MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Stephan Peele,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

August 4, 2021

Court of Appeals Case No. 21A-CR-726

Appeal from the Marion Superior Court

The Honorable Shatrese M. Flowers, Judge

The Honorable James K. Snyder, Magistrate

Trial Court Cause No. 49G02-0205-PC-123251

Crone, Judge.

Case Summary

[1] Stephan Peele[1] appeals the denial of his petition for removal from the sex offender registry, claiming that he was retroactively subjected to a lifetime registration requirement in violation of Indiana's prohibition against ex post facto laws. We affirm.

Facts and Procedural History

[2] Peele was born in February 1964. In the late 1980s, he was charged in Shelby County with six counts of child molesting, two as class B felonies, three as class C felonies, and one as a class D felony. Although the record from Shelby County could not be found either on microfilm or in paper form, it appears that Peele was convicted on all counts. *See* Appellant's Supp. App. Vol. 2 at 2 (Peele's verified petition for removal from the sex offender registry averring same). In April 1989, Peele was sentenced to twelve years, seven of which were executed.

[3] In 2002, the State charged Peele in Marion County with two counts: class B felony sexual misconduct with a minor "[o]n or between September 4, 2000 and November 22, 2001" and class B felony sexual misconduct with a minor "[o]n or between November 23, 2001 and December 9, 2001[.]" Appellant's Amended App. Vol. 2 at 21. The underlying allegations reflect an ongoing

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[1] The record includes two spellings of Peele's first name. As best we can discern, he actually spells his name Stephan rather than Stephen.

sexual relationship between Peele and a fourteen- to fifteen-year-old girl who lived across the hall from him. On March 20, 2003, in exchange for the dismissal of both class B felony counts, Peele pled guilty by plea agreement to an amended count of class C felony sexual misconduct with a minor "[o]n or between September 4, 2000 and November 22, 2001[.]" *Id*. at 35. Peele's plea agreement stated in pertinent part, "Pursuant to IC 5-2-12, upon conviction or upon release from any incarceration, Defendant shall register as a convicted sex offender with local law enforcement … and shall comply with all requirements of said statute[.]" *Id*. at 32. Peele was sentenced to eight years, with five years executed in the Department of Correction (DOC) and the remainder suspended to probation.

[4] Effective July 1, 2001, our legislature amended the Indiana sex offender registration statutes, collectively referred to as the Sex Offender Registration Act (SORA), to require lifetime registration for certain sex and violent offenders, who previously had been subject to registration for ten years. In August 2004, Peele was released from incarceration and placed in a community transition program. His name was added to the sex offender registry on June 10, 2005. In July 2007, the DOC informed Peele that he was required to register as a sex offender for life.

[5] In February 2019, Peele filed a petition for removal from the sex offender registry pursuant to Indiana Code Section 11-8-8-22(c), claiming that he had completed ten years of registration and that the allegedly retroactive application of the lifetime registration requirement would violate Indiana's Ex Post Facto

Clause. The State filed a motion to dismiss for lack of subject matter jurisdiction, which the trial court granted. Peele filed a motion for clarification and a motion to correct error, both of which were denied. He filed a notice of appeal, and another panel of this Court reversed, determining that the trial court erred in dismissing Peele's petition for lack of subject matter jurisdiction. *Peele v. State*, 141 N.E.3d 838, 844 (Ind. Ct. App. 2020), *trans. denied*. The panel held that the trial court had subject matter jurisdiction over his petition. The panel did not issue a ruling on the merits of his ex post facto claim but remanded for that purpose. *Id*.

[6] In April 2021, the trial court issued an order denying Peele's petition on the merits. Peele now appeals. Additional facts will be provided as necessary.

Discussion and Decision

[7] In 1994, our legislature adopted "Zachary's Law," the first iteration of SORA. Ind. Code Ch. 5-2-12 (repealed and recodified at Ind. Code Ch. 11-8-8). Before the 2001 amendments to SORA were enacted, sex and violent offenders were required to register for ten years following their release from a penal facility, community transition program, or community corrections program, or from their placement on parole or probation. Ind. Code § 5-2-12-13 (repealed and recodified as Ind. Code § 11-8-8-19). In 2001, the General Assembly amended the statute to include a lifetime registration requirement for certain sex or violent offenders. The lifetime registration requirement became effective July 1, 2001, and reads, in pertinent part:

> A sex and violent offender who is convicted of at least two (2) unrelated sex and violent offenses that were committed: (1) when the person was at least eighteen (18) years of age; and (2) against victims who were less than eighteen (18) years of age at the time of the crime is required to register for life.

Ind. Code § 5-2-12-13(e) (2001) (now Ind. Code § 11-8-8-19(e) (the SORA amendment)).

[8] We generally apply an abuse of discretion standard when reviewing the trial court's ruling on a petition to remove an offender from lifetime registration under SORA. *Cundiff v. State*, 66 N.E.3d 956, 958 (Ind. Ct. App. 2016). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and reasonable inferences supporting the petition for relief. *Id*. As the party seeking to be removed from the sexual offender registry, Peele bore the burden of proving his grounds for relief by a preponderance of the evidence. Ind. Code § 11-8-8-22(h).

