

IN THE SUPREME COURT OF IOWA
Supreme Court No. 23-0005
Dubuque County No. CVCV112810

JOHN FELLER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

APPELLEE'S BRIEF

BRENNA BIRD
Attorney General of Iowa

BRIDGET A. CHAMBERS
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-8894 (fax)
bridget.chambers@ag.iowa.gov

SCOTT NELSON
Dubuque County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

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**STATEMENT OF THE ISSUE PRESENTED FOR
REVIEW**

I. The District Court Acted within the Proper Scope of Its Discretion in Denying Feller’s Application to Modify the Requirement that He Register as a Sexual Offender for Life.

Authorities

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State v. Pickens, 558 N.W.2d 396 (Iowa 1997)

Iowa Code § 692A.106 (2021)

Iowa Code § 692A.2 (2021)

Iowa Code section 692A.128 (2021)

Iowa Code section 709.8(3) (2021)

Iowa Code § 692A.118 (2021)

Iowa Code § 692A.102 (2021)

Iowa Code § 692A.103 (2021)

ROUTING STATEMENT

This case can be decided based on existing legal principles. Therefore, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

This is an appeal by the applicant John Feller from the district court's denial of his application for modification of the requirement that he register as a sexual offender for life.

Course of Proceedings

On October 24, 2011, John Feller was convicted of two counts of lascivious acts with a child, each in violation of Iowa Code section 709.8(3). His convictions arose out of Dubuque County case numbers FECR095382 and FECR096569. Judgment Entry; App. 99-101. As a result of his convictions, Feller is required to register a sexual offender for life. Ex. 19 (Decision of Registration Determination), D067; App. 90.

On December 1, 2021, Feller filed an application in the district court for Dubuque County seeking release from the sexual offender registration requirement. Application, D0001; App. 7-10. Hearing on Feller's application was held on July 13, 2022. The Honorable

Michael J. Shubatt presided over the hearing. The district court denied Feller's application on October 3, 2022. Ruling, D0078; App. 13-17.

On October 18, 2022, Feller filed a motion to Amend or Enlarge the district court's ruling. Motion, D0080; App. 18-25. The court denied that motion on December 6, 2022. Order, D0082; App. 26-27. Feller filed his notice of appeal on December 30, 2022. Notice of Appeal, D0083; App. 28-29.

Facts

John Feller married Kayla Wolter and became the stepfather of J.B.; Feller and Wolter also had one daughter together, L.F. While Feller was married to J.B.'s mother, he sexually abused J.B over a period of years. The abuse started when Feller and Wolter were engaged and continued until shortly before J.B. told her mother. When J.B. threatened to tell her mother, Feller told her she had to keep the abuse a secret to keep the family together. Eventually, J.B. did tell her mother and her mother contacted authorities. Minutes of Evidence (FECR095382, D0059; FECR096569, D0062); App. --.

J.B. was eight or nine years old when the abuse started. The abuse continued until she was sixteen. L.F. was not yet born when

Feller started abusing J.B. and she would have been five or six when it stopped. Tr. (D0087) 9:24-10:12. At the time of Feller's modification hearing, L.F. was fifteen years old. Tr. (D0087) 9:22-23.

ARGUMENT

I. **The District Court Acted within the Proper Scope of Its Discretion in Denying Feller's Application to Modify the Requirement that He Register as a Sexual Offender for Life.**

Preservation of Error

The State does not challenge error preservation.

Standard of Review

This Court reviews for abuse of discretion the district court's decision to deny modification. *Becher v. State*, 957 N.W.2d 710, 714 (Iowa 2019); *Fortune v. State*, 957 N.W.2d 696, 703 (Iowa 2020).

Merits

John Feller challenges the district court's denial of his application for modification of the sexual offender registration requirement under Iowa Code section 692A.128. Feller has not shown that the district court made a clear error of judgment such that its denial of his application was an abuse of discretion. Consequently, this Court should reject his challenge to the district court's ruling.

Feller challenges the district court’s refusal to relieve him from his obligation to register as a sexual offender for life. The Iowa Department of Public Safety maintains a central registry of information collected from persons required by Iowa law to register as sex offenders. Iowa Code § 692A.118 (2021). 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 (2021). 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) (2021). An offender convicted of an “aggravated offense” under Iowa law is required to register as a sex offender for life. Iowa Code §§ 692A.106(5), 692A.2(3) (2021). Feller is subject to the lifetime registration requirement. *See*, Exh. 19, D0067; App. 90.

