune reported to the evaluating professional conducting his risk assessment that “he fondled and performed oral and anal sex on his seven-year-old male victim over the course of approximately two years.” (Exhibit 3 – Risk Assessment Report at p. 1; Conf. App. 6; *see* 8/27/2019 Ruling at 4; App. 13).

Fortune was released from prison and placed on work release on June 9, 2009. (Application at ¶ 5; App. 7). He received a parole on December 16, 2009, and discharged his sentence on January 3, 2011. (*Id.*; App. 7). Fortune completed sex offender treatment in January 2010. (Exhibit 3 at p. 3; Conf. App. 8).

Fortune’s lascivious acts conviction qualifies as an “aggravated offense” that requires his lifetime registration as a sex offender in the state of Iowa. (Application at ¶ 9; App. 7); *see* Iowa Code §§ 692A.101(1)(a)(4)

(defining aggravated offense); 692A.102(1)(c)(12) (sex offense classifications); 692A.106(5) (duration of registration). Fortune initially registered as a sex offender in Iowa upon his release from prison in June 2009. Fortune's convictions classify him as a Tier III sex offender who is required to report quarterly to the local sheriff's office to verify the accuracy of his registration information. (Application at ¶ 7; App. 7); *see* Iowa Code §§ 692A.102(1)(c)(12); 692A.108(1)(c). Because his offense was against a minor, Fortune is subject to the exclusion zone and employment restrictions outlined within Iowa Code section 692A.113. (Application at ¶ 8; App. 7).

Fortune was subsequently convicted in June 2017 of failing to comply with sex offender registry requirements. (*See* Exhibit A – Guilty Plea: *State v. Fortune*, Humboldt Co. No. AGCR009994); Exhibit B – Judgment Entry: *State v. Fortune*, Humboldt Co. No. AGCR009994); App. 75-79; 81-83). Fortune's noncompliance conviction arose from his failure to report an internet alias he created to evade a Facebook policy that prohibits registered sex offenders from using its services. (*See* 8/20/2019 Transcript at p.30, 1.11 – p.31, 1.5). Fortune was also convicted in 2013 of disorderly conduct that originated as a domestic abuse assault. (Exhibit 6 – Stable 2007 Risk Assessment at p. 1; Conf. App. 11); *see State v. Fortune*, Webster Co. No. SMCR345363.

In August 2018, Fortune sought to modify his sex offender registration requirements by filing an application in Humboldt County pursuant to Iowa Code section 692A.128. (*See generally* Application; App. 6-9). In support of his application, Fortune submitted the results of multiple sex offender risk assessments conducted by the Second Judicial District Department of Correctional Services that generally found him to be at low risk to reoffend. (*See* Exhibit 3; Conf. App. 6-8). Fortune was found to be at level III or “average risk” to reoffend on the updated Static 99-R assessment tool. (*See* Exhibit 3 at p. 2; Conf. App. 7).

Following hearing, the District Court entered orders on August 27 and September 12, 2019, denying Fortune’s application for modification and motion for reconsideration. (8/27/2019 Ruling; 9/12/2019 Ruling; App. 10-16; 31-32). In rejecting Fortune’s bid to forego further registry obligations, the District Court found that the need to protect the public from another offense of the type Fortune committed is great. (8/27/2019 Ruling at p. 5; App. 14). The District Court determined that Fortune’s purposeful plan to circumvent rules meant to protect Facebook users that resulted in his failure to comply conviction and his avoidance of a DHS abuse investigation each undermined the intended public safety goals of the registry. (8/27/2019 Ruling at p. 5; App. 14). The lack of a universal finding of low risk to reoffend

on all administered risk assessments also raised concern for the District Court. (8/27/2019 Ruling at p. 4; App. 13). Lastly, the District Court found Fortune’s stated goals of returning to emergency services and attending school functions not compelling compared to the potential access for further victimization such activities could open. (8/27/2019 Ruling at pp. 5-6; 9/12/2019 Ruling at p. 1; App. 14-15; 31).

