IN THE SUPREME COURT OF IOWA

No. 23-0005

JOHN FELLER,

Petitioner-Appellant,

v.

STATE OF IOWA,

Respondent-Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR DUBUQUE COUNTY
HONORABLE MICHEAL J. SHUBATT, JUDGE

PETITIONER-APPELLANT'S FINAL REPLY BRIEF

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CERTIFICATE OF SERVICE

On October 18, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon the Petitioner-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State

STATE STATUTES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I: THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING JOHN FELLER'S APPLICATION FOR MODIFICATION

Fortune v. State, 957 N.W.2d 696 (Iowa 2021)

Becher v. State, 957 N.W.2d 710 (Iowa 2021)
Evansv.State, 2022 WL 3907741(Iowa Ct. App. Aug. 31,2022)
Fortune v. State, 957 N.W.2d 696 (Iowa 2021)
Newton v. Iowa Dept. of Public Safety, 805 N.W.2d 398 (Iowa Ct. App. 2011)
State v. Buck, , 2022 WL 951067 (Iowa Ct. App. Mar. 30, 2022)
State v. Larvick, , 2022 WL 610361(IowaCt. App. March 2, 2022)
State v. Oltrogge, 2022 WL 2824774 (Iowa Ct. App. July 20, 2022)

ROUTING STATEMENT

John Feller asks that the Supreme Court retain this case. The State did not respond to the reasons given by Feller for retention.

In April, 2021 the Iowa Supreme Court decided Fortune v. State, 957 N.W.2d 696 (Iowa 2021) and Becher v. State, 957 N.W.2d 710 (Iowa 2021). Those cases significantly clarified the 2009 law with regard to sex offender modification cases, such as this one, brought under 692A.128.

The Iowa Supreme Court held that district courts were given some discretion to deny relief, even when the offender satisfied the threshold criteria set out in the statute. The Supreme Court however clearly limited that discretion. Any rejection of an application has to be supported by substantial evidence of a substantial and current public safety risk. Fortune v. State, 957 N.W.2d 696, 706 (Iowa 2021) Unfortunately despite the limiting language in the Supreme Court cases, some district courts are testing the limits of that discretion. In cases like this one, some judges are finding significant public safety risks where almost nothing is shown.

See Evans v State, 2022 WL3907741 (Iowa Ct. App. August 31, 2022). One judge recently denied relief, saying he had discretion and did not really have to consider case law. (See pending case of Walker v. State, 23-1480 where the order was dated September 7, 2023).

In Feller's case, his crime was against a step daughter. She had a much younger sister, who is Feller's biological daughter. After Feller got out of prison, with permission from both his parole officer and the girl's mother, he began writing to her. Sometimes, with her mother's knowledge, she would write back, even though there is no suggestion that they ever physically met. At some point the daughter stopped opening the letters. Some of those unopened letters were opened by family and placed into the record at the hearing on the modification request. That is it.

The public safety concern, accepted by the judge, was that Feller periodically sent letters or cards to his biological daughter. He did this after getting permission from his parole officer and the girl's mother. No one ever told him to stop. In the past few years the daughter has not opened the communications. Feller has had no contact with her other than sending the letters.

It is hard to understand how this concern amounts to substantial evidence of substantial current public safety concern.

Retention is needed to clarify for district judges that the discretion in these cases is in fact limited.

Retention is also needed to address an apparent conflict between Court of Appeals cases. Contrast Larvick v State, 2022 WL 610361 (Iowa Ct. App. March 2, 2022) and Evans v State, 2022 WL3907741 (Iowa Ct. App. August 31, 2022) (denying modification) with State v Buck, 2022 WL 951067 (Iowa Ct. App. March 30, 2022) and State v Oltrogge, 2022 WL 2824774 July b20, 2022) (reversing the denials of relief.)

Purposes of a Reply Brief

In any reply brief, it is appropriate to do several things. First, the brief can update the case law if there have been any changes in the time since the original brief. There is no such new law.

Second, the brief can point out the places in the State's brief where there is an agreement as to certain points, perhaps because the matter was not contested by the State on appeal.

