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IN THE COUNTY COURT, FOURTH JUDICIAL CIRCUIT, NASSAU COUNTY, FLORIDA

CASE NO. 2018-CO-352

STATE OF FLORIDA

vs.

WILLIAM EUGENE WRIGHT

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This cause came on for hearing on Defendant's Motion to Dismiss the Information filed against him, charging him with a violation of Section 19¼-27 of the Nassau County, Florida, Code of Ordinances. On the evidence presented, the Court finds as follows:

A. That on May 8, 2007, the defendant, WILLIAM EUGENE WRIGHT, pled No Contest to one count of Lewd and Lascivious or Indecent Act upon a Child, in violation of Florida Statutes, Section 800.04, and adjudication was withheld by the Court.

B. The Court terminated probation and discharged Defendant from further supervision on June 26, 2012.

C. Defendant has never violated any registration requirements and remains in compliance with all sex offender registration requirements.

D. Defendant, an Honorably-discharged Vietnam Conflict combat veteran, and his wife, Nancy, of over forty (40) years purchased a single-family residential home in Nassau County in June 2018 and moved into the home located at 96041 Piney Island Drive, Fernandina Beach on July 19, 2018.

E. Defendant is a 100% VA-rated, disabled combat Veteran, aged 73 years, with multiple chronic illnesses requiring continued medical care with multiple providers.

F. Defendant relies on a walker for his limited mobility.

G. Defendant lives with his wife, Nancy, and she is his primary caregiver.

H. Defendant properly registered with the Nassau County Sheriff's Office in July 2018, in accordance with the Florida Department of Law Enforcement (FDLE) registration requirements for sexual offenders.

I. Defendant was informally visited by Detective M. F. Murdock several days after occupying the residence on Piney Island Drive. Det. Murdock informed Defendant that by residing within 2500 feet of a school bus stop, Defendant was in violation of Nassau County Ordinance, Section 19 ¼-27, originally adopted as Nassau County Ordinance 2007-26.

J. Defendant was served a Notice to Appear on November 30, 2018, for a single charge of Sexual Offender or Predator Residency Violation pursuant to County Ordinance "2007-34".

K. The State subsequently filed an Information charging Defendant with Sexual Offender or Sexual Predator Residency Prohibition, pursuant to Nassau County Ordinance Section "19.1/4" (sic) on January 31, 2019.

L. Nassau County Ordinance Sections 19¼-26 through 19¼-29, originally adopted as Ordinance 2007-26, was approved by the Nassau County Commission on August 27, 2007, after the date of Defendant's sexual offense.

M. Nassau County Ordinance Section 19¼-27 differs notably from Florida Statute 775.215,[1] commonly known as the State of Florida's sex offender residency restriction statute, in that the county ordinance greatly expands both the (a) type of facilities and (b) the linear distance from facilities that result in prohibited zones for sex offender residency. Subsection (a) of said section 19¼-27 provides as follows:

> "(a) It is unlawful for any person who has been convicted of a violation of F.S. §§794.011 (sexual battery), 800.04 (lewd and lascivious acts by a child), or 847.0145 (selling or buying of minors for portrayal in sexually explicit conduct), as the same may be amended from time to time, or convicted of a similar law of another jurisdiction in which the victim of the offense was less than sixteen (16) years of age, and regardless of whether adjudication of guilt has been imposed or withheld, to establish permanent residence or temporary residence, or otherwise reside within two thousand five hundred (2,500) or less, of any facility as the same as defined herein."

N. "Facilities," as defined in the ordinance, includes school bus stops, as well as some 50 other types of facilities. There are 3,858 school bus stops in Nassau County.

O. Defendant's home is located within 2,500 feet of a school bus stop.

P. That as of late 2019, there were 36,215 non-vacant residential parcels with residential units in Nassau County; (Def. Ex. 3, p.9).

Q. That as of late 2019, at least 35,906 (99.1%) of the residential units in Nassau County would be restricted from residency by the defendant; (Def. Ex. 3, p.9). It is further likely that some or all of the remaining 309 unrestricted units could be considered restricted due to their proximity to other facilities not considered by the study presented by Defendant, Def. Ex. 3.