This Court has held that the purpose of Iowa Code chapter 692A is “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”). The registration requirements of Iowa Code chapter 692A were not enacted to punish adult perpetrators like Feller, but to promote public safety through the dissemination of information. *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.

A person required to be registered as a sexual offender may make application to the district court in his county of residence for modification of the registration requirement. Iowa Code § 692A.128 (2021). Among the criteria 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;” “[a] risk assessment has been completed and the sex offender was classified as a low risk to reoffend;” and, the sex offender was not incarcerated when the application was filed. Iowa

Code § 692A.128(1)(b), (c) & (d) (2021). For a person classified as a Tier III sex offender, five years must have elapsed since the commencement of his registration requirement. Iowa Code § 692A.128(1)(a) (2021). Lastly, a person 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).

In deciding a modification application, the district court must first determine whether an applicant has met the gateway requirements of Iowa Code section 692A.128. If the statutory requirements are not met, that is the end of the matter, and the district court must deny the modification. *Fortune*, 957 N.W.2d at 705.

If the applicant meets the threshold statutory requirements, the district court proceeds to the second step, i.e., determining whether the registration requirements should be modified. *Fortune*, 957 N.W.2d at 705. Under section 692A.128(6) (2021), the district court may, but is not required to, hold a hearing. At any such a hearing, the district court is permitted to consider any evidence the district court deems appropriate. *Fortune*, 957 N.W.2d at 703.

Here, the district court held a hearing on Feller’s application for modification. After hearing, the district court found that Feller had met the threshold requirements. Ruling; App. 13-17. The State agrees with the court’s determination that Feller met the threshold requirements for modification.

However, the district court is not required to grant modification if the statutory requirements are met. *Fortune*, 957 N.W.2d at 705. Instead, the district court has discretion whether to grant modification. *Fortune*, 957 N.W.2d at 705-6. In addition to compliance with the statutory requirements, the district court may consider additional factors that are relevant to the questions of whether the offender poses a sufficient risk of re-offense to require continued registration or whether public safety requires continued registration “to provide a degree of control on the offender and provide information to the public.” *Fortune*, 957 N.W.2d at 707.

Our Court has provided guidance on the factors that are relevant to the decision to grant or deny a petition for modification. In exercising the district court’s discretion “the statutory requirements are certainly important factors to be considered by the district court on the ultimate issue of modification, but they cannot be

considered exclusive factors.” *Fortune*, 957 N.W.2d at 705-6. The district court may consider any other factors it finds relevant to the modification issue. *Fortune*, 957 N.W.2d at 707. The district court should focus on the risk of re-offense and the ongoing need for registration to protect public safety, and not on other factors.

Fortune, 957 N.W.2d at 706.

The district court should consider only those factors that bear on whether the applicant is at low risk to re-offend and whether there is no substantial benefit to public safety in extending the registration requirements. The Court has noted that “‘low risk’ does not mean ‘no risk.’” *Fortune*, 957 N.W.2d at 706. Neither will “conclusory appeals to public safety” defeat a modification application. The threat to public safety must be tied to the individual applicant and to the record established in each case. *Id.* The mere possibility of re-offense cannot be considered determinative. *Becher*, 957 N.W.2d at 716. The risk analysis applied by the district court must be consistent with the requirement that an offender be considered low risk under applicable validated assessment tools. *Becher*, 957 N.W.2d at 716.

The district court is not bound by an evaluation that determines that an offender is at low risk to re-offend, though such an evaluation

is “weighty evidence” on the issue of modification. *Becher*, 957 N.W.2d at 716. Further, the district court may consider the underlying nature of the crime. However, district courts “should be cautious in rejecting the validated risk assessments based on a case-by-case judicial impression of the underlying offense. The court’s focus must be on the present danger or threat to public safety, not on punitive response to past crime.” *Id.* “In the exercise of discretion under Iowa Code section 692A.128, the district court must take care to ensure that public safety, and not punishment, provides the lens through which facts are evaluated.” *Fortune*, 957 N.W.2d at 707. The goal of protecting public safety may include protection of a specific potential victim. *State v. Larvick*, No. 20-1273, 2022 WL 610361, *4 (Iowa Ct. App. Mar. 2, 2022).

