YEAR 2005 CASE SUMMARIES

By
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Sex offender registration statute does not constitute cruel and unusual punishment. [In the Matter of D.L.] (05-2-03A)

On February 23, 2005, the Tyler Court of Appeals held that the sex offender registration statute does not constitute cruel and unusual punishment when applied to juveniles because it is nonpunitive in both intent and effect.

05-2-03A. In the Matter of D.L., No. 12-03-00071-CV, 2005 Tex.App.Lexis 1447 (Tex.App.– Tyler 2/23/05).

Facts: A jury of the County Court at Law no. 1 of Gregg County, Texas, found that defendant juvenile had committed six acts of aggravated sexual assault involving five victims and that he used or exhibited a deadly weapon during one of the incidents. He was sentenced to 10 years of probation and was required to register as a sex offender pursuant to Tex. Code Crim. Proc. Ann. ch. 62. Defendant appealed arguing that ch. 62 was unconstitutional on its face under the Eighth Amendment prohibition against cruel and unusual punishment

Held: Affirmed

Opinion Text: The court found that, as applied to juveniles, the registration procedure was nonpunitive in both intent and effect and therefore could not constitute cruel and unusual punishment. Any "shaming" that occurred from registration was the result of community response and not the requirement itself. Therefore, any public embarrassment of juvenile registrants could not be considered an affirmative disability or restraint under the intent-effects test. The court also found no error in denying defendant's motion to sever the six counts for separate trials, reasoning that the legal elements of proof were similar for each victim, the cases shared common witnesses and fact patterns, and defendant made no showing that evidence of the extraneous offenses would not have been admissible in severed cases. In addition, an officer's testimony regarding a polygraph test taken by defendant's sister did not result in reversible error, and the evidence was sufficient to find that defendant used a knife in a manner making it a deadly weapon.

A jury found that D.L., a juvenile, had committed six acts of aggravated sexual assault against five different victims and that he used or exhibited a deadly weapon during one of the incidents. He was sentenced to ten years of probation and was required to register as a sex offender pursuant to Chapter 62 of the Texas Code of Criminal Procedure. On appeal, D.L. raises five issues relating to cruel and unusual punishment, the trial court's denial of his motions for severance and mistrial, the terms of his community supervision, and the sufficiency of the evidence to support the deadly weapon finding. We affirm.

Around the first of April in 2002, C.L. was sleeping with his grandmother, M.L. In the middle of the night, M.L. was awakened by C.L., who was "on all fours," still asleep, and crying out: "[B.S.], help me! Stop! Stop! [D.L.], you're hurting me! Stop it! Get off of me." C.L. was approximately four years old at the time.

The next morning, C.L.'s [*2] grandmother asked him if somebody "had been messing with him." C.L. told his grandmother that D.L. "put his thing up my ass. I was crying. I was trying to get away." Later in the day, M.L. questioned B.S. and S.L., two of C.L.'s older cousins, about whether they had "fooled" with C.L. The boys went outside for a short time. Upon their return, S.L. stated that it was D.L. and that D.L. "got both me and [B.S.]."

M.L. reported the information to the Gregg County Sheriff's Office. Detective Tim Bryan, the investigator who spoke to M.L., notified Child Protective Services and also set up interviews for C.L., S.L., and B.S. at the Child Advocacy Center of East Texas. In separate interviews, each child restated his allegations against D.L. At least one of the children told the interviewer that D.L. had also sexually assaulted another cousin, C.H., and a neighbor, R.H. All of the alleged victims were under the age of fourteen.

A grand jury certified the State's third amended petition in which it alleged that D.L. had engaged in delinquent conduct by committing aggravated sexual assault against C.H., S.L., B.S., C.L., and R.H. *See TEX. PEN. CODE ANN. § 22.021(a)(2)(B)* [*3] (Vernon Supp. 2004-2005) (aggravated sexual assault occurs where sexual assault is committed against a person who is younger than fourteen). The State also alleged that D.L. used or exhibited a deadly weapon, a knife, during the incident involving R.H. The matter proceeded to a jury trial. The jury found D.L. guilty on all counts and made a deadly weapon finding. D.L. was sentenced to probation for ten years and removed from his home. By agreement of the parties, D.L. was placed in the managing conservatorship of the Texas Department of Protective and Regulatory Services, who placed D.L. at a juvenile sex offender treatment facility. He was also required to register as a sex offender. This appeal followed.

