

IN THE SUPREME COURT OF IOWA

No. 20-0353

DUBUQUE COUNTY NO. CVCV110001

DENNIS BECHER,
APPLICANT-APPELLANT,
v.
STATE OF IOWA,
RESPONDENT-APPELLEE.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
THE HONORABLE MICHAEL J. SHUBATT

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 EXERCISED ITS VAST DISCRETION IN DENYING MODIFICATION OF BECHER’S SEX OFFENDER REGISTRATION REQUIREMENT?

Authorities

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Iowa R. App. P. 6.904(3)(e)

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

A. Nature of the Case.

Applicant-Appellant Dennis Becher [Becher] appeals from a ruling denying his request for modification of his lifetime requirement to register as a sex offender resulting from his conviction on two counts of third-degree sexual abuse.

B. Course of Proceedings and Disposition.

On October 29, 2019, Becher filed in the Iowa District Court for Dubuque County an application for modification of sex offender registry requirements pursuant to Iowa Code section 692A.128. (Application; App. 4-5). The State subsequently answered and resisted Becher's application. (Answer). Hearing on the merits of Becher's application was held on January 3, 2020. (*See generally* 1/3/2020 Transcript; Conf. App. 10-48).

The District Court issued a ruling on January 14, 2020, denying Becher's request for modification. (*See generally* 1/14/2020 Ruling; App. 6-8). Becher's subsequent motion to reconsider or enlarge findings was denied

on January 29, 2020. (*See* Motion to Reconsider; 1/29/2020 Ruling; App. 9-10). Becher now appeals. (Notice of Appeal; App. 11-12).

C. Statement of Facts.

Becher was sentenced on June 2, 2000, to two consecutive ten-year prison terms after he plead guilty to committing two counts of third-degree sexual abuse against his then nine-year-old adopted daughter in violation of Iowa Code sections 709.1 and 709.4(1). (1/3/2020 Transcript at p.6, ll. 23-24; p.7, ll. 4-7; p.17, ll. 14-21; p. 19, ll. 3-7; Conf. App. 15; 16; 26; 28); *see State v. Becher*, Woodbury County No. FECR049418. Becher admitted to “sexually fondling his daughter over and under her clothing” over the course of about a year. (1/3/2020 Transcript at p. 6, l. 25 – p.7, l. 3; p.19, ll. 8-11; Conf. App. 15-16; 28).

Each of Becher’s counts of conviction qualify as an “aggravated offense” that requires his lifetime registration as a sex offender in the state of Iowa. Iowa Code §§ 692A.1(1)(c) (defining aggravated offense to include sexual abuse in the third degree in violation of sections 709.4(1)), 692A.2(3) (1999 Supp.) (mandating lifetime registration for aggravated offenses); *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). Becher has registered continuously with the Iowa sex offender

registry since his release from incarceration in May 2009 upon the full discharge of his prison sentence. (1/3/2020 Transcript at p. 6, ll. 5-8; Conf. App. 15). While incarcerated, Becher completed sex offender treatment. (Exhibit A at p. 1-2; 1/3/2020 Transcript at p.7, ll. 11-20; Conf. App. 5-6; 16).

In October 2019, Becher sought to modify his sex offender registration requirements by filing an application in Dubuque County pursuant to Iowa Code section 692A.128. (*See generally* Application; App. 4-5). In support of his application, Becher submitted a summary of the results of multiple sex offender risk assessments conducted by the First Judicial District Department of Correctional Services that generally found him to be at low risk to reoffend. (*See* Exhibit A; Conf. App. 5-9). Specifically, Becher was found to be at level II or “below average risk” to reoffend on the updated Static 99-R assessment tool. (*See* Exhibit A at pp. 2-3; Conf. App. 6-7).

