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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001322-MR

BILLY S. JEFFRIES — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 17-CI-01302

JUSTICE AND PUBLIC SAFETY CABINET and COMMONWEALTH OF KENTUCKY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

LAMBERT, JUDGE: Billy S. Jeffries has appealed from the order of the Franklin Circuit Court denying his motion for summary judgment challenging his need to register as a sex offender pursuant to Kentucky's Sex Offender Registration Act (SORA), Kentucky Revised Statutes (KRS) 17.500 *et. seq*. Finding no error, we affirm.

The facts underlying this appeal were the subject of a joint stipulation, which we shall rely on in this opinion. In June 1997, Jeffries was convicted in Shelby Circuit Court (95-CR-00049) for the murder and attempted first-degree rape of a 77-year-old woman. Jeffries was 15 years old when the crimes took place. He was sentenced to 35 years in prison, and he served out his sentence on May 1, 2017. On April 25, 2017, Jeffries registered as a sex offender by completing a Kentucky Sex Offender Registration Form, which listed him as a 20-year registrant. Pursuant to KRS 17.580, his registration information was posted on the public website of the Kentucky State Police. This public Sex Offender Registry website permits members of the public to search for registrants by name, address, or location, and they may ask to be informed if a registrant changes residence. Jeffries currently lives in McCreary County, Kentucky. Several documents were jointly filed, including the final judgment in Jeffries' criminal case, his Sex Offender Registration Form, his current web flyer posted on the Kentucky State Police public website, his discharge notice from the Department of Corrections, and the Sex Offender Registrant Responsibilities form he signed.

On December 18, 2017, Jeffries filed a complaint with the Franklin Circuit Court seeking declaratory and injunctive relief related to his need to register as a sex offender pursuant to SORA. As defendants, he named the Justice and Public Safety Cabinet (the agency responsible for developing and

implementing the system) and the Commonwealth of Kentucky (the entity initiating prosecutions for violations of SORA) (collectively, the Cabinet). Jeffries stated that upon his release from custody in May 2017, he moved in with his wife and her two children in McCreary County. Also upon his release, he was told that he had to register as a sex offender for 20 years and comply with a list of conditions. These conditions included the prohibition from being on school or daycare grounds without written permission of the principal or school board pursuant to KRS 17.545(2), and he claimed that having to notify the officials where his step-children attended school would result in community members being informed of his status as a sex offender. This, he claimed, would negatively affect the children's education. He was unable to participate in any school events involving the children or to assist in parental duties, including picking the children up from school. Jeffries also alleged that he was prohibited from taking photographs of or filming his step-children without his wife's written permission pursuant to KRS 17.546(2). Finally, he stated that his status as a sex offender registrant had made it difficult to find and maintain employment, which was significantly impairing his ability to provide for his family.

For his claims for relief, Jeffries contended that as a youthful offender, SORA's retroactive application to him violated both the Kentucky and United States Constitutions as it was an *ex post facto* law, was cruel and unusual

punishment, and because the registration requirement was not rationally related to a legitimate governmental interest. He requested that SORA be declared unconstitutional as applied to him. In its answer, the Cabinet sought dismissal of Jeffries' complaint.

In March 2018, the parties entered into stipulated facts as set forth above, and a briefing schedule was set. Jeffries filed a motion for summary judgment or to set the matter for a trial, to which the Cabinet responded. On August 6, 2018, the circuit court entered an opinion and order denying Jeffries' motion for summary judgment and entering a judgment in favor of the Cabinet, thereby dismissing Jeffries' complaint. This appeal now follows.

Our standard of review is set forth in *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996), as follows:

> The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, Ky., 833 S.W.2d 378, 381 (1992). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest*, 807 S.W.2d at 480, *citing*

> *Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor . . ." *Huddleston v. Hughes*, Ky. App., 843 S.W.2d 901, 903 (1992), *citing Steelvest, supra* (citations omitted).

"Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

Here, the parties have stipulated to the facts; therefore, the only issues before us involve questions of statutory interpretation, which constitute questions of law:

> This appeal involves the interpretation of a statute. Statutory construction is an issue of law and, accordingly, we review the circuit court's statutory construction *de novo*. *See Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007).
>
> > The primary purpose of judicial construction is to carry out the intent of the legislature. In construing a statute, the courts must consider the intended purpose of the statute —the reason and spirit of the statute—and the mischief intended to be remedied. The courts should reject a construction that is unreasonable and absurd, in preference for one that is reasonable, rational, sensible and intelligent.

> *Commonwealth v. Kash*, 967 S.W.2d 37, 43-44 (Ky. App. 1997) (internal quotation marks and citations omitted). In construing a statute, a court should "use the plain meaning of the words used in the statute." *Monumental Life Insurance Company v. Department of Revenue*, 294 S.W.3d 10, 19 (Ky. App. 2008).

Commonwealth v. Davis, 400 S.W.3d 286, 287-88 (Ky. App. 2013).

The version of KRS 17.510 in effect when Jeffries registered as a sex offender provided as follows:[1]

> (1) The cabinet shall develop and implement a registration system for registrants which includes creating a new computerized information file to be accessed through the Law Information Network of Kentucky.
>
> (2) A registrant shall, on or before the date of his or her release by the court, the parole board, the cabinet, or any detention facility, register with the appropriate local probation and parole office in the county in which he or she intends to reside. The person in charge of the release shall facilitate the registration process.
>
> (3) Any person required to register pursuant to subsection (2) of this section shall be informed of the duty to register by the court at the time of sentencing if the court grants probation or conditional discharge or does not impose a penalty of incarceration, or if incarcerated, by the official in charge of the place of confinement upon release. The court and the official shall require the person to read and sign any form that may be required by the cabinet, stating that the duty of the person to register has been explained to the person. The court and the official in charge of the

[1] The version in effect when Jeffries registered as a sex offender was part of HB 463 with an effective date of June 18, 2011. SORA was next amended on June 29, 2017, shortly after he registered.

place of confinement shall require the releasee to complete the acknowledgment form and the court or the official shall retain the original completed form. The official shall then send the form to the Information Services Center, Department of Kentucky State Police, Frankfort, Kentucky 40601.

(4) The court or the official shall order the person to register with the appropriate local probation and parole office which shall obtain the person's fingerprints, DNA sample, and photograph. Thereafter, the registrant shall return to the appropriate local probation and parole office not less than one (1) time every two (2) years in order for a new photograph to be obtained, and the registrant shall pay the cost of updating the photo for registration purposes. Any registrant who has not provided a DNA sample as of July 1, 2009, shall provide a DNA sample to the appropriate local probation and parole office when the registrant appears for a new photograph to be obtained. Failure to comply with this requirement shall be punished as set forth in subsection (11) of this section.

(5) (a) The appropriate probation and parole office shall send the registration form containing the registrant information, fingerprint card, and photograph, and any special conditions imposed by the court or the Parole Board, to the Information Services Center, Department of Kentucky State Police, Frankfort, Kentucky 40601. The appropriate probation and parole office shall send the DNA sample to the Department of Kentucky State Police forensic laboratory in accordance with administrative regulations promulgated by the cabinet.

(b) The Information Services Center, upon request by a state or local law enforcement agency, shall make available to that agency registrant information, including a person's

fingerprints and photograph, where available, as well as any special conditions imposed by the court or the Parole Board.

(c) Any employee of the Justice and Public Safety Cabinet who disseminates, or does not disseminate, registrant information in good faith compliance with the requirements of this subsection shall be immune from criminal and civil liability for the dissemination or lack thereof.

(6) Any person who has been convicted in a court of any state or territory, a court of the United States, or a similar conviction from a court of competent jurisdiction in any other country, or a court martial of the United States Armed Forces of a sex crime or criminal offense against a victim who is a minor and who has been notified of the duty to register by that state, territory, or court, or who has been committed as a sexually violent predator under the laws of another state, laws of a territory, or federal laws, or has a similar conviction from a court of competent jurisdiction in any other country, shall comply with the registration requirement of this section, including the requirements of subsection (4) of this section, and shall register with the appropriate local probation and parole office in the county of residence within five (5) working days of relocation. No additional notice of the duty to register shall be required of any official charged with a duty of enforcing the laws of this Commonwealth.