STATEMENT OF THE CASE

Nature of the Case:

There is no disagreement as to the nature of the case.

Course of Proceeding:

There is no disagreement about the procedural history of the modification case.

Some comment is needed about the course of proceeding in the criminal cases. This was addressed by Feller in several places in his brief. See pages 15-17 and pages 46-48. There was no response at all by the State to this point. It had also been ignored by the District Court.

When Feller was sentenced in 2011, he was sentenced in two different cases. Exhibit 16; App. p.99 The two cases involved the same victim. They involved the same allegations, but were intended to cover different acts within the same time frame. Compare the two Trial Informations; Exhibits 10 and 13; App. p. 96 & p.102 The Minutes from the two cases were identical.

It turns out that a plea agreement had been reached before the filing of the second case. Feller would plead to two different counts of Lascivious Acts, the D felony, covering different events. Ex. 15; App. p. 98 This was supposed to be handled by amending the original Trial Information, adding a new Count. Instead, apparently when the prosecutor in the case was on vacation, the additional charge was added, in the form of a brand new case with a separate case number. See the letter to Feller from his trial attorney. Ex. 20; App. p. 91

As none of the parties at the time knew of the potential problem, there was no Motion to consolidate the two cases. The cases preceded first to a guilty plea,

and then, the sentencing. What is significant is that both of the charges he pled to were for offenses that would only carry 10 years on the registry. Neither offense was for an "aggravated offense, " as defined in 692A.101(1)(a). An aggravated offense carries lifetime on the registry, even if it is a first offense requiring registration. See 692A.106(5).

Had they been charged in a single amended Trial Information, the registration length for Mr. Feller would have been 10 years. Since he first registered in January, 2014, he would have less than one year left had that been his duration of registration.

Unfortunately, for Feller, there was an obscure provision of Chapter 692A that talks about when two sex offenses should be regarded as a repeat sex offense. See 692A.102(6) The provision was upheld by the Court of Appeals in Newton v. Iowa Dept. of Public Safety, 2011 WL 3480993, at *1 (Iowa App.,2011). The provision says that offenses are regarded as two offenses if they have separate case numbers. If you have two offenses requiring registration, charged in separate case numbers, you have to register for life.

This could have been avoided by just formally consolidating the cases into one case. That did not happen.

This was mentioned because Feller believes that the legislative determination than an offense is not an aggravating offense should be a relevant factor in the balance of factors in a modification case.

STATEMENT OF FACTS

The State describes the only facts it considers relevant in less than a page of their brief, starting on page 6.

The only facts the State finds worth mentioning are that (1) Feller abused his step-daughter over a period of years.[1] (2) Feller has been writing to his biological daughter since his release from prison. (3) That biological daughter was about 10 years younger than the step daughter victim and still lives at home.

The State leaves out quite a number of very relevant facts pointed out by Feller. The State apparently does not contest the following:

Extent and nature of Feller's contact with L.F.

[1] The State references testimony from the hearing that the abuse took place over seven or eight years. The Minutes at the time said that the victim had said the abuse took place over four years. See Exhibit 11, p. 1; Con. App p.17 It should not be necessary or appropriate in a modification case to engage the victim with a factual inquiry of about exactly what happened over what period of time.

1. Feller was denied modification because of an apparent public safety threat to his biological daughter. She was 15 years old, at the time of the hearing, on modification.

2. Feller's only contact with that biological daughter since he got out of prison was to send her cards and letters.

3. Feller wrote to this daughter, who was not his victim, after first getting permission to write from his parole officer. The parole officer, in fact, had contacted Feller's ex-wife, the mother of L.F, to find out if this contact was acceptable. The mother gave permission.

4. During that time that Feller was on parole, he would occasionally get some written communication back from L.F.

5. Having been given permission Feller wrote almost every month. After apparently a certain point in time, including the last few years, L.F. stopped opening the letters.

6. There is no evidence in the record, however, that anybody, including Feller's ex-wide, ever told Feller to stop. Perhaps, the mother was thinking that since the letters were not being opened, there was no real problem.

