

IN THE COURT OF APPEALS OF IOWA

No. 0-900 / 10-0115
Filed February 9, 2011

**IN THE INTEREST OF J.D.P.,
Minor Child,**

**J.D.P., Minor Child,
Appellant.**

Appeal from the Iowa District Court for Johnson County, Sylvia A. Lewis,
Judge.

J.D.P. appeals the juvenile court's order requiring him to register as a sex
offender. **AFFIRMED.**

Jesse A. Macro, Jr. of Gaudineer, Comito, & George, L.L.P., West Des
Moines, for minor child.

Thomas J. Miller, Attorney General, Kyle Hanson and Bruce Kempkes,
Assistant Attorneys General, Janet M. Lyness, County Attorney, and Patricia
Weir, Assistant County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

EISENHAUER, J.

J.D.P. appeals from a juvenile court's denial of his request for review of the requirement he register as a sex offender. J.D.P. also asserts constitutional challenges under ex post facto and cruel and unusual punishment clauses. We affirm.

I. Background Facts and Proceedings.

In December 2006, a petition was filed alleging J.D.P. had committed several delinquent acts. In April 2007, the juvenile court denied the State's motion to waive jurisdiction and on May 1, 2007, J.D.P. was adjudicated delinquent for acts constituting second-degree sexual abuse, in violation of Iowa Code sections 709.1(1) and 709.3(1) (2007).¹ The juvenile court found J.D.P. committed a sex act "through the use of physical force and threats of harm, including threats to the victim's life." J.D.P. was ordered placed "at a residential placement that provides treatment for adolescent sex offenders and includes a locked unit." J.D.P. was placed at the Four Oaks STOP program.

On December 17, 2008, the court reviewed the matter and ordered the STOP placement to continue. The order also stated: "The Court anticipates that upon discharge from the Four Oaks STOP program that J.D.P. will be required to register on the Sex Offender Registry."

On January 21, 2009, J.D.P. filed an application requesting the court "lift the requirement that he register for the Sex Offender Registry." The hearing on

¹ The delinquency adjudication also included third-degree burglary. For clarity, reference to statutes before the July 1, 2009 amendments will be cited Iowa Code (2007), and reference to statutes effective July 1, 2009, will be cited Iowa Code (2009).

this application was continued several times. On May 13, 2009, J.D.P. filed a motion requesting “the Hearing on child’s Application to Remove Requirement that Juvenile Register on Sex Offender Registry, scheduled for July 17, 2009 . . . be cancelled.” Also on May 13, 2009, the court ruled:

The Court has been apprised that the child has been allowed to voluntarily remain in residential care with transition planning to allow the child to remain in voluntary foster family care until he has obtained his high school diploma.

Therefore, the Court continues the hearing to be promptly reset if the child elects to discontinue care.

This case remains set for in-court review on [July 17, 2009].

On June 26, 2009, J.D.P. filed a “request for modification of dispositional orders” and requested “Orders be entered modifying the stated placement from ‘residential placement’ to ‘foster family placement’ and the Orders cite that his current placement is voluntary.” On June 29, 2009, the court ruled:

[T]he Court modifies prior orders to allow the child to be released from residential care and placed in foster family care.

The Juvenile Court continues to exercise jurisdiction under the condition the child continues to remain in voluntary foster family care and is a full time high school student meeting conditions of the Department of Human Services for payment. Juvenile Court Office to continue supervision.

On July 17, 2009, after hearing, the juvenile court ordered:

The Court is advised [J.D.P.] has remained in residential care at the [STOP] program on a voluntary basis having reached age 18 on April 8, 2009. [J.D.P.] plans to continue in voluntary foster care . . . upon graduating from the [STOP] program and to remain in voluntary foster care until he has graduated from High School.

. . . The Court has been requested to waive the requirement that [J.D.P.] register as a sex offender.

The Court Orders that [J.D.P.] register as a sex offender upon release from residential care and [sets a waiver hearing for September 2009].