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[1] Section 775.215(2)(a) provides as follows:

(2)(a) A person who has been convicted of a violation of s. 794.011, s. 800.04, s. 827.071, s. 847.0135(5), or s. 847.0145, regardless of whether adjudication has been withheld, in which the victim of the offense was less than 16 years of age, may not reside within 1,000 feet of any school, child care facility, park, or playground. However, a person does not violate this subsection and may not be forced to relocate if he or she is living in a residence that meets the requirements of this subsection and a school, child care facility, park, or playground is subsequently established within 1,000 feet of his or her residence.

DISCUSSION

Defendant argues that the Nassau County Ordinance, as applied to the defendant herein, violates the Ex Post Facto clause of the United States and Florida Constitutions[2], in that his qualifying offense was committed before the effective date of the ordinance, and the County's ordinance's effects on him are punitive.

In *Smith v. Doe,* 538 U.S. 84 (2003), the Court set out the framework for determining whether a law constitutes a prohibited retrospective punishment: (1) was the legislative intent in enacting the law punitive; (2) if the intention was civil and non-punitive, is the statutory scheme so punitive either in purpose or effect as to negate the [legislature's] intention to deem it civil. In analyzing the effects of a law for purpose of ex post facto analysis, relevant factors include whether, in its necessary operation, the regulatory scheme has been regarded in our history and traditions as a punishment whether it imposes an affirmative disability or restraint, whether it promotes the traditional aims of punishment, and whether it has a rational connection to a non-punitive purpose; *Smith,* supra at p. 97.

This Court does not find that the County's legislative intent was punitive. Indeed, in a companion ordinance regulating holiday activities for sexual offenders, the County stated its legislative intent was to reduce the potential risk of harm to children of the community by limiting the opportunity for sexual offenders and sexual predators to be in contact with unsuspecting children; *Nassau County Code of Ordinances*, Section 19¼ -42.

In *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), the Court set out seven factors to determine whether the effects are sufficiently punishing to negate the legislative non-punitive intent: (1) does the sanction involve an affirmative disability or restraint; (2) has the sanction been historically regarded as a punishment; (3) does the sanction come into play only on a finding of scienter; (4) will the sanction promote traditional aims of punishment - retribution and deterrence; (5) does the sanction apply to behavior that it already a crime; (6) may the sanction be rationally connected to a non-punitive purpose; and (7) does the sanction appear excessive in relation to that alternative purpose; *Mendoza-Martinez,* supra at p. 168-169.

In *Doe v. Miami-Dade County,* 846 F.3d 1180 (11 Circ. 2017), the plaintiffs had challenged the county's 2,500 foot residency restriction. In holding that the plaintiffs' claim stated a plausible cause of action, the Court found (1) that the allegation that the County's 2,500 foot residency restriction ("among the strictest in the nation"), imposed a direct restraint on the plaintiff's freedom to select or change residences, drastically exacerbating transience and homelessness, (2) was excessive in comparison to the ordinance's stated public goal of addressing recidivism, with no evidence that residency restrictions have any impact on recidivism or public safety, (3) failed to consider the individual's risk of recidivism, (4) not only failed to advance but directly undermined the goal of public safety by making categorical assumptions about groups of former sexual offenders, and (5) undermined the offenders' abilities to successfully re-enter society and increased the risk of recidivism by making it more difficult for plaintiffs and others to secure residences, receive treatment and obtain and maintain employment, were sufficient to state a plausible claim that the County's residency restriction was

[2] U.S. Const., Art. I, §10, cl. 1.; Art. I, §10, Fla. Const.

so punitive in effect as to violate the ex post facto clauses of the federal and Florida Constitutions; *Miami-Dade,* supra, at p. 1186.