(7) If a person is required to register under federal law or the laws of another state or territory, or if the person has been convicted of an offense under the laws of another state or territory that would require registration if committed in this Commonwealth, that person upon changing residence from the other state or territory of the United States to the Commonwealth or upon entering the Commonwealth for employment, to carry on a vocation,

or as a student shall comply with the registration requirement of this section, including the requirements of subsection (4) of this section, and shall register within five (5) working days with the appropriate local probation and parole office in the county of residence, employment, vocation, or schooling. A person required to register under federal law or the laws of another state or territory shall be presumed to know of the duty to register in the Commonwealth. As used in this subsection, "employment" or "carry on a vocation" includes employment that is full-time or part-time for a period exceeding fourteen (14) days or for an aggregate period of time exceeding thirty (30) days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit. As used in this subsection, "student" means a person who is enrolled on a full-time or part-time basis, in any public or private educational institution, including any secondary school, trade or professional institution, or institution of higher education.

(8) The registration form shall be a written statement signed by the person which shall include registrant information, including an up-to-date photograph of the registrant for public dissemination.

(9) For purposes of KRS 17.500 to 17.580 and 17.991, a post office box number shall not be considered an address.

(10) (a) If the residence address of any registrant changes, but the registrant remains in the same county, the person shall register, on or before the date of the change of address, with the appropriate local probation and parole office in the county in which he or she resides.

(b) 1. If the registrant changes his or

her residence to a new county, the person shall notify his or her current local probation and parole office of the new residence address on or before the date of the change of address.

2. The registrant shall also register with the appropriate local probation and parole office in the county of his or her new residence no later than five (5) working days after the date of the change of address.

(c) If the electronic mail address or any instant messaging, chat, or other Internet communication name identities of any registrant changes, or if the registrant creates or uses any new Internet communication name identities, the registrant shall register the change or new identity, on or before the date of the change or use or creation of the new identity, with the appropriate local probation and parole office in the county in which he or she resides.

(d) 1. As soon as a probation and parole office learns of the person's new address under paragraph (b)1. of this subsection, that probation and parole office shall notify the appropriate local probation and parole office in the county of the new address of the effective date of the new address.

2. As soon as a probation and parole office learns of the person's new address under paragraph (b)2. of this subsection or learns of the registrant's new or changed electronic mail address or instant messaging, chat, or other Internet communication name identities under paragraph (c) of this subsection, that office shall forward this information as set forth under subsection (5) of this section.

(11) Any person required to register under this section who knowingly violates any of the provisions of this section or prior law is guilty of a Class D felony for the first offense and a Class C felony for each subsequent offense.

(12) Any person required to register under this section or prior law who knowingly provides false, misleading, or incomplete information is guilty of a Class D felony for the first offense and a Class C felony for each subsequent offense.

(13) (a) The cabinet shall verify the addresses and the electronic mail address and any instant messaging, chat, or other Internet communication name identities of individuals required to register under this section. Verification shall occur at least once every ninety (90) days for a person required to register under KRS 17.520(2) and at least once every calendar year for a person required to register under KRS 17.520(3). If the cabinet determines that a person has moved or has created or changed any electronic mail address or any instant

messaging, chat, or other Internet communication name identities used by the person without providing his or her new address, electronic mail address, or instant messaging, chat, or other Internet communication name identity to the appropriate local probation and parole office or offices as required under subsection (10)(a), (b), and (c) of this section, the cabinet shall notify the appropriate local probation and parole office of the new address or electronic mail address or any instant messaging, chat, or other Internet communication name identities used by the person. The office shall then forward this information as set forth under subsection (5) of this section. The cabinet shall also notify the appropriate court, Parole Board, and appropriate Commonwealth's attorney, sheriff's office, probation and parole office, corrections agency, and law enforcement agency responsible for the investigation of the report of noncompliance.