Hearing on the request to waive the registration requirement was held in September 2009. The child had left the STOP program in July 2009. In its ruling after the hearing, the juvenile court found: “It was the Court’s position that [J.D.P.] would be required to register as a sex offender once he was no longer in a residential facility.” The court stated new legislation, effective July 1, 2009, eliminated “the Court’s authority to review the requirements of the sex offender registry as applied to juveniles adjudicated [to have] committed sex offenses.” The court concluded it “no longer has discretion to determine whether the requirement to register should be waived,” stating:

Statutory construction requires that statutes are to be applied prospectively unless expressly made retrospective. . . . It is the State’s position that 692A.125 applies to [J.D.P.] as his failure to register at the time he turned age 18 was due to his decision to voluntarily remain in the STOP residential facility and the facility’s willingness to allow him to remain. Under prior law, he was not required to register until he was no longer in the residential setting. The statute did not really speak to this somewhat anomalous status of a voluntary placement, but the Court recognized that he would be required to register immediately upon leaving the program. The Court now finds that [J.D.P.] was required to register prior to July 1, 2009, and that chapter 692A.125 [2009] does indeed apply to him.

The court also ruled the new legislation did not violate constitutional prohibitions against ex post facto laws or cruel and unusual punishment. This appeal followed.

II. Standard of Review.

Generally, “our standard of review for juvenile cases is de novo.” *In re B.A.*, 737 N.W.2d 665, 667 (Iowa Ct. App. 2007). However, when construction of statutory language is at issue, “our standard of review is for corrections of errors

of law.” *Id.* We review constitutional challenges de novo. *State v. Corwin*, 616 N.W.2d 600, 601 (Iowa 2000).

III. Registration Requirement.

J.D.P. argues the juvenile court erred when it determined the amendments to Iowa Code Chapter 692A, effective July 1, 2009, apply retroactively to him. J.D.P. argues the court “should have applied former Iowa Code § 692A.2(6) (2007) and exercised its discretion” to determine whether he “should be required to register as a sex offender.”

Iowa Code section 692A.125(2)(a) (2009) specifically addresses the retroactivity of the July 2009 amendments:

2. The registration requirements of this chapter shall apply to a sex offender convicted of a sex offense or a comparable offense under prior law prior to July 1, 2009, under the following circumstances:

a. Any sex offender including a juvenile offender who is required to be on the sex offender registry as of June 30, 2009.

“Convicted” is defined to include “adjudicated delinquent.” Iowa Code § 692A.101(7) (2009). “Sex Offense” is defined as:

[A]n indictable offense for which a conviction has been entered that [1] has an element involving a sexual act, sexual contact, or sexual conduct, and [2] which is enumerated in section 692A.102, and means any comparable offense for which a conviction has been entered under prior law

Id. § 692A.101(27) (2009). The juvenile court found J.D.P. committed a sex act in violation of section 709.3(1). Further, second-degree sexual abuse in violation of section 709.3(1) is an offense “enumerated in section 692A.102.” *See id.* § 692A.102(1)(c)(7) (2009) (stating violation of section 709.3(1) is a Tier III offense). Accordingly, J.D.P.’s delinquency adjudication is a “comparable

offense under prior law” and “the registration requirements of this [2009] chapter shall apply” if J.D.P. “is required to be on the sex offender registry as of June 30, 2009.” See *id.* § 692A.125(2)(a) (2009).

To determine whether J.D.P. is required to be on the registry as of June 30, 2009, we analyze the 2007 Iowa Code’s requirements for registration. J.D.P. argues because he was in a residential treatment facility on June 30, 2009, he was *not* “required to be on the sex offender registry as of June 30, 2009.”

Iowa Code section 692A.2(1) (2007) provided: “A person who has been convicted of . . . an aggravated offense . . . or a sexually violent offense . . . shall register as provided in this chapter.” Generally, the word “shall” imposes a duty. See *id.* § 4.1(30)(a) (2007). Conviction again includes “adjudicated delinquent;” “aggravated offense” is defined to include second-degree sexual abuse “in violation of section 709.3”; and “sexually violent offense” is defined to include sexual abuse “under section 709.1.” *Id.* § 692A.1(1)(b), .1(3), .1(9)(a) (2007). Accordingly, J.D.P. meets the statutory requirements for registration and therefore, “shall register.” See *id.* § 692A.2(1) (2007).