Additional facts will be mentioned in the course of the State’s argument as necessary.

ARGUMENT

I. THE DISTRICT COURT REASONABLY FOUND THAT MODIFICATION OF FORTUNE’S SEX OFFENDER REGISTRATION REQUIREMENT POSED AN UNDUE RISK TO PUBLIC SAFETY DESPITE HIS ASSESSED LOW RISK TO REOFFEND.

A. Standard of Review.

Iowa Code section 692A.128 “grants the district court authority to modify [sex offender] registration obligations if certain conditions are met.” *State v. Wallace*, No. 15-1448, 2016 WL 6636681 at *2 (Iowa Ct. App., Nov. 9, 2016) (quoting *State v. Iowa Dist. Court for Story Cnty.*, 843 N.W.2d 76, 77 (Iowa 2014)). The District Court’s conclusion on whether an applicant has satisfied the mandatory statutory prerequisites are reviewed for errors of

law and the underlying fact findings for substantial evidence. *Wallace*, 2016 WL 6636681 at *2.

If an applicant satisfies the statutory preconditions, the District Court “*may* modify the registration requirements.” Iowa Code § 692A.128(5) (emphasis added). Because the authority conferred by this provision is clearly discretionary, the District Court’s ultimate conclusion granting or denying a modification application is reviewed for an abuse of discretion. *Wallace*, 2016 WL 6636681 at *2. “An abuse of discretion occurs when a district court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *State v. Wilson*, 878 N.W.2d 203, 210-11 (Iowa 2016).

B. Preservation of Error.

Fortune filed an application for modification of his sex offender registry requirements and obtained the District Court’s ruling upon that application. (*See* Application; 8/27/2019 Ruling; App. 6; 10). Fortune subsequently filed for reconsideration of the District Court’s ruling arguing that the District Court failed to give proper consideration to his risk assessment results and other evidence presented at hearing. (*See* Motion to Reconsider; 9/12/2019 Ruling; App. 17-30; 31-32). The question of whether the District Court

abused its discretion in denying Fortune's application for modification is accordingly preserved for appellate review.

C. Argument.

The District Court reasonably denied Fortune's application for modification of his sex offender registration requirement. In so doing, it properly rejected Fortune's overly restrictive interpretation of the modification statute. Instead, the District Court gave appropriate consideration to Fortune's inconsistent risks assessments, his history of non-compliance with registry requirements and evasive behaviors, the underlying facts of his criminal offense, and the lack of a compelling basis justifying the intrusion upon public safety a modification would pose.

Overview of Sex Offender Registry

The Iowa Department of Public Safety is mandated by law to maintain a central registry of information collected from persons required by Iowa law to register as sex offenders. Iowa Code § 692A.118. Persons convicted of any of the statutorily delineated criminal offenses involving sexual misconduct, including lascivious acts with a child, shall register as sex offenders in the state of Iowa. Iowa Code §§ 692A.102, 692A.103. In most cases, a person convicted of a qualifying sex offense is required to register for a minimum period of ten years. Iowa Code §§ 692A.103(1), 692A.106(1).

However, because his offense is characterized as an “aggravated offense” under Iowa law, Fortune is required to register as a sex offender for life. *See* Iowa Code § 692A.106(5) (“A sex offender shall . . . upon conviction of an aggravated offense . . . register for life.”).

This Court has held that the purpose of Iowa Code chapter 692A is clear: “to require registration of sex offenders and thereby protect society from those who because of probation, parole, or other release are given access to members of the public.” *In re S.M.M.*, 558 N.W.2d 405, 408 (Iowa 1997); *see also State v. Iowa Dist. Court for Story Cnty.*, 843 N.W.2d 76, 81 (Iowa 2014) (“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”); *State v. Pickens*, 558 N.W.2d 396, 400 (Iowa 1997) (“the statute was motivated by concern for public safety, not to increase the punishment”). Thus, Iowa Code chapter 692A’s registration requirements were not enacted to punish adult perpetrators like Fortune, but to promote public safety through the dissemination of information.¹ *See, e.g., State v. Aschbrenner*, 926

¹ This Court, however, has found Iowa’s sex offender registration statute punitive as to juvenile offenders. *In re T.H.*, 913 N.W.2d 578, 596 (Iowa 2018).