(b) An agency that receives notice of the noncompliance from the cabinet under paragraph (a) of this subsection:

1. Shall consider revocation of the parole, probation, postincarceration supervision, or conditional discharge of any person released under its authority; and

2. Shall notify the appropriate county or Commonwealth's Attorney for prosecution.

For his first argument, Jeffries contends that requiring him to register under SORA violates state and federal *ex post facto* provisions due to its retroactive application to youthful offenders. The Cabinet, in turn, argues that the issues Jeffries raises have already been addressed by the Supreme Court.

In *Buck v. Commonwealth*, 308 S.W.3d 661 (Ky. 2010), the Kentucky Supreme Court held that the 2006 amendments to SORA did not make the statute punitive in nature and therefore did not violate the *ex post facto* clauses of the Kentucky or United States Constitutions. The *Buck* Court was tasked with evaluating its earlier decision in *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2002), which held that prior versions of SORA did not violate the *ex post facto* clause of the Kentucky or the United States Constitutions in light of its retroactive application.[2] The Court set forth the history of SORA (also known as Megan's Law), which was enacted in 1994 and subsequently amended multiple times. It then explained the applicable law as follows:

> Both the United States Constitution and the Kentucky Constitution prohibit *ex post facto* laws. U.S. Const. art. I, § 10; Ky. Const. § 19(1). An *ex post facto*

[2] The *Buck* Court quoted the following statement from *Hyatt*:

> The Kentucky 1998 and 2000 Sex Offender Registration Statutes are directly related to the nonpunitive goals of protecting the safety of the public. The statutes in question do not amount to a separate punishment based on past crimes.... Any potential punishment arising from the violation of [SORA] is totally prospective and is not punishment for past criminal behavior.

Buck, 308 S.W.3d at 665-66 (Ky. 2010) (quoting *Hyatt*, 72 S.W.3d at 572).

law is any law, which criminalizes an act that was innocent when done, aggravates or increases the punishment for a crime as compared to the punishment when the crime was committed, or alters the rules of evidence to require less or different proof in order to convict than what was necessary when the crime was committed. *Purvis v. Commonwealth*, 14 S.W.3d 21, 23 (Ky. 2000) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798)). The key inquiry is whether a retrospective law is punitive. *Martin v. Chandler*, 122 S.W.3d 540, 547 (Ky. 2003) (citing *California Dept. of Corr. v. Morales*, 514 U.S. 499, 506 n. 3, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995)). *See also Commonwealth v. Baker*, 295 S.W.3d 437, 442 (Ky. 2009), *cert. denied*, ––– U.S. ––––, 130 S.Ct. 1738, 176 L.Ed.2d 213 (2010).

To determine whether a retrospective law is punitive, "we must determine whether the legislature intended to establish a civil, nonpunitive, regulatory scheme, or whether the legislature intended to impose punishment." *Baker*, 295 S.W.3d at 442 (citing *Smith v. Doe*, 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003)). If the legislature intended to impose punishment, then the law is punitive. *Id*. Where the "legislature intended to enact a civil, nonpunitive, regulatory scheme, then we must determine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id*. (internal quotations and citations omitted).

In determining whether a civil, nonpunitive, regulatory scheme is punitive in either purpose or effect, this Court and the U.S. Supreme Court have applied five of the factors discussed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). These factors are "whether, in its necessary operation, the regulatory scheme" (1) has been regarded in our history and traditions as punishment, (2) promotes the traditional aims of punishment, (3) imposes an affirmative disability or restraint, (4) has a rational

> connection to a nonpunitive purpose, or (5) is excessive with respect to the nonpunitive purpose. *Baker*, 295 S.W.3d at 443-44 (citing *Doe*, 538 U.S. at 97, 123 S.Ct. 1140). These factors provide a "useful framework," but are "neither exhaustive nor dispositive." *Doe*, 538 U.S. at 97, 123 S.Ct. 1140.

Buck, 308 S.W.3d at 664-65.