Next, the 2007 statute described both the timetable for the registration process and the juvenile court’s discretion to excuse registration:

(1) . . . A person required to register . . . shall, upon a first conviction, register for a period of ten years commencing as follows:

- (a) From the date of placement on probation.
- (b) From the date of release on parole or work release.
- (c) From the date of release as a juvenile from foster care or residential treatment.
- (d) From the date of any other release from custody.

. . . .

(6) A person is not required to register while incarcerated, in foster care, or in a residential treatment program. A person who is convicted, as defined in section 692A.1, of . . . a sexually violent offense^[2] or another relevant offense as a result of adjudication of delinquency in juvenile court shall be required to register as required in this chapter unless the juvenile court finds that the person should not be required to register under this chapter. If a juvenile is required to register and the court later modifies the order regarding the requirement to register, the court shall immediately notify the department.

Id. § 692A.2(1), .2(6) (2007). The statute authorized the juvenile to delay the act of registration due to residential or foster care placements. However, this delay did not change the fact the juvenile’s act of registration is required and did not eliminate the juvenile’s “*shall register*” requirement. See *id.* (stating “[a] person required to register . . . shall . . . register . . . commencing as follows”). Residential and foster care placements only affect *when* the juvenile fulfills the existing duty to register. See *id.*

Further, the discretion granted to the juvenile court to excuse registration did not eliminate the juvenile’s “*shall register*” requirement. In *S.M.M.*, the Iowa Supreme Court explained the statutory registration process in the context of a vagueness challenge to the language—“as a result of adjudication of delinquency in juvenile court shall not be required to register as required in this chapter if the juvenile court finds that the person should not be required to register under this chapter.” *In re S.M.M.*, 558 N.W.2d 405, 406 (Iowa 1997) (quoting Iowa Code § 692A.2(1) (Supp. 1996). The court stated:

² “Sexually violent offense” is “sexual abuse as defined under section 709.1.” Iowa Code § 692A.1(9)(a) (2007). The juvenile court ruled J.D.P. acted “in violation of Iowa Code Sections 709.1(1), 709.3(1) and 702.17.”

[T]he State argues that the statute is not vague; it presumes that all offenders, including juveniles, are required to register, and the only exception is if the juvenile court in its discretion decides registration should be waived. The burden is on the juvenile to establish that he is entitled to an exception. We agree

The juvenile court's order . . . construed [the statute] as providing a presumption of registration with discretion in the juvenile court to excuse registration if that is justified. . . .

S.M.M. argues that [the statute] could just as readily be construed to create a presumption in *favor* of excusing registration. The wording of the statute, however, does not support that construction. *It begins with the general requirement that all offenders in the specified group of crimes be required to register, then allows a juvenile court to excuse registration in some cases.* Here, the court concluded there were no facts to support a ruling excusing S.M.M. from the required registration.

While it is true that the statute does not provide specific guidelines for the exercise of the court's discretion, it is clear that this discretion is not unbridled, as suggested by S.M.M. *The court is not permitted to decide who initially falls within the requirement of the registration statute. The statute prescribes who is covered by the registration requirements; the only discretion in the court is in deciding who will be excused.*

Id. at 406–07 (emphasis added).³

We conclude the current statutory scheme likewise does not permit the juvenile court to “decide who initially falls within the requirement of the registration statute.” See *id.* Rather, the statute prescribes who shall register. See *id.* All along, as indicated in the December 17, 2008 order, the court expected J.D.P. to register upon discharge from STOP. As of June 30, 2009, the juvenile court had not exercised its discretion to *excuse* J.D.P. from registration. Accordingly, J.D.P. is “a juvenile offender who is required to be on the sex

³ The sex offender registration statute at issue provided:
 person who is convicted . . . [of] a sexually violent offense as a result of adjudication of delinquency in juvenile court shall not be required to register as required in this chapter if the juvenile court finds that the person should not be required to register under this chapter.
In re S.M.M., 558 N.W.2d 405, 406 (Iowa 1997).

offender registry as of June 30, 2009.” Therefore, the amendments effective July 1, 2009, retroactively apply to J.D.P.’s registration as a sex offender. See Iowa Code § 692A.125(2)(a) (2009).