In the instant case, the defendant presented evidence that residency restrictions such as those adopted by Nassau County do not reduce recidivistic sex crime rates; (Def. Ex. 3, p. 1). However, they do lead to problems for sex offenders attempting to find unrestricted housing, a key factor in the successful re-entry into society; *Id.*

This residency restriction weighs heavily against a finding of a civil, non-punitive effect; *Commonwealth v. Baker,* 295 S.W. 3rd 437, 445 (Ky. 2009)("We find it difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint,"); *State v. Pollard,* 908 N.E.2d 1145, 1150 (Ind. 2099)(restraint was neither minor nor indirect where defendant was no longer allowed to live in house he owned and would be forced to incur the cost of obtaining and relocating to other housing). Mr. Wright would incur a significant restraint as he would be required to leave a home he owns with his wife of forty years, and would be forced to incur additional costs of relocation and purchasing a new home.

As to the second *Mendoza-Martinez* factor, there are three ways the Nassau County ordinance punishes Mr. Wright. First, precluding him from living virtually anywhere in Nassau County (less than 1% of all available housing) is tantamount to banishment, which was a colonial punishment; *Smith v. Doe*, supra, at p. 97. Second, the restriction limits his residential options as if he had remained under penal supervision. Probation is a form of criminal sanction; *U.S. v. Knights,* 534 U.S. 112, 119 (2001); *Pollard,* supra at p. 1151; *Mikaloff v. Walsh,* 2007 WL 2572268 (N.D. Ohio). But a residency restriction is an even more onerous punishment than parole because it is a blanket prohibition that applies for life, as opposed to parole, which is individualized and time-limited. Where, as here, the ordinance imposes conditions comparable to or more onerous than probation or parole, this weighs heavily in favor of a penal finding; *State v. Pollard,* supra at p. 1151.

Finally, the application of the ordinance to Mr. Wright resembles the colonial punishment of public shaming, which intentionally exposed the miscreant to public shaming; *Smith v. Doe,* supra at p. 97-98. The ordinance, as applied to Mr. Wright, forces him to live in full view of the public, every night of every day for the rest of his life, subject to ostracism, vigilantism, and worse, solely because of his past crime; see, *Doe v. Pataki,* 120 F.3rd 1263, 1279.

The ordinance's retributive effect is significant. By imposing a blanket, lifetime restraint based solely on his past crime, the ordinance "begins to look far more like retribution for past offenses than a regulation intended to prevent future ones;" *Comm. v. Baker,* 295 S.W. 3d 437, 444 (Ky. 2009).

The Nassau County ordinance prohibits sexual offenders from residing, i.e., sleeping at night, within 2,500 feet of areas where children may congregate during the day. It does not prohibit them from residing with children, working with children, visiting them at school, daycare, playgrounds, beaches, pools, etc. It does not regulate contact with children. Given the facts that (1) the ordinance keeps offenders from sleeping nearly a half of a mile from where children may gather only when the children are gone; (2) is unrelated to sex offender recidivism; (3) increases the risk of homelessness and recidivism by all offenders; and (4) leads directly to homelessness or outright banishment, there is no rational connection between the ordinance and a civil purpose.

Regarding the final *Mendoza-Martinez* factor, if a residency restriction constitutes an affirmative disability, and resembles a traditional punishment, but makes no individualized assessment in relation to a civil aim, it is excessive in relation to that aim; *Pollard,* supra at p. 1153 (because the ordinance applied equally to persons convicted of sex offenses against children and adults, and failed to consider whether an individual offender posed a danger to anyone, it was excessive in relation to a rational purpose). The Nassau County ordinance applies to persons of whatever age, and regardless of infirmity or even incapacitation. It applies to people who are working hard towards rehabilitation, who require stability in order to refrain from reoffending. It applies to people attempting to reintegrate into family and civil life. It applies to people who have been thoroughly rehabilitated, who represent no risk of harm to any child. Yet it does not apply to sex offenders exempted under Sec. 19¼ -27(d)(1-5),[3] regardless of the virulent risk that some of these may present.

