YEAR 2005 CASE SUMMARIES

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

Chapter 62 (sex offender registration statute) held constitutional as applied to juveniles. [In the Matter of D.L.](05-3-05A)

On February 23, 2005, the Tyler Court of Appeals held that, as applied to juveniles, the registration procedure was nonpunitive in both intent and effect and therefore could not constitute cruel and unusual punishment.

05-3-05A. In the Matter of D.L., ___S.W.3d ___, No. 12-03-00071-CV, 2005 Tex.App.Lexis 1447 (Tex.App.— Tyler 2/23/05).

Facts: 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. Defendant argued that ch. 62 was unconstitutional on its face under the Eighth Amendment prohibition against cruel and unusual punishment.

Held: Affirmed

Opinion: 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)*. 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 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) 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 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 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, 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 constitute cruel and unusual punishment.

Conclusion: D.L.'s first issue is overruled.