The *Buck* Court recognized that "SORA requires an intervening, independent failure or omission (i.e., failure to register or providing false, misleading, or incomplete registration information) before it becomes punitive. When a statute is not expressly punitive, the relevant question for *ex post facto* purposes is what the statute *requires*—not the consequences of noncompliance." *Id*. at 667. The Court ultimately concluded, "[a]nalyzing SORA and its 2006 amendments in light of what it requires from the registrant, we continue to believe that SORA is a remedial measure with a rational connection to the nonpunitive goal of protection of public safety, and we see no reason to depart from our holding in *Hyatt*." *Buck*, 308 S.W.3d at 667-68.

As to whether juveniles are exempt from registration, our Supreme Court addressed this issue in *Murphy v. Commonwealth*, 500 S.W.3d 827, 832 (Ky. 2016), holding that public policy did not exempt juveniles from registering under SORA. In doing so, the Court analyzed KRS 17.510(6) and 17.510(7) and rejected Murphy's claim that the statute only applied to adults and youthful offenders.

Jeffries specifically argues that SORA was intended to be punitive and therefore violative of the *ex post facto* clauses. He argues that the additional requirements added in amendments to SORA enacted after *Hyatt* was rendered made it punitive. He claims that changes made in statutes limiting how a sex offender may behave expressly stated a punitive intent, making SORA's retroactive application constitutionally impermissible. We rejected this argument in *Stage v. Commonwealth*, 460 S.W.3d 921 (Ky. App. 2014), as Jeffries noted in footnote 6 of his brief, and we decline his request to hold that this and other cases rejecting that argument were wrongly decided.

In *Stage*, we explained:

> In 2011, as part of a large-scale overhaul of Kentucky's criminal code, the General Assembly amended SORA in a bill entitled, "AN ACT relating to the criminal justice system, making an appropriation therefor, and declaring an emergency." *See* 2011 Ky. Acts ch. 2 (hereinafter referred to as "HB 463"). HB 463 modified KRS 17.510 and 17.520 to include a sex offender's "postincarceration supervision" among the existing list of privileges a court may revoke for noncompliance with registration requirements.
>
> On appeal, Stage asserts that the 2011 changes to SORA, namely the title of the act containing them, made SORA punitive and, therefore, impermissibly retrospective. In other words, Stage asks us to conclude that the General Assembly, through HB 463, rejected the Supreme Court's three prior holdings and transformed SORA into a punitive law. We cannot oblige that request.

Stage points emphatically to the General Assembly's use of the term "criminal justice system" in the title of HB 463. He argues that the inclusion of this term, defined by several sources as encompassing the punishment of criminals, signaled a punitive intent behind the changes HB 463 effected. *See Black's Law Dictionary* 431 (9th ed. 2009); *American Heritage Dictionary*, 430–31 (5th ed. 2011). This is a tenuous reading of our General Assembly's intent.

Of course, this Court is bound by the well-established rule that we must assign the words employed in a statute their ordinary meaning. *See, e.g., Lynch v. Commonwealth*, 902 S.W.2d 813, 814 (Ky. 1995). However, the Supreme Court's inclusion of the term "criminal justice system" in the title of HB 463 does not so automatically cast four words added to two statutes in a punitive light. In fact, the Supreme Court has rejected the same argument Stage now makes concerning SORA, holding that the title of an act, while helpful, is not solely determinative of the intent behind it. *See Commonwealth v. Baker*, 295 S.W.3d 437, 443 (Ky. 2009). Hence, we look beyond the title of HB 463 for other evidence of the punitive intent Stage asserts was behind that bill.

An examination of HB 463's changes to SORA reveals no evidence of the General Assembly's wish to transform SORA into a law which punished, as opposed to merely monitored, sex offenders. The identical additions to both KRS 17.510 and 17.520 simply acknowledge that other portions of the same bill made a sex offender eligible for "postincarceration supervision" in addition to other custodial options, and that revocation of that privilege was now possible. Giving these words their plain meaning, the acknowledgment they make does nothing to change the effect of the law or to increase the punishment of a registrant. In short, the addition of these words to these statutes constitutes neither a substantial, nor a punitive change to SORA or its purpose.