There is the "clearest proof of punishment in the County's ordinance." As noted above, the Commission evinces both civil and penal intent. But the penal effects are unambiguous: (1) Like many other sexual offenders in Nassau County, Mr. Wright will be restrained from living virtually anywhere in the county; (2) at best, the County ordinance resembles probation and parole; at worst, outright banishment and public shaming; (3) while the Commission invokes deterrence, its focus on unpunished crimes, both past and future, betrays a retributive animus; (4) the sole basis for the restriction is a criminal conviction; (5) most of the enumerated crimes require scienter; (6) there is no rational connection between the ordinance, which regulates only where sexual offenders stay at night, and forces them into the streets or out of the county, thereby increasing the risk of recidivism, and defeats the goal of child protection; and (7) even if there were a rational connection, the ordinance is excessive in banishing Mr. Wright to less than one percent of available housing in Nassau County without any regard to his individual risk, or lack thereof.

Mr. Wright's offense was committed many years ago, and he has paid his debt to society. He is well into his 70's, is infirm, requires a walker for limited mobility, requires frequent medical treatment at clinical facilities, and relies on his wife of over 40 years as his caregiver. His offense was committed prior to the County's adoption of Section 19¼-27. Given the weight of its penal effects, the ordinance as applied to Mr. Wright violates the ex post facto clause of the United States Constitution. See *Comm. v. Baker*, supra at p. 446; *Pollard,* 908 N.E.2d at 1153 ("Restricting the residence of offenders based on conduct that may have nothing to do with crimes against children, and without considering whether a particular offender is a danger to the general public, the statute exceeds its non-punitive purposes.").

In enacting Section 775.215, Florida Statutes, the Florida legislature expressed concern that its statutory residency restrictions could be viewed as punishment, and therefore that the restrictions could violate the ex post facto clauses of not only the federal but the state

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[3] The five exemptions are: (1) the person established and registered the residency prior to the effective date of the ordinance; (2) the person was a minor when he/she committed the offense and was not convicted as an adult; (3) the person is currently a minor, residing in a permanent residence with a parent or guardian, which said residence was established and registered prior to the effective date of the ordinance; (4) the facility located within the proscribed distance was established after the person established his/her residence; and (5) the person is convicted of a subsequent sexual offense, as an adult after lawfully residing at a registered residence within the proscribed distance of a facility.

constitution. See Senate Staff Analysis to Senate Bill 120, Ch. 2004-55, Laws of Florida.[4] For that reason, it deliberately exempted sex offenders whose crimes preceded enactment of the state law.

In the instant case, Mr. Wright was charged with, pled no contest to, had adjudication withheld, and apparently served the sentence for a crime qualifying him as an offender against children before the Nassau County residency restriction ordinance was enacted. This Court concludes that as applied to Mr. Wright, the ordinance violates the prohibition on ex post facto laws contained in the U.S. Constitution because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed. Had the County exempted from its ordinance sex offenses that occurred prior to its effective date, it may have withstood this constitutional challenge.

In consideration of the above, it is

ORDERED and **ADJUDGED:**

1. That Nassau County Code Section 19¼-27 is hereby declared unconstitutional, in its application to Defendant, WILLIAM EUGENE WRIGHT.

2. The Information filed herein against WILLIAM EUGENE WRIGHT is DISMISSED.

DONE and **ORDERED** in Fernandina Beach, Nassau County, Florida, this 24th day of April, 2020.

Wesley R. Poole
County Judge

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[4] "It can be argued that a prohibition on where someone can live constitutes punishment under the ex post facto clause of either the state or federal constitutions. No court has directly addressed the issue. If a court were to hold that a restriction on where a person can live is punishment, and that a school bus stop is not already included in the general category of places where children regularly congregate, retrospective application of this condition to conditional releasees would violate the ex post facto clauses.

Courts have held that provisions requiring the registration of certain sexual offenders are merely regulatory and therefore not punishment under the ex post facto clause. See, e.g., Simmons v. State, 753 So. 2d 762, 763 (Fla. 4th DCA 2000). If a court were to hold that restrictions on living location were regulatory, or that a school bus stop is already included in the general category of places where children regularly congregate, it would find no ex post facto violation.

These ex post facto concerns relate only to the provisions of Section 1 of the bill. By its terms, Section 2 applies only to persons who commit qualifying offenses on or after October 1, 2004."