The District Court entered orders on January 14 and January 29, 2020, denying Becher’s application for modification and motion for reconsideration. (1/14/2020 Ruling; 1/29/2020 Ruling; App. 6-8; 9-10). In rejecting Becher’s bid to forego further registry obligations, the District Court found that the legislature created the sex offender registry to protect potential victims from future abuse by sex offenders. (1/14/2020 Ruling at p. 2; App. 7). After observing that the sex offender registry requirement “has not prevented

Becher from living his life”, the District Court ruled that it had “heard no persuasive reason as to why Becher should not be required to continue to adhere to sex offender registration requirements.” (1/14/2020 Ruling at p. 2; App. 7). The Court found Becher’s below average risk to reoffend an insufficient basis, in and of itself, to “remove the protection that the registration requirement affords the community.” (1/14/2020 Ruling at p. 2; App. 7).

Additional facts will be discussed below as necessary.

ARGUMENT

I. THE DISTRICT COURT REASONABLY EXERCISED ITS VAST DISCRETION IN DENYING MODIFICATION OF BECHER’S SEX OFFENDER REGISTRATION REQUIREMENT.

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 conclusions 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.

Becher filed an application for modification of his sex offender registry requirements and obtained the District Court’s ruling upon that application. (See Application; 1/14/2020 Ruling; App. 4-5; 6-8). Becher subsequently filed for reconsideration of the District Court’s ruling arguing that the District Court applied an incorrect legal standard and failed to give proper consideration to his risk assessment results. (See Motion to Reconsider; 1/29/2020 Ruling; App. 9-10). The question of whether the District Court abused its discretion in denying Becher’s application for modification is accordingly preserved for appellate review.

C. Argument.

The District Court reasonably denied Becher's application for modification of his sex offender registration requirement. In so doing, it properly rejected Becher's contention that a registrant's risk to reoffend alone should inform a court's determination as to whether a section 692A.128 modification is appropriate. Instead, the District Court gave appropriate consideration to not only Becher's risk assessments, but also the underlying facts of his criminal offense and the lack of a compelling reason 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 sexual abuse, 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, Becher 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.”); *see also* Iowa Code § 692A.2(3) (1999 Supp.).

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 Becher, but to promote public safety through the dissemination of information.¹ *See, e.g., State v. Aschbrenner*, 926 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

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).

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 Becher, five years must have elapsed since the commencement of their registration requirement. Iowa Code § 692A.128(1)(a); (*see* 1/3/2020 Transcript at p. 6, ll. 9-11). 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 Becher has demonstrated each of the applicable preconditions for seeking modification of his sex offender registration requirement. Becher's registration requirement commenced ten years prior to his application for modification. *See* Iowa Code § 692A.128(1)(a). He has 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). Becher 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 Becher discharged his sentence in 2009 and he is no longer subject to corrections supervision. *See* Iowa Code § 692A.128(6).

Becher's contention, however, that mere demonstration of the above criteria creates a presumption of entitlement to modification of his sex offender registration absent the State demonstrating such a modification would pose an undue risk to the public 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 Becher 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.”).

Instead, the Iowa Code grants the District Court wide latitude in determining what evidence, if any, to take concerning the merits of an application for modification. *See* Iowa Code § 692A.128(4) (“The court may, but is not required to, conduct a hearing on the application to hear any evidence deemed appropriate by the court.”). This authorization allows it to hear, and therefore consider, *any evidence* it deems appropriate. *Id.* Thus, in addition to assessed risk, the District Court can reasonably rely upon any number of factors, including examining a person’s underlying offenses and current circumstances, to determine whether, in its informed opinion, modification of any particular sex offender’s registration requirements would unduly place public safety at risk or otherwise undermine the purposes of the registry statute without appropriate cause. The District Court’s inquiry under section 692A.128 is in no way limited to only addressing a sex offender’s potential risk to reoffend and any ongoing danger they may pose.

The District Court, therefore, did not error in rejecting Becher’s invitation to apply the registration waiver structure applicable to juvenile offenders to adult offenders like himself. *Compare* Iowa Code § 692A.103(3)

with Iowa Code § 692A.128. The waiver provision of Iowa Code section 692A.103(3) “gives the juvenile court discretion to excuse an eligible juvenile from the registration requirement.” *In re A.J.M.*, 847 N.W.2d 601, 605 (Iowa 2014). Waiver is only available if “the juvenile court ‘finds’ in its discretion that the eligible juvenile is not likely to reoffend.” *In re A.J.M.*, 847 N.W.2d at 606. As this Court itself has already observed, “[t]here is no companion waiver provision for adult sex offenders” *In re A.J.M.*, 847 N.W.2d at 605. Consequently, interpretations of the waiver provision for juvenile offenders does not inform how the District Court should interpret and apply the modification provisions of section 692A.128.