7. Some of the letters were opened by the family for the modification hearing. Some were offered into evidence.

Feller's ex-wife was an appropriately protective mother

The second major piece of evidence ignored by the State and the District Judge, had to do with Feller's ex-wife, Kayla Wolter, and the role she played in this case.

8. The Minutes from the criminal case, show that when the older sister, the victim, finally told her mother about the abuse, the mother immediately kicked Feller out of the house. Exhibit 11, p.1; Con. App. p. 17,

9. At the modification hearing the victim, J.B. testified on cross examination that her mother Kayla was absolutely protective of both her and her sister. Hearing Tr. p. 16, line 20 to p. 17 line 6.

10. Remarkably, the State does not mention these facts.

Feller went beyond satisfying the criteria under 692A.128

11. This fact is not disputed by the State, nor could it be. The State's brief says the State "agrees with the Courts determination that Feller met the threshold requirement for modification".

12. John Feller not only satisfied the criteria, but he went well beyond the criteria.

13. He was low risk on every test administered. On the best known, STATIC 99, he scored Risk Level I, once there was the adjustment for time free in

the community. Exhibit 1, p. 3-4; Con. App. p. 6 He had passed the point of what is called "desistance." That is the point in time when the risk of sexually offending is the same or lower than that presented for persons placed on probation or released from prison, who do not have sex offenses.

14. The reasoning around desistance is that those non sex offenders are not required to register even though they have perhaps a 2% chance of reoffending. When the sex offender gets that low or lower, they should not have to register either. It is important to understand that the offenders in the Supreme Courts cases of Fortune and Becher were overall low. They have not yet reached the point of desistance.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING JOHN FELLER'S APPLICATION FOR MODIFICATION

Standard of Review:

The State in its brief articulates that the standard of review is for "abuse of discretion." The State, however, does not respond to Feller's argument that the discretion announced in the Fortune case is very much limited.

Discretion is limited as follows:

1. All reasons given must be related to current public safety concerns which in turn are related to the risk posed by the Applicant.

2. If a proper factor is considered, it must be supported by substantial evidence.
3. Consideration of an improper factor would be an abuse of discretion.
4. Failure to consider a relevant factor would be an abuse of discretion.

Here is the summary of Feller's argument for an abuse of discretion as presented in his opening brief

There was/is no question that John Feller satisfied the threshold criteria for modification. Judge Shubatt acknowledged that John Feller was low risk to reoffend. For that reason the focus on for this brief is whether the Court abused its discretion in denying the Application.

Indeed, the district court abused its discretion in a number of ways. (1) The judge's primary reason for denying the application was the judge's imagined threat Feller currently posed to his daughter, L.T. When the evidence about that threat is examined, it should be clear that there is not substantial evidence to support that need to continue Feller on the registry.

(2) There was also an abuse of discretion because there was no substantial evidence that Feller posed any danger to the community at large. L.T. already knows about John Feller's offense. So does her family. Having Feller on the registry does not make her any safer. Presumably, to support a finding of the registration, there must be something by way of threat to the community. There simply is no substantial evidence of that threat, given his very low risk.

(3) Discretion involves a balancing of factors. Failures to consider relevant factors are an abuse of discretion. In this case, Feller argued that the court should consider the unusual procedural events in the criminal case, which unfairly gave Feller lifetime on the registry. If the prosecutor had only amended the Trial Information to add the second count, Feller would have only had to register for 10 years. He would be almost finished with that obligation.

The court should have considered as a relevant factor the harsh current length of registration which was apparently caused by a clerical error in the County Attorney's office.

(4) Fortune cautioned that the judge was not to use "non validated assessments made by the district court based upon the nature of the crime and its apparent relationship to recidivism." Fortune at p. 708. In this case, the court relied on the fact that at the hearing, Feller did not make eye contact with the Judge. The court characterized his demeanor as "discomfort and avoidance". Ruling p. 3; App. p. 13 Moreover, the judge was critical of the fact that Feller testified by affidavit. There is no validated basis for thinking that a sex offender's discomfort when appearing in court with his victim present is a basis for finding an increased risk. Moreover, affidavit testimony is perfectly acceptable- particularly when the prosecutor has the opportunity to cross examine it and chooses not to do that. For a

discussion about affidavit testimony in one of these cases see State v Oltrogge, 2022 WL 2824774 at *4 (Iowa Ct. App. July 20, 2022)

The State's Response:

The States discussion of the merits of the case goes from page 15 to page 20 of his brief.