> We therefore reject Stage's argument that the title of HB 463 alone is somehow indicative of the General Assembly's punitive intent. At its core, this is a rehashed argument which our Supreme Court has previously rejected—*see Hyatt*, *Nash*, and *Baker*—even doing so in the face of seemingly more compelling indicia of legislative intent than the meager changes Stage now cites. *See Buck*. Accordingly, we conclude that the wisdom and reasoning the Supreme Court has previously employed in response to claims regarding SORA's constitutionality must prevail again.
>
> That the General Assembly employed the term "criminal justice system" in the title of HB 463 indicates little more than the inevitable relationship between that ambitious and sweeping piece of legislation and our system of criminal justice, a system constructed not only for the punishment of criminals but also for the achievement and maintenance of the public's safety. To that end, SORA remains what it was prior to 2011 and what our Supreme Court has always professed it to be: "a remedial measure with a rational connection to the nonpunitive goal of protection of public safety[.]" *Buck* at 667.

Stage, 460 S.W.3d at 924-25. We see no need to alter our decision in this case.

We also reject Jeffries' arguments that SORA is punitive as applied to him or that he should be distinguished and exempted from application of the law. He argued that he should be distinguished because he was transferred to circuit court as a youthful offender due to the homicide rather than the attempted rape conviction, which was the crime that triggered SORA's registration requirement. We find no merit in this argument.

Next, Jeffries argues that SORA violates his due process rights and constitutes cruel punishment. He relies in large part on the affidavits he filed from Dr. Elizabeth Letourneau from Johns Hopkins University related to the efficacy of sex offender registration and notification laws for both adults and juveniles. However, as the Supreme Court held in *Martinez v. Commonwealth*, 72 S.W.3d 581, 584 (Ky. 2002), "[t]he statutory system is a remedial measure designed to *protect and inform the public* and not to punish the offender." (Emphasis added.) This Court extensively addressed both procedural and due process protections in *Moffitt v. Commonwealth*, 360 S.W.3d 247 (Ky. App. 2012), and held that SORA did not violate these protections in that case. We decline to disturb our holding in that case.

For his third and final argument, Jeffries contends that KRS 17.545(2) and KRS 17.546(3)[3] are unconstitutional. KRS 17.545(2) provides:

> No registrant, as defined in KRS 17.500, nor any person residing outside of Kentucky who would be required to register under KRS 17.510 if the person resided in Kentucky, shall be on the clearly defined grounds of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility, except with the advance written permission of the school principal, the school board, the local legislative body with jurisdiction over the publicly owned playground, or the day care director that has been given after full disclosure of the person's status as a registrant

[3] The statutory language at issue is now contained in subsection (2). Because the language in that subsection has not changed, we shall refer to the older version.

> or sex offender from another state and all registrant information as required in KRS 17.500. As used in this subsection, "local legislative body" means the chief governing body of a city, county, urban-county government, consolidated local government, charter county government, or unified local government that has legislative powers.

KRS 17.546(3), in turn, provides:

> No registrant shall intentionally photograph, film, or video a minor through traditional or electronic means without the written consent of the minor's parent, legal custodian, or guardian unless the registrant is the minor's parent, legal custodian, or guardian. The written consent required under this subsection shall state that the person seeking the consent is required to register as a sex offender under Kentucky law.

Jeffries argues that KRS 17.545(2) is akin to banishment, which was addressed in *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009), when the Supreme Court held that sex offender residency restrictions were punitive and therefore unconstitutional. That is not the case in the present appeal, as the statute merely prevents a sex offender from being on school property, a publicly owned playground, or a licensed day care facility without written permission. We find no merit in Jeffries' argument that being in a small community makes a difference in this analysis.