CRUEL AND UNUSUAL PUNISHMENT

Chapter 62 of the Texas Code of Criminal Procedure prescribes the registration procedure for persons convicted of sex-related offenses. The requirements of Chapter 62 apply to juveniles. *TEX. CODE CRIM. PROC. ANN. art. 62.12(b)(1)* (Vernon Supp. 2004-2005). In his first issue, D.L. argues that Chapter 62 is unconstitutional on its face as a violation of the *Eighth Amendment* prohibition against cruel and unusual [*4] punishment for a juvenile**.** n1 *See U.S. CONST. amend. VIII*. The State counters that the reporting requirement is not punitive and therefore cannot constitute cruel and unusual punishment.

n1 D.L. did not raise this issue in the trial court. However, a facial challenge to the constitutionality of a statute may be raised for the first time on appeal. ***In re B.S.W.****, 87 S.W.3d 766, 771 (Tex. App.-Texarkana 2002, pet. denied)*.

A statute is presumptively constitutional. ***Barshop v. Medina County Underground Water Conservation Dist.****, 925 S.W.2d 618, 629, 39 Tex. Sup. Ct. J. 858 (Tex. 1996)*. If possible, we interpret a statute in a manner that renders it constitutional. ***Id***. The burden of proof is on the party challenging the presumption of constitutionality. ***Gen. Servs. Comm'n v. Little-Tex Insulation Co., Inc.****, 39 S.W.3d 591, 598, 44 Tex. Sup. Ct. J. 397 (Tex. 2001)*. The party raising a facial challenge must demonstrate that the statute always [*5] operates unconstitutionally. ***Wilson v. Andrews****, 10 S.W.3d 663, 670, 43 Tex. Sup. Ct.*

J. 220 (Tex. 1999). In other words, the party must establish that no set of circumstances exists under which the statute would be valid. ***In re B.S.W.**, 87 S.W.3d at 771*.

Constitutional Analysis

It is rudimentary that the Chapter 62 reporting requirements cannot be cruel and unusual punishment when applied to juveniles if the requirement is not punishment for constitutional purposes. *See **Ex parte Robinson**, 116 S.W.3d 794, 797 (Tex. Crim. App. 2003)*. [HN6] Whether the provisions of a particular statute constitute punishment for constitutional purposes can be answered by application of what is known as the "intent-effects" test. ***Rodriguez v. State**, 93 S.W.3d 60, 67 (Tex. Crim. App. 2002)*.

Under the "intent-effects test," a reviewing court must first ask whether the legislature intended the statute to be a criminal punishment. ***Id.*** If that question is answered in the negative, the court must then examine "whether the statutory scheme [is] so punitive either in purpose or effect as to transform what was clearly intended [*6] as a civil remedy into a criminal penalty." ***Id.*** (citing ***Hudson v. United States**, 522 U.S. 93, 99, 118 S. Ct. 488, [493], 139 L. Ed. 2d 450 (1997))*. The manifest intent of a statute will be rejected only where the party challenging the statute provides the "clearest proof" that the statute is actually criminally punitive in operation. ***Rodriguez**, 93 S.W.3d at 67* (citing ***Kansas v. Hendricks**, 521 U.S. 346, 361, 117 S. Ct. 2072, [2082], 138 L. Ed. 2d 501 (1997))*.

To evaluate whether the effects of a statute are criminally punitive, courts generally look to the factors set forth by the Supreme Court in ***Kennedy v. Mendoza-Martinez**, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)*. ***Rodriguez**, 93 S.W.3d at 68*. Those factors include (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has traditionally been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment--retribution and deterrence; (5) [*7] whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable to it; and (7) whether it appears excessive in relation to the alternative purpose assigned. ***Id.*** (citing ***Kennedy**, 372 U.S. at 168-69, 83 S. Ct. at 567-68*).