IV. Ex Post Facto Law.

J.D.P. argues retroactive application of the 2009 registration requirements is an unconstitutional violation of the ex post facto clauses in the United States and Iowa Constitutions. We disagree and adopt the juvenile court’s resolution of this issue:

The Court finds that this issue was determined by the U.S. Supreme Court in *Smith v. Doe*, [538 U.S. 84, 105-06,] 123 S. Ct. 1140, [1154, 155 L. Ed. 2d 164, 185] (2003). . . . [T]he Supreme Court overturned the decision of the Ninth Circuit determining that although the state legislature had intended the Alaska Sex Offender Registration Act (similar to the Iowa Act) to be a non-punitive, civil regulatory scheme, its effects were punitive. The Supreme Court reversed [and ruled] that the registration requirements were a legitimate exercise of the state’s regulatory powers rationally related to a legitimate non-punitive purpose. Therefore, application retroactively did not violate Constitutional prohibitions.

See *State v. Pickens*, 558 N.W.2d 396, 400 (Iowa 1997) (holding chapter 692A is regulatory or remedial, not punitive, and therefore not ex post facto when applied retroactively); *S.M.M.*, 558 N.W.2d at 406 (holding *Pickens* analysis applies to a juvenile’s registration requirements).

V. Cruel and Unusual Punishment.

J.D.P. argues requiring him to register for his lifetime⁴ for an offense committed at age fifteen is a *punishment* “disproportionate to the severity of the

⁴ We note lifetime registration is not a certainty because the statute establishes a modification process. Iowa Code § 692A.128 (2009).

delinquent act” and therefore a violation of the [constitutional] protections against cruel and unusual punishment.

The Iowa Supreme Court, in the context of an ex post facto challenge, has ruled Iowa’s sex offender registration requirement does not constitute punishment, stating:

[T]he court should consider whether a procedure has historically been regarded as punishment. The United States Supreme Court has noted that registration is not considered to be punishment. . . . Cases from other jurisdictions have rejected the argument that sex offender registration has historically been considered to be punishment. . . . We agree.

Pickens, 558 N.W.2d at 399-400. Also in the context of an ex post facto challenge, the United States Supreme Court has ruled Alaska’s registration requirements do not constitute punishment. *Smith v. Doe*, 538 U.S. at 105, 123 S. Ct. at 1153, 155 L. Ed. 2d at 185 (stating the registration requirement is “not so excessive a regulatory requirement as to become a punishment”). We conclude the *Pickens and Smith* analysis is applicable to J.D.P.’s cruel and unusual punishment claim. Registration is not punishment because “the primary purpose of a sex offender registry is not to punish, but to aid the efforts of law enforcement officers in protecting society.” *Pickens*, 558 N.W.2d at 400.

AFFIRMED.

Danilson, J., concurs; Vaitheswaran, P.J., concurs specially.

VAITHESWARAN, P.J. (concurring specially)

I specially concur. The actual language of the amended statute does not unambiguously require J.D.P. to register as a sex offender. That statute requires registration of “[a]ny sex offender including a juvenile offender who is required *to be on* the sex offender registry as of June 30, 2009.” Iowa Code § 692A.125(2)(a) (Supp. 2009) (emphasis added). Although section 692A.2(1) (2007) stated that a person such as J.D.P. who was convicted of an aggravated offense “shall register as provided in this chapter,” he was not required “to be on” the registry as of June 30, 2009 because, pursuant to section 692A.2(6), he was “in a residential treatment program” as of that date. Read literally, the two statutes would allow J.D.P. to fall through the cracks and not be subject to the sex offender registry requirements. This was clearly not the intent. As J.D.P. concedes,

Section 692A.103(4) ([Supp.] 2009) requires a child to register for life and divests the court’s ability to excuse the child from the registry if the child was 14 years of age or older at the time the delinquent act was committed and the court makes a finding that the offense was committed by force or the threat of serious violence.

Given this clearly expressed legislative intent, I agree with the majority’s conclusion that the amended statute applies to J.D.P.