We find persuasive the Cabinet's citation to Ky. OAG 15-003 *2-3 (2015 WL 1523838) (Jan. 30, 2015), in which the Attorney General addressed the application of the statute at issue here:

Regarding KRS 17.545(2), it must first be determined if the statute was intended to impose punishment. Based on the statutory language and the obvious purpose of the law, it is clear that there was no intention to punish convicted sex offenders any further by enacting the day care and school grounds exclusion. Unfortunately, schools and day cares have been a common target of attack throughout the county. Attempting to protect these facilities by simply directing a convicted sex offender to obtain permission prior to admittance onto the specific premises is directly related to nonpunitive goals of protecting the safety of the public. Therefore, KRS 17.545(2) was not intended to impose punishment on sex offenders and the determination that must now be made shifts to whether the statute is so punitive in purpose or effect that it negates the State's goal of deeming the enactment civil.

In *Baker*, the Court focused on five factors when making the determination of whether the regulatory scheme was punitive in effect: (1) has this type of act been regarded in our history and traditions as punishment, (2) does this act promote the traditional aims of punishment, (3) is there an affirmative imposition of disability or restraint, (4) is there a rational connection to nonpunitive purposes, or (5) is the scheme excessive with respect to the nonpunitive purpose. *Comm. v. Baker*, 295 S.W.3d at 443 (Ky. 2009).

Historically, the protection of children in this country has always been a top priority. As such, procedures utilized to help keep kids at school or day care safe have been strongly supported, and we see no indicia of abatement in this historical trend. Therefore, a statutory provision intended to help administrators, teachers, and care providers keep track of who is on campus is not punitive in nature and would not be regarded as such based on our history and traditions of punishment. This system simply furthers the goal of protecting children and those who care for them.

Furthermore, establishing a routine of obtaining permission prior to entering the relevant premises does not promote any traditional aim of punishment. The statute does not contain an absolute bar to ever being present on the grounds of a day care or school. The statute simply requires those in charge be given notice of a sex offender's intention to enter the premises and the chance to review the situation. This procedure firmly supports the State's interest in protecting the public and is not a promotion of traditional punishment.

The next inquiry regarding KRS 17.545(2) is whether it imposes an affirmative disability or restraint. In contrast to having to move from a home bought before a crime or restricting the locations in which one may be able to live, the obligation to request permission to enter onto the premises of a school or day care is minimal. The statute does not require advanced notice prior to every visit to a school or day care; it simply mandates a convicted sex offender to inform the administrators or directors of an applicable facility of their registration status prior to an initial visit and be granted permission. Also, the question of whether the statute is rationally connected to a nonpunitive purpose must be answered in favor of retroactive enforcement. As mentioned above, there is a legitimate interest in protecting children and those working with them at schools and day care facilities. The obligation to obtain permission before entering the relevant premises is rationally connected to a nonpunitive purpose as it keeps employees aware of a convicted sex offender's presence, helps ensure the safety of children, and is minimally taxing on the offender. Furthermore, the process set forth in KRS 17.545(2) does not restrict a sex offender from performing any vital functions nor cause them any extreme inconvenience. "A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith v. Doe*, 538 U.S. 84, 103 (2003).

> Based on the above discussion, the Kentucky Office of the Attorney General is of the opinion that KRS 17.545(2) may constitutionally be applied to sex offender registrants that committed their registrable offenses prior to the enactment of the statute. The law was not meant to be punitive, nor is the enactment so punitive in purpose or effect that it negates the State's intentions of deeming it civil. Therefore, the Kentucky Office of the Attorney takes no issue with the retroactive enforcement of KRS 17.545(2).

And as to the photography restrictions in KRS 17.546(3), these, too, are minimally taxing and serve a non-punitive purpose in protecting children. Both of these statutes also contain exemptions in that a registered offender may request permission to be on school or daycare grounds or to take photographs of children. That permission may be denied does not make the statutes punitive and therefore unconstitutional.

Accordingly, we hold that the circuit court did not err as a matter of law in upholding the constitutionality of SORA, including KRS 17.545(2) and KRS 17.546(3), and granting a judgment in favor of the Cabinet.

For the foregoing reasons, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES:

Graham Gray
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