The court of criminal appeals has twice considered whether certain provisions of Chapter 62 are punitive in effect. In ***Rodriguez***, the court held, after applying the ***Kennedy*** factors, that certain 1997 amendments were nonpunitive. ***Rodriguez**, 93 S.W.3d at 67-68*. In addressing an *Eighth Amendment* challenge the following year, the court concluded that "the 1999 version of the [sex offender registration program], like the 1997 version, [was] nonpunitive in both intent and effect" and therefore did not constitute cruel and unusual punishment. ***Ex parte Robinson**, 116 S.W.3d at 797-98* ("We have already thoroughly applied the ***Kennedy*** factors to the 1997 version of the [sex offender registration program] and found it nonpunitive in effect.").

D.L. points out that these cases dealt [*8] with adult offenders and whether Chapter 62 constitutes cruel and unusual punishment when applied to juveniles is an open question. D.L. argues that juveniles are often treated differently from adults in our laws. He states that, based upon the differences in the maturity and culpability of juveniles and adults, the practice of "shaming" juvenile sexual offenders by public registration is inconsistent with evolving standards of decency in a civilized society. Consequently, he concludes, when applied to juveniles, Chapter 62 is cruel and unusual punishment.

We recognize that children who violate the law are frequently treated less severely than adults who commit the same violation. *See **In re M.A.H.**, 20 S.W.3d 860, 865 (Tex. App.-Fort Worth 2000, no pet.)*. That policy is especially evident in cases such as the one at hand where, although a juvenile commits a

crime that would be a first-degree felony if committed by an adult, the juvenile matter, subject to certain exceptions not applicable here, is adjudicated under the Texas Juvenile Justice Code. *See TEX. FAM. CODE ANN. § § 51.01-61.107* (Vernon 2002 & Supp. 2004-2005). However, the [*9] legislature clearly intended to subject juveniles adjudicated for sexually-related offenses to the mandates of the registration and reporting provisions. *See TEX. CODE CRIM. PROC. ANN. art. 62.12(b)(1)*. Therefore, as previously stated, D.L. cannot succeed in his challenge here unless he shows that the public registration requirements of Chapter 62 always constitute cruel and unusual punishment when applied to juveniles. D.L.'s first step in meeting that burden is to show that these requirements are punitive. *See **Rodriguez**, 93 S.W.3d at 67*.

In considering D.L.'s issue, we have carefully reviewed the analysis in ***Rodriguez***. We iterate that we must presume the legislature acted in a constitutionally sound fashion when it enacted Chapter 62. ***Id.** at 69*. D.L. has not presented any argument to rebut this presumption. Therefore, as to the first prong of our inquiry, legislative intent, we must presume that the legislature intended Chapter 62 to be civil and remedial, and not criminal or punitive, in relation to the claim D.L. asserts here. *See **id.*** As to the second prong, punitive effect, [*10] D.L. does not challenge the ***Rodriguez*** analysis, but merely asserts that Chapter 62 creates a practice of "shaming" juveniles who are required to register as sex offenders. We interpret this statement as a reference to the first ***Kennedy*** factor: whether the reporting requirement involves an affirmative disability or restraint.

In ***Rodriguez***, the court of criminal appeals stated that when applying this factor, the question is whether the provisions of the statute itself, as opposed to the speculative response of the community, work an affirmative disability or restraint. ***Id.** at 71*. Any "shaming" that occurs from registration as a sex offender is the result of community response and not Chapter 62 itself. Therefore, any potential public embarrassment of juvenile registrants cannot be considered an affirmative disability or restraint. Moreover, we conclude that the ***Rodriguez*** analysis and application of the remaining ***Kennedy*** factors would not differ in the case at hand. Therefore, we hold that, as applied to juveniles, Chapter 62 is nonpunitive in both intent and effect. Because Chapter 62 is not punitive, it cannot [*11] constitute cruel and unusual punishment. D.L.'s first issue is overruled.

[TEXT OMITTED]

Conclusion: Having overruled D.L.'s first, second, third, fourth, and fifth issues, the judgment of the trial court is ***affirmed***.

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