IN THE SUPREME COURT OF IOWA

No. 22-0779

NATHANIEL DANIEL OLSEN,

Applicant-Appellant,

v

.

STATE OF IOWA,

Respondent-Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR SCOTT COUNTY
HONORABLE TOM REIDEL, JUDGE

APPELLANT'S FINAL REPLY BRIEF

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CERTIFICATE OF SERVICE

On February 16, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon the Plaintiff-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to:

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Purposes of a Reply Brief

In any reply brief, it is appropriate to do three 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 reply to specific statements by the State in its brief. In this case the State raised an affirmative defense that had not previously been addressed.

Finally, 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.

ROUTING STATEMENT

The State acknowledges that the Nathan Olsen's argument about the Privileges and Immunities Clause presents a constitutional question of first impression. The State says retention is not necessary as Olsen is not even eligible for modification for a reason other than the fact he does not live in Iowa. The State's novel suggestion points to the fact that Olsen had a registration violation seven years into his ten year registration requirement. That Iowa conviction apparently adds 10 years to the length of his registration. The State argues that the

minimum period of 5 years for modification under 692A.128 should not date from the initial registration. Rather the State, in a case of first impression, says Olsen cannot apply for modification until 5 years into his second 10 year obligation. This effectively converts the minimum period requirement under 692A.128 from 5 to 15 years.

This construction, if accepted, would effectively disqualify many people from modification if they ever had a registration violation. That would be a restriction that would affect a significant number of people.

If the State's affirmative defense is taken seriously, it only adds to the need for retention in this case.

STATEMENT OF THE CASE

Nature of the Case:

The parties agree that this is an appeal from the denial of an Application for a Sex Offender Modification brought under 692A.128. The appeal presents a very different appeal from those in the last two years that have essentially contested denials on the merits.

This case was dismissed by the District Court which found that Nathan Olsen could not bring such an action at all. That was because Olsen did not reside in Iowa. Ruling; Appx. p. 9.

Olsen has argued that denying him this statutory opportunity to reduce his obligation to register in Iowa, violated his rights under the Privileges and Immunities clauses of the respective Constitutions.

The State in its brief now raises an alternative affirmative defense, one that was rejected without discussion by the District Court.

Course of Proceeding:

The State raised its affirmative defense regarding the minimum period of time in an Amended Answer; Appx. p. 17 The District Judge, in finding that Olsen did satisfy the criteria for modification, implicitly rejected this defense. Ruling p. 3; Appx. p.27

STATEMENT OF FACTS

The facts of Olsen's case are not really contested. At the same time, when the State briefly described the facts at page 10 of their brief, the State omitted/ or glossed over several relevant facts. Such facts which are not contested, include the following:

1. Olsen received probation for the equivalent of a deferred judgment for his sexual assault in Wisconsin in 2009. The State only referred to this as "probation."

2. Wisconsin does not require him to register if he has the deferred judgment from Wisconsin. The State did not mention this.

3. The Iowa statue is different from Wisconsin's and is reasonably clear. You have to register in Iowa even if you have a deferred judgment. This follows from the Iowa definition of "conviction" in 692A.101 (7). That definition includes if you have a deferred judgment. That is true whether the case is from Iowa or from another state.

4. Olsen did transfer his probation on the sexual offense from Wisconsin to Iowa. As a result, starting in 2009, he registered in Iowa. He continued to register in Iowa for approximately ten years.

5. His registration obligation, according to the Iowa Department of Public Safety, was initially set for only ten years. DPS determined that his offense was not

an "aggravated offense" which would require lifetime on the registry. The State did not mention this.

6. Olsen was convicted of a sex offender registration violation in 2017 in Muscatine County. That registration violation added 10 years to the length of Olsen's registration. See 692A.106(4).

7. But for his Iowa registration violation, Olsen would have finished his registration obligation in 2019 and we would not be having this case. The State did not mention this.

8. After Olsen got his registration violation he lived in Scott County for a while. He then moved to Illinois. One reason he moved to Illinois was that Illinois does not require him to register because of the deferred judgment in Wisconsin.

9. As of 2023 Olsen still owes Iowa about another 6 years of registration. That time runs even while Olsen is out of state. If he moved back to Iowa he would have to register until 2029. The State did not mention this.

10. Olsen has very real reasons for wanting to return to Iowa. See Affidavit, Exhibit 11; Appx.p.43. Those include the fact he could not live with his current partner, as he is not married to her. The child endangerment statute would subject both of them to criminal penalties. The State is silent on the reasons Olsen has for returning to Iowa.

ARGUMENT

I

DENYING OLSEN A FORUM TO MODIFY HIS IOWA REGISTRATION REQUIREMENT VIOLATES THE PRIVILEDGES AND IMMUNITIES CLAUSES OF THE IOWA AND UNITED STATE CONSTITUTIONS.

Standard of Review:

The parties agree that appellate review of this constitutional review would be *de novo*. The parties also agree that the proper analysis regarding the Privileges and Immunities Clause issue, is whether the restriction on out of state applicants is "reasonable."

Preservation of Error:

The parties agree that the issue has been preserved for review.

The Statute

Here is the entirety of 692A.128. Subsection 4 talks about where the Application should be filed.