[9] Peele maintains that applying the SORA amendment to him would amount to retroactive application in violation of Indiana's Ex Post Facto Clause. Article 1, Section 24 of the Indiana Constitution reads, in relevant part: "No ex post facto law … shall ever be passed." The Ex Post Facto Clause forbids laws that impose punishment for an act not otherwise punishable at the time it was committed or impose additional punishment for an act already proscribed at the time. *Harlan v. State*, 971 N.E.2d 163, 167 (Ind. Ct. App. 2012). "The policy underlying the Ex Post Facto Clause is to give effect to the fundamental principle that persons have a right to fair warning of that conduct which will

give rise to criminal penalties." *McVey v. State*, 56 N.E.3d 674, 678 (Ind. Ct. App. 2016) (quoting *Gonzalez v. State*, 980 N.E.2d 312, 316 (Ind. 2013)).

[10] Peele maintains that there is no evidence that he committed the Marion County sex offense on or after the effective date of the SORA amendment, July 1, 2001, and therefore it cannot be applied to him retroactively. As previously mentioned, the charging information for the amended count of class C felony sexual misconduct with a minor alleges that the offense occurred "*[o]n or between* September 4, 2000 and November 22, 2001[.]" Appellant's Amended App. Vol. 2 at 35 (emphasis added). These dates straddle the effective date of the SORA amendment. The trial court found that the date range listed in the information did not provide enough specificity as to when Peele committed the offense but ultimately concluded that no ex post facto violation occurred.

[11] Peele's case certainly is not the first case involving a charging information that lists dates straddling the effective date of SORA or its amendments. For example, in *Harlan*, the petitioner sought relief from registration as a sexual violent predator (SVP). 971 N.E.2d at 169. He admitted during his guilty plea hearing that he had committed one of his sex crimes "between [a date that preceded the SVP statute] *through and including* [a date after the effective date of the statute.]" *Id*. (emphasis added). As a result, the *Harlan* court rejected the petitioner's ex post facto claim, specifically holding that he had admitted to having committed one of his sex crimes after SORA had taken effect and therefore suffered no ex post facto violation. *Id*.

[12] In *McVey*, 56 N.E.3d at 676, the defendant unsuccessfully petitioned to have his name removed from the sex offender registry. Like Peele, McVey was charged based on events that occurred during a range that straddled the effective date of the 2001 SORA amendment, i.e., "between October 1998 and August 2001." *Id*. Four of McVey's five sex offense convictions were either merged before sentencing or vacated during post-conviction proceedings, and the evidence adduced during his post-conviction proceedings showed that the one remaining conviction was based on conduct that occurred between March and May 2001. *Id*. at 678-79. The *McVey* panel therefore held that the Ex Post Facto Clause prohibited the retroactive application of the lifetime-registration requirement to McVey. *Id*. at 679.

[13] Here, Peele asserts that there is no evidence that he committed his most recent offense *after* the effective date of the lifetime registration amendment, i.e., on or between July 1 and November 22, 2001. However, we remind him that it is he, not the State, that bears the burden of proof – by a preponderance of evidence. Ind. Code § 11-8-8-22(h). This means that he bore the burden of showing that it was more likely than not that he committed his most recent offense *before* July 1, 2001. The transcript of his Marion County guilty plea hearing could not be located, and, per agreement, there was no hearing conducted on his petition for removal from the sex offender registry. The record includes no sworn testimony from Peele concerning the date(s) of his sexual misconduct with his minor victim. When he filed his verified petition for removal, he attached as Exhibit B the probable cause affidavit (PCA), which included the sworn

testimony of a detective that the victim reported that she had an "ongoing sexual relationship" with Peele that involved "engag[ing] in sexual intercourse at … Peele's apartment." Appellant's Amended App. Vol. 2 at 22. The victim reported that the relationship began shortly after she moved into Peele's apartment building in August of 2000 and that "the last time … Peele had sex with her was approximately two weeks prior to being evicted," which occurred "in December 2001." *Id*.

[14] We agree with Peele that in a criminal proceeding, such statements in a PCA are allegations and often are fraught with hearsay concerns. However, the current proceeding is not subject to the rigorous standard of proof of a criminal action, and the burden is not on the State. Peele himself submitted the PCA as an exhibit attached to his petition and therefore forfeited any hearsay argument. The fact that Peele pled guilty to only one count does not mean that he can rely on that count having represented one of the sexual encounters early in the relationship.

[15] Simply put, Peele did not meet his burden of demonstrating that his only act(s) of sexual misconduct with his minor victim, charged as "[o]n or between September 4, 2000 and November 22, 2001," occurred before July 1, 2001. As such, he has failed to carry his burden of showing an ex post facto violation, and the trial court did not abuse its discretion in denying his petition for removal from the sex offender registry. Accordingly, we affirm.

[16] Affirmed.

Riley, J., and Mathias, J., concur.