Whether to modify a registration requirement rests in the discretion of the district court. “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.” *Fortune*, 957 N.W.2d at 703. “A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law.” *Fortune*, 957 N.W.2d at 703 (cleaned up). A district court

also commits an abuse of discretion when it fails to consider a relevant factor, or considers an improper or irrelevant factor, on the question of whether the ongoing risks of danger from the sex offender justify continuation of the registration requirements. *Fortune*, 957 N.W.2d at 707.

In addition, the district court's stated reasons for a decision on modification must be sufficient "to allow appellate review of the trial court's discretionary action." *Fortune*, 957 N.W.2d at 707 (cleaned up). "Where only proper factors have been considered," the Court "will find an abuse of discretion only where there is a clear error of judgment". *Id.*

Here, the district court held a hearing on Feller's modification request. Feller did not testify. However, he did submit an affidavit and documents showing that the risk assessments conducted by the Department of Corrections showed him to be at a low risk to re-offend. *See*, Exhs. 8 (affidavit), D0056; 1 (DCS Assessment), D0049; 2 (STATIC-99 Assessment), D0050; 3 (ISORA Assessment), D0051; 4 (STABLE Assessment), D0052; App. 86, Conf. App. 6-12, 13, 14, 15-16.

Other evidence, however, showed that Feller posed a greater risk to the public and to his younger daughter than the assessments indicated. Our Court has noted,

In some cases, . . . it may be possible to identify increased risk based upon what appears to be repeated patterns of behavior. For example, an offender might be engaging in what is ordinarily innocent behavior that looks more suspicious in light of the facts of the underlying crime. For instance, an offender who loiters at the same location as a past offense might raise concerns. To that extent, the similarity of patterns between past offenses and present behavior could be quite relevant. The focus, however, must be on the present danger or threat to public safety, not on punitive response to past crime.

Fortune, 957 N.W.2d at 709.

The victim of Feller's convictions for lascivious acts, J.B., testified that Feller was her stepfather. At the time of hearing, J.B. was twenty-seven years old and married. Tr. (D0087) 7:16-8:21. Feller began to sexually abuse J.B. when she was eight or nine years old and he continued to abuse her until she was sixteen, a period of seven to eight years. Tr. 9:24-10:6. J.B. has a younger sister, L.F. who is twelve years younger than J.B.; L.F. was fifteen years old at the time of the hearing. Tr. 9:14-23; 10:16-18. L.F. is Feller's biological daughter. Tr. 17:25 – 18:4.

J.B. testified that she is concerned that Feller had been attempting to contact L.F. by letter. He wrote letters to L.F. almost

every month from the time he was incarcerated in 2012 up until April of 2022. Tr. 11:4-12:8; 16:3-14. She is concerned because the letters “have a theme.” Tr. 12:18-23. She described that theme as,

... very much a push. Right? It’s I want to see you. Why haven’t I heard from you? It’s like a jab after jab. It’s why haven’t you contacted me? Why this? Why that? And she has opportunities to write back, and she doesn’t, and that’s her decision. But I think what these letters prove is the language before parole and after parole have the same enticing language of why this? Why that? Why haven’t you done this? Why haven’t you given back to me, you know? And it’s very much a jab at her. Why haven’t you contacted your grandma, you know? It hurts to see the jabs coming through and same manipulation technique of trying to entice her to contact him.

Tr. 13:1-14. J.B. testified that Feller used the same type of persistence with her, that Feller’s letters used

the same type of manipulation techniques of jabbing, pushing at those home buttons, the family buttons. Especially since we’re a very tight-knit family. It hits the family buttons, and those are the buttons that opens you up to maybe this is okay to do or maybe I’m doing something wrong, when really you’re not the one doing something wrong.

Tr. 13:14-14:18.

J.B. believes requiring Feller to register as a sexual offender protects L.F. and others. She is concerned that if Feller were around other people’s children or grandchildren, he would get into a comfort zone of “this is a child, and it’s a temptation. And regardless of the tests that have been taken, the temptation is always there. You have a

bad day? Well, guess what? Your temptation is there right in front of you.” She testified that she would “[a]bsolutely not” allow Feller to have contact with her two children. Tr. 14:19-15:13.