N.W.2d 240, 248 (Iowa 2019); *Pickens*, 558 N.W.2d at 400; *In re S.M.M.*, 558 N.W.2d at 408. Therefore, any alleged ambiguities in Iowa’s sex offender law or uncertainties as to its application to a particular offender should be resolved in favor of furthering public safety by requiring continued registration. Iowa Code § 4.4(5) (“Public interest is favored over any private interest”); see *Teamsters Local Union No. 421 v. City of Dubuque*, 706 N.W.2d 709, 717 (Iowa 2005).

Registration Modification

Persons required to be registered as sex offenders in the state of Iowa can make application to the district court in their county of residence for modification of their registration requirements. Iowa Code § 692A.128. Among the requirements that must be met before an applicant’s request for modification can be granted are that “[t]he sex offender has successfully completed all sex offender treatment programs that have been required,” that “[a] risk assessment has been completed and the sex offender was classified as a low risk to reoffend;” and “[t]he sex offender is not incarcerated when the application is filed.” Iowa Code § 692A.128(1)(b), (c) & (d). For persons classified as a Tier III sex offender like Fortune, five years must have elapsed since the commencement of their registration requirement. Iowa Code § 692A.128(1)(a). Lastly, persons subject to ongoing corrections supervision

must also procure a stipulation from the judicial district department of correctional services agreeing to the modification. Iowa Code § 692A.128(1)(e).

The State does not contest that Fortune has demonstrated each of the applicable preconditions for seeking modification of his sex offender registration requirement. Fortune's registration requirement commenced nine years prior to his application for modification. *See* Iowa Code § 692A.128(1)(a). He had completed all required sex offender treatment. *See* Iowa Code § 692A.128(1)(b). He submitted with his application the results of a validated risk assessment approved by the Iowa Department of Corrections that found him to be at low risk to reoffend. *See* Iowa Code § 692A.128(1)(c). Fortune was released from prison in 2009. *See* Iowa Code § 692A.128(1)(d). The stipulation of the Judicial District Department of Correctional Services was not required because Fortune discharged his sentence in 2011 and he is no longer subject to corrections supervision. *See* Iowa Code § 692A.128(6).

Fortune's contention, however, that mere demonstration of the above criteria automatically entitles him to modification of his sex offender registration is belied by the plain language of the statute and must be rejected. Rather, as the Legislature has unambiguously instructed, once the requisite

eligibility criteria are established, the District Court *may* – but is not compelled to – modify any registration requirements applicable to the applying offender. Iowa Code § 692A.128(5) (“The [district] court *may* modify the registration requirements under this chapter.”); *see Wallace*, 2016 WL 6636681 at *2 (“The authority conferred by this provision is clearly discretionary.”); *see also State v. Adams*, 554 N.W.2d 686, 690 (Iowa 1996) (“use of the word “may” shows the legislature’s intention to confer a discretionary power, not to impose a requirement”); *State ex rel. Lankford v. Allbee*, 544 N.W.2d 639, 641 (Iowa 1996) (“word “may” indicates that the director has discretion”); Iowa Code § 4.1(30)(c) (“The word “may” confers a power.”).

Nor was the District Court required to defer solely to the final risk assessment scoring in determining whether to grant Fortune his requested modification. Such an interpretation would again render the District Court’s delegated discretion under the statute without meaning. *See Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 376, 380 (Iowa 2000) (“When construing the statute, we read the language used, and give effect to every word.”). Had the Legislature intended such a result, it would have commanded that the District Court *shall* modify the registration requirements of any eligible sex offender who was

deemed to be at low risk to reoffend on a validated assessment. *Shell Oil Co.*, 606 N.W.2d at 379 (“A court determines intent from “what the legislature said, not from what it might or should have said.”). Thus, in addition to assessed risk, the District Court can reasonably rely upon any number of factors, including examining a person’s long-term behaviors and proclivities, to determine whether, in its informed opinion, modification of any particular sex offender’s registration requirements would unduly place public safety at risk.