The State does not mention at all reasons 3 and 4 above.

The State's only argument can be summarized as followed:

Feller abused a step-daughter over some period of years.

He is now trying to communicate with a younger daughter.

Feller has written letters to his biological daughter, L.F. for years.

That is it.

The State says writing letters or cards every month is a repeated pattern of behavior that is somehow similar to his behavior with his victim, when everyone was living in the same household. This brings it within the caution set out in Fortune about going back to look at the crime.

The testimonies from the victim and her mother at the hearing were that they thought Feller being on the registry provided protection, not only for L.F., but also anyone with children in the community.

That is it.

So what is wrong with the State's analysis?

Justice Appel in the Fortune case said that repeated patterns of behavior could look more suspicious in light of the underlying crime.

Here's the exact quote:

> In some cases, however, it may be possible to identify increased risk based upon what appears to be repeated patterns of behavior. For example, an offender might be engaging in what is ordinarily innocent behavior that looks more suspicious in light of the facts of the underlying crime. For instance, an offender who loiters at the same location as a past offense might raise concerns. To that extent, the similarity of patterns between past offenses and present behavior could be quite relevant. The focus, however, must be on the present danger or threat to public safety, not on punitive response to past crime.
> Fortune v. State, 957 N.W.2d 696, 709 (Iowa, 2021)

The problem for the State is that you just cannot equate the behavior of abusing the step-daughter while living in your own household with writing to that person's sister, once a month, with permission.

This is particularly the case where apparently the letters at this point are not even read. The victim described the similarity as both being persistent and pushy behavior. See Hearing Transcript p. 13 line 1 to p. 14, line 9.

Writing a monthly letter that does not get read is nowhere near the same thing as presumably a pattern of abuse, perhaps prefaced by some kind of grooming behavior. Even J.B. testified the communication while they were all

living in the same house as sexual. Transcript. p.13, lines 19-24. The letters were in no way sexual.

There is a second problem with the State's logic. The danger described by the witnesses at the hearing was to a specific person, L.F. L.F. already knows about Feller's crime. So do all the people around her. Keeping Feller on the registry provides absolutely no safety to L.F.

The District Court accepted States' argument that a marginal danger to biological daughter constituted a basis for being concerned with the "public." There is simply no scientific basis for going from a danger to a family member to a danger to the entire community.

The actuarial evidence is that individuals who offend within the family are in fact the lowest risk offenders among all sex offenders. Feller presented this argument in his brief, at pages 29-30. The State chose to ignore this argument and evidence. There is no basis for thinking that danger to L.F. equates to danger in the community.

Here is what Justice Appel had to say about non scientific assumptions.

> With respect to Fortune's attack on the district court's emphasis on the underlying nature of the offense, we think the results of the risk assessment tools should not generally be overridden by non-validated risk assessments made by the district court based upon the nature of the crime and its apparent relationship to recidivism. First, consideration of the nature of the crime comes perilously close to punishment, an impermissible

> goal of the sex offender registration. Further, the nature of the crime has already been factored into the equation in two ways. First, as a tier III offender, Fortune must have at least five years in the community without reoffense to be eligible for modification compared to shorter periods of time for less serious offenses. Iowa Code § 692A.128(2)(*a*). Second, the nature of the crime is a factor considered in the validated assessment tools. District courts should be cautious in rejecting the validated risk assessments based on a case-by-case judicial impression of the underlying offense. Fortune v. State, 957 N.W.2d 696, 708 (Iowa, 2021).

Concluding that Feller poses a risk to the community because of an offense within the family, where the offender is a very low risk, would be the very non-validated risk assessment that Justice Appel said should not happen.