Because modification is a separate issue from waiver, section 692A.128 is more akin to the modification/suspension provisions of Iowa Code section 692A.103(5) that are applicable to juvenile offenders who are not initially excused from registering as sex offenders. *See In re A.J.M.*, 847 N.W.2d at 608. Thus, as discussed above, at a modification hearing, “factors in addition to the likelihood of reoffending become relevant.” *Id.*

Furthermore, this Court has repeatedly recognized that “children are constitutionally different from adults.” *See, e.g., State v. Sweet*, 879 N.W.2d 811, 833 (Iowa 2016). Consequently, 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 Becher’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 Becher’s conviction information through the sex offender registry, the District Court properly sought to inventory Becher’s

background and circumstances in an effort to determine whether an adequate reason existed to justify such a modification.

The District Court reasonably determined that the offenses for which Becher 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 Becher repeatedly imposed upon his nine-year old victim over a year period was exponentially magnified. The societal interest in preventing similar harm to others is equally enhanced.

Furthermore, the modification statute requires notice be provided, if possible, to a sex offender's victims. *See* Iowa Code § 692A.128(4). This is presumably so that a court, when contemplating any requested registration modification, may hear and weigh evidence of the harm and lasting injury a sex offender inflicted upon them.

The District Court also noted that Becher's risk assessments did not uniformly score at low risk to reoffend. (1/14/2020 Ruling at pp. 1-2; App. 6-7). This finding is supported by the record as the updated Static 99-R performed for Becher found him to be at level II or "below average risk" to

reoffend, not level I or “very low risk.” (Exhibit A at pp. 2-3; Conf. App. 6-7). While the commentary attached to the Judicial District Department of Correctional Services’ scoring summary surmises that an offender’s risk of reoffending likely goes down with time, the actual scoring on the Static 99-R does not change—*i.e.*, it remains static. So, while the Judicial District Department of Correctional Services found that Becher overall was considered to be at low risk to reoffend and therefore eligible to seek modification, the District Court was not wrong in observing that the assessments were not unanimous in this finding.

Additionally, unlike some registered sex offenders, Becher is not struggling to find a place to live or to obtain necessary medical or vocational services due to his registry requirements. Becher is gainfully employed as an over-the-road truck driver, has never experienced prolonged periods of unemployment since his release from prison, can freely travel, and has recently purchased a home. (1/3/2020 Transcript at p.4, ll. 5-18; p. 9, ll. 16-20; p. 10, ll. 5-10; p. 15, l. 25 – p. 16, l. 5; Conf. App. 13; 18; 19; 24-25). The District Court did not error in observing that simple inconvenience with the obligations and restrictions attendant with his sex offender registration status without more was not a compelling reason to grant his modification petition. (1/14/2020 Ruling at p. 2; App. 7).

As the petitioning party seeking to either modify or eliminate his ongoing sex offender registration obligation, Becher bore the burden of establishing sufficient reasons existed for the Court to act. *See* Iowa R. App. P. 6.904(3)(e). The State was not required to prove Becher posed an ongoing risk to public safety. Because continued registration and public dissemination of information is the preferred means to facilitate the legislature's public safety goals for enacting and maintaining the sex offender registry, the District Court reasonably declined to exercise its discretion to grant Becher's modification petition in the absence of demonstrated good cause. (1/14/2020 Ruling at 2; App. 7). As the District noted, the mere fact that Becher went to prison, served his sentence and complied with his treatment requirements "is not in and of itself, a justification for removing the registry requirement." (1/14/2020 Ruling at 2; App. 7).

CONCLUSION

For the above-stated reasons, the State respectfully requests this Court affirm the District Court's denial of Becher'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 3,372 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 October 13, 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 October 13, 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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