Nor was the District Court wrong in rejecting Fortune’s invitation to apply the modification structure applicable to juvenile offenders to adult offenders like himself. As correctly noted by the District Court: “The sentencing goals for juvenile and adult offenders and the differing psychological traits of adult and juvenile offenders have led to far different protocols in rehabilitation, sentencing, treatment, protection of the public and other dispositional goals.” (8/27/2020 Ruling at p. 4.; App. 13). This Court has also recognized that the registration of juvenile sex offenders “is readily distinguishable based on the unique concerns of juvenile offenders that are inapplicable to adult offenders. Adult offenders are better able to meaningfully reintegrate into the community and interact with their peer groups notwithstanding the restrictions in the sex offender registration

statute” *Aschbrenner*, 926 N.W.2d at 248. It is therefore unquestioned that there are significant public policy reasons justifying treatment of adult offenders differently than juvenile offenders. *See, e.g., State v. Bruegger*, 773 N.W.2d 862 (Iowa 2009).

Discretion Reasonably Applied

While the discretion to deny an application for modification is undoubtedly not without limits, the District Court did not abuse its discretion in this case as the factors it weighed were sufficiently correlated to the public safety goals of Iowa Code chapter 692A to reasonably justify the denial of Fortune’s request. *Cf. State v. McNeal*, 897 N.W.2d 697, 710 (Iowa 2017) (Cady, C.J., concurring specially) (“Discretion expresses the notion of latitude.”). As noted above, the sex offender registry exists to enhance public safety by facilitating the dissemination of information to the community at large. *E.g., Aschbrenner*, 926 N.W.2d at 247-48. Before agreeing to foreclose the public’s access to Fortune’s conviction information through the sex offender registry, the District Court properly sought to inventory Fortune’s background and circumstances in an effort to determine whether the anticipated effect upon public safety of such a modification would be acceptably limited.

The District Court initially expressed concern that Fortune’s risk assessments did not uniformly score at low risk to reoffend. This finding is supported by the record as the updated Static 99-R performed for Fortune found him to be at level III or “average risk” to reoffend. (Exhibit 3 at p. 2; Conf. App. 7; *see* Exhibit 12 – Static 99-R Tally Sheet; App. 70). This enhanced scoring was the result of modifications made to this risk assessment tool in 2016. (8/20/2019 Transcript at p.7, 1.22 – p.8, 1.17). With these revisions, Fortune now scored near the middle or average and not at the low end of the scale on the Static 99-R. (*See* Exhibit 12; App. 70). So, while the Judicial District Department of Correctional Services found that Fortune overall was considered to be at low risk to reoffend, the District Court was not wrong in observing that the assessments were not unanimous in this finding. (8/27/2019 Ruling at p. 4; App. 13).

Fortune seeks to diminish the importance of this outlier by claiming that the raw statistical chance of him reoffending still remains relatively small. Regardless of the actual recidivism percentage this moniker represents, Fortune cannot dispute that his “average risk” to reoffend as measured on this assessment is greater than other offenders who scored at either “very low risk” or “below average risk” to reoffend.

The District Court also examined Fortune's criminal history since his release from prison. (8/27/2019 Ruling at pp. 4-5; App. 13-14). Fortune's conviction for disorderly conduct that arose from a domestic disturbance raised reasonable questions as to whether Fortune has mastered the skills needed to effectively modulate his impulse control when interacting with others. (*See* Exhibit 6; Conf. App. 11).