Feller is not Larvick

The State, as did Judge Shubatt, relied heavily on the Court of Appeals decision of Larvick v State, 2022 WL 610361 (Iowa Ct. App. March 2, 2022.) That case was decided by the Court of Appeals a few months prior to the hearing in Feller. Clearly the Dubuque County Attorney knew about Larvick, perhaps presenting his evidence to try to match the Larvick facts.

What is also quite clear, however, is that this case is not Larvick.

Larvick offended with a biological daughter, over a period of years. She had a younger sister. The Court of Appeals observed that Larvick's ex wife, the mother of his two daughters, had known about the abuse and was "unable or unwilling to protect the victim." Larvick, 2022 WL 610361at *3. Indeed, the ex-wife had

apparently abandoned the children to live with Larvick at the time the charges were brought.

After Larvick served his time in prison and finished his parole, the Court of Appeals noted that Larvick had "rekindled" his relationship with his ex-wife. At that point she had custody of the younger daughter.

In addition Larvick's ex-wife was "not providing the younger daughter with necessary information about Larvick, giving rise to the potential for future abuse of the younger daughter." Larvick at *3.

This is in stark contrast with evidence in Feller. All agree that Feller's ex wife, Kayla Wolter, was/is both protective and strong. She kicked John Feller out of the house when she learned of the abuse. The younger daughter had been provided with enough evidence about the abuse of her sister to be very afraid of John Feller.

There is also no evidence that Feller is trying to "rekindle" his relationship with Kayla Wolter, who has remarried.

Something else should be said about the Larvick decision. Larvick had questioned whether a possible danger to one person, his daughter, could justify remaining on the registry. The danger, according to Fortune, seemed to be to the public. After all, Larvick's daughter at least knew Larvick was on the registry.

Over Larvick's objection the Court of Appeals found that the daughter was a member of the public, so the goal of enhancing public safety was furthered by adding protection to just the one person. Larvick at *4.

Particularly with the facts in Feller's case, there is no added protection to the daughter if you keep Feller on the list. Moreover, Fortune requires that there be a substantial benefit to "public safety". Fortune at page 706.

The State might suggest a connection between family abuse and protection for all those other children in the community. That connection is a non-validated assumption not supported by risk analysis.

Conclusion

This case is a sad case. Maybe many of these intra-family cases are like that. John Feller committed a crime with a step-daughter. His family essentially ended when his victim told her mother about the abuse.

After serving his prison sentence, he learned that he had to register for life. It should have been only ten years. An apparent clerical error in the prosecutor's office made it lifetime. So did the apparent lack of knowledge by the lawyers, about the obscure law regarding when something was a second offense.

When he got out of prison, with permission of his parole office and his ex wife, he sent monthly cards and letters to his biological daughter. She had not been

his victim. At some point she stopped opening the letters. No one told him he had to stop writing.

He applied to end his registration requirement. He is very low risk.

The Iowa Supreme Court in April of 2021 described how district courts should evaluate modification requests. The Supreme Court said that in exercising discretion, district courts could in some fashion take into consideration “public safety.”

In this case, the District Judge relied on that “public safety" rationale in denying an application from John Feller.

For individuals such as Feller, who clearly satisfy the threshold requirements, the Iowa Supreme Court requires that there be a showing of a “substantial benefit” to public safety, if the person remains on the registry. That showing must be supported by "substantial evidence”.

This Court should find that in this case the judge abused his discretion. There was not substantial evidence of a substantial risk to public safety that would exist if John Feller came off the sex offender registry.

The case should be returned to the district court with directions to grant the application.

RESPECTFULLY
SUBMITTED,

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ATTORNEY'S CERTIFICATE OF COSTS

I, Philip B. Mears, Attorney for the Petitioner-Appellant, hereby certify that the cost of preparing the foregoing Petitioner-Appellant's Final Brief was $2.50.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(f)(1) or (2) because:

[X] this brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 and contains 3,931 words, excluding the parts of the brief exempted by Iowa Rs. App. P. 6.903(1)(f)(1).

/s/ Philip B. Mears
Signature

10/18/2023
Date