Kayla Wolter, the ex-wife of Feller and the mother of J.B. and L.F., also opposed lifting Feller’s registration requirement. Tr. 18:20-19:15; 21:25-22:9. She testified that she was contacted by Feller’s parole officer who told her that Feller wanted to contact L.F. and asked if she would consent to Feller sending a letter. She consented to the initial letter and later consented to additional letters. Out of concern for L.F.’s safety and well-being, Ms. Wolter added limitations on what Feller could say in his communications with L.F. because she did not want him “going on and on about how he apologizes and everything about him and not really specific to anything [L.F.] needed to know about. Tr. 19:19-20:25; Exh. 21 (parole officer notes), D0075; App. 92.

Ms. Wolter agreed with J.B.’s testimony that Feller had written to L.F. almost monthly since 2012. She testified that L.F. is “very aware” that Feller writes to her and that she may write to him if she wants but that L.F. does not want communication with Feller. L.F. does not read the letters from Feller; she does not even open the

letters. The family opened some of those letters to prepare for the hearing, however. Ms. Wolter testified that L.F. “is very scared that what happened to her sister” would happen to her “if she had any contact with” Feller. Tr. 21:1-24.

Ms. Wolter testified that she believed there was merit in continuing to require Feller to register as a sexual offender to protect L.F. and “[a]nyone.” Her opinion is that Feller “needs to have some kind of check to keep him in check from not doing this again, because when he had not one watching him, he did it over and over and over again to my daughter” over a period of seven to eight years. Tr. 21:25-22:14.

The district court denied Feller’s application. It found that Feller’s case was similar to that of *State v. Larvick*, 2022 WL 610361. Ruling at 3; App. 15. Larvick was the father of two daughters. He was convicted of sexually abusing his oldest daughter during the period when she was fifteen to seventeen years old. As a result, he was required to register as a sex offender for ten years. After his release from prison, he applied for modification of his registration requirement, which was denied. On appeal, our Court of Appeals affirmed the denial. The Court found “a repeated pattern of Larvick

utilizing his relationship with the mother of his biological daughters to have access to those daughters. He has already sexually abused the older child, and the pattern suggests he is a potential danger to the younger.” *Larvick*, 2022 WL 610361, at *4.

Here, the district court considered all the evidence and there is no suggestion that it considered any improper factor. The district court noted that its determination was “difficult” because “the testing that has been done indicates that Feller has completed all of his required programming and is a low risk to reoffend.” Ruling at 3; App. 15. Ultimately, however, the court found that, as in *Larvick*, J.B.’s testimony established a pattern that presented a sufficient risk to the general public and to a specific person to require continued registration. The Court explained,

[t]hat pattern is a manipulative, never-ending push to establish a relationship with a young girl who does not want such a relationship. While the facts of this case are slightly different from *Larvick*, they are the same on one salient point: Feller continues to engage in an identifiable pattern of behavior that he exhibited with his older daughter in the prelude to and course of his sexual abuse of her.

Ruling at 4; App. 16. The court concluded that “Feller presents a significant enough risk to reoffend that he should continue to register

as a sex offender....” *Id.* That ruling is supported by the record and falls within the district court’s broad discretion.

Feller has not met his burden to show that the district court’s denial of his application for modification was a “clear error of judgment.” This Court should uphold the district court’s ruling.

CONCLUSION

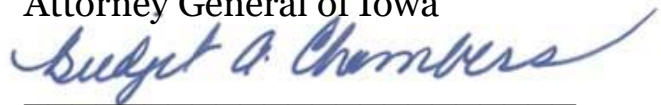
The Court should affirm the district court’s denial of John Feller’s application to modify the requirement that he register as a sexual offender.

REQUEST FOR NONORAL SUBMISSION

Oral argument is unlikely to assist the Court in deciding the issue raised on appeal. Therefore, the State waives oral argument. However, if appellant is granted oral argument, counsel for appellee desires to be heard in oral argument, as well.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa



BRIDGET A. CHAMBERS
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
bridget.chambers@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This 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:

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Dated: October 11, 2023



BRIDGET A. CHAMBERS
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
bridget.chambers@ag.iowa.gov