More disturbingly was Fortune's conviction for failing to comply with sex offender registry requirements. (*See* Exhibits A, B; App. 75-79; 81-83). As noted by the District Court, this offense involved Fortune engaging in purposeful deception to evade Facebook's prohibition on sex offenders using its services. (8/27/2019 Ruling at pp. 4-5; App. 13-14). Ashley Lappe, the Judicial District Department of Correctional Services psychologist who conducted Fortune's risk assessments, found his noncompliance concerning "to some degree" because "being able to follow the stipulations of the registry would indicate a pro social individual." (8/20/2019 Transcript at p.15, l.19 – p.16, l.3). If Fortune cannot be trusted to do the right things when he is facing potential criminal consequences, the District Court could reasonably discount Fortune's present assurances that modification would not undermine public safety. Fortune may have viewed his own noncompliant behavior as not "a big deal" but the seriousness with which the Legislature views non-

compliance with registry requirements is evidenced by the fact that in addition to any criminal penalty imposed, an offender's term of registration shall be extended ten years for each conviction entered. (8/20/2019 Transcript at p.28, ll.10-14); *see* Iowa Code § 692A.104(4). Consequently, this one conviction alone is grounds to deny Fortune's modification request.

Fortune's impulsive behavior of marrying someone he only recently met in an admitted scheme to derail an ongoing DHS abuse investigation further illustrates his willingness to act in manner that circumvents the public safety intentions of the registry statute. (8/27/2019 Ruling at p. 5; App. 14; *see* 8/20/2019 Transcript at p.19, l.8 – p.20, l.6). While marriage did remove the specter of a child endangerment finding from his relationship with his now wife, the episode still raises legitimate questions as to the extent of the machinations we would engage to avoid detection of his misdeeds. *See* Iowa Code § 726.6(1)(h).

Unlike some registered sex offenders, Fortune is not struggling to find a place to live or to obtain necessary medical or vocational services due to his registry requirements. Fortune was able to attend school and he is gainfully employed. (8/20/2019 Transcript at p.20, l.16 – p.22, l.1). Fortune is not without remedy to attend his stepchildren's school activities as he has the right to petition the school directly for such permission. Nothing in Iowa Code

chapter 692A precludes *per se* his participation on or access to social media platforms. The District Court accordingly did not error in observing that Fortune's simple inconvenience with the obligations and restrictions attendant with his sex offender registration status was not a compelling reason to grant his modification petition. (8/27/2019 Ruling at pp. 6-7; 9/12/2019 Ruling at p. 1; App. 15-16; 31).

Lastly, the offenses for which Fortune was convicted do matter to the calculus of whether he should be relieved of his ongoing registration requirements. In view of the nature of his criminal behavior, the District Court reasonably viewed his application for modification with a degree of scrutiny that someone else convicted of a lesser offense may not warrant. For example, compared to someone who engaged in a single act of indecent exposure, the harm Fortune repeatedly imposed upon his seven-year old victim over a two-year period was exponentially magnified. The societal interest in preventing similar harm to others is equally enhanced. The District Court accordingly did not abuse its discretion by considering how a modification order could facilitate Fortune's potential access to new victims.

CONCLUSION

For the above-stated reasons, the State respectfully requests this Court affirm the District Court's denial of Fortune's application for modification of his sex-offender-registry requirements.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

Appellee State of Iowa does not believe that oral argument is necessary in this matter. Should the Court grant the Appellant oral argument, the State would request time equal to that of the Appellant.

CERTIFICATE OF COMPLIANCE

This Proof Brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6,903(1)(g)(1) or (2) because this Proof Brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font size and contains 3,588 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ John R. Lundquist
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PROOF OF SERVICE

I, John R. Lundquist, hereby certify that on September 23, 2020, I, or a person acting on my behalf, did serve Appellee State of Iowa's Final Brief and Conditional Request for Oral Argument on all other parties to this appeal by EDMS to the respective counsel for said parties:

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CERTIFICATE OF FILING

I, John R. Lundquist, hereby certify that on September 23, 2020, I, or a person acting on my behalf, filed Appellee State of Iowa's Final Brief and Conditional Request for Oral Argument with the Clerk of the Iowa Supreme Court by EDMS.

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