> 1. A sex offender may file an application in district court seeking to modify the registration requirements under this chapter.
> 2. For an offender whose requirement to register as a sex offender commenced prior to July 1, 2022, an application shall not be granted unless all of the following apply:

a. The date of the commencement of the requirement to register occurred at least two years prior to the filing of the application for a tier I offender and five years prior to the filing of the application for a tier II or III offender.
b. The sex offender has successfully completed all sex offender treatment programs that have been required.
c. A risk assessment has been completed and the sex offender was classified as a low risk to reoffend. The risk assessment used to assess an offender as a low risk to reoffend shall be a validated risk assessment approved by the department of corrections.
d. The sex offender is not incarcerated when the application is filed.
e. The director of the judicial district department of correctional services supervising the sex offender, or the director's designee, stipulates to the modification, and a certified copy of the stipulation is attached to the application.

3. For an offender whose requirement to register as a sex offender commenced on or after July 1, 2022, an application shall not be granted unless all of the following apply: **not applicable for Olsen's case**

4. The application shall be filed in the sex offender's county of principal residence.

5. Notice of any application shall be provided to the county attorney of the county of the sex offender's principal residence, the county attorney of any county in this state where a conviction requiring the sex offender's registration occurred, and the department. The county attorney where the conviction occurred shall notify the victim of an application if the victim's address is known.
6. The court may, but is not required to, conduct a hearing on the application

Argument

The District Court dismissed the case, concluding that there was no jurisdiction over the matter, as Olsen did not live, work, or go to school in Iowa. He relied on the language in 692A.128(4) that says the Application should file the Application in the County of residence. Indeed the modification of registration statue, 692A.128(4) does say that the application shall be filed "in the county of residence." Olsen lived in Illinois at the time he applied for modification. For that reason his application was denied by the judge.

The question for this court is whether a non-citizen of Iowa can utilize the modification statue. More particularly this general statement in this case is whether the non-citizen can use 692A.128 where his registration obligation in Iowa directly results from an Iowa conviction. Olsen asserts that denying him the state forum violates his rights under the Privileges and Immunities Clauses.

The parties agree as to the proper legal analysis under the Constitutional challenge. The legal question that is presented is whether

> "the non-resident is given access to the courts of this state upon on terms which in themselves are reasonable and adequate for the enforcing any rights he may have even though they may not be technically and precisely the same in extent of those accorded to

> resident citizens" State's Brief pg 15 citing Canadian N. Ry. Co. v. Eggen, 252 U.S. 553, 40 S. Ct. 402, 64 L. Ed. 713 (1920)

Put another way, the question is whether prohibiting Olsen from modifying his Iowa registration requirement is "reasonable and adequate" if he lives out of State.

There are a number of reasons why the court should conclude that it is quite unreasonable to deny Nathan Olsen access to the Iowa courts for his modification action. This establishes the Constitutional violation.

(1) In this case the out of state resident is being denied access to Iowa courts, entirely. This prohibition is absolute. This is unlike the unemployment case from the Iowa Court of Appeals. Nitsos v. Emp. Appeal Bd., 2012 WL 2122493 (Iowa Ct. App. 2012) Nitsos could have filed in Polk County, under the IAPA. Olsen, as long as he does not live or work or go to school in Iowa, cannot bring his action for modification in any court in Iowa. In other words, as long as Olsen is not currently registering in Iowa, he cannot use the modification statute.

(2) This is a restriction on access to the courts. Access to the courts is recognized as involving a fundamental right. McBurney v. Young, 569 U.S. 221, 133 S. Ct. 1709 (2013) Chambers v. Baltimore & O.R. Co., 207 U.S. 142 (1907)

(3) The modification statue, Section 692A.128, is the only legal mechanism in Iowa in order to reduce the requirement to register.

(4) Olsen has a current obligation to register in Iowa, because of the 2017 registration violation conviction. That Iowa conviction added ten years to his original obligation that came from Wisconsin. Olsen should be able to use 692A.128 just like a person with an original conviction in Iowa, who has moved away.

Judge Reidel said "(t)he reason for Olsen's need to register did not arise in Iowa." (Ruling. p. 6-7; App.p.30-31) The judge overlooked the fact that the Iowa SOR violation conviction is what creates the current Iowa requirement to register. He overlooked the fact that there is a current Iowa requirement to register, based on that Iowa violation in 2017.

(5) Conditioning Olsen's use of 692A.128 on his registering in Iowa is harsh. The Iowa Supreme Court has recognized how consequential and severe is the requirement to register. Fortune v. State, 957 N.W.2d 696, at 709 (Iowa 2021) If Judge Reidell is correct, Olsen would presumably have to be back in Iowa and registering for 9 months before he could get an assessment and get into court and have a hearing. Quite clearly, if he left Iowa after 6 months while the court case was pending, you could anticipate a motion to dismiss because he no longer lived in Iowa.

Responses to specific things said or not said in its brief?

The State in its discussion of the Privileges and Immunities Clause does not discuss at all the circumstance where the Iowa conviction is what puts the out of state person on the registry.

Response: This situation had been addressed by two different district courts cases. Levke v. State, Polk County, Iowa CVCV052897 (Ruling Nov. 22, 2017) and State v. Brady, Tama County, Iowa FECR009867 (Ruling Aug. 12, 2019) (Both cases are available on EDMS.)

Both of the district courts cases found that the modification statute had to be available to the out of state residence, given the Privilege and Immunities Clause.

This is important because Olsen really is in the same situation as those individuals who have Iowa convictions. At this point, Olsen's obligation to registry in Iowa derives specifically from the Iowa conviction which extended his initial period of registration form 10 to 20 years.

If it is unreasonable to deny the forum for offenders with Iowa offense sex offenses, it is equally unreasonable to bar Olsen, whose continued registration in Iowa is also the result of an Iowa sex offender registry conviction.

The State says in its brief at page 17, that it is reasonable not "to task the district courts with determining whether to modify an as yet nonexistent requirement for a sex offender, who is merely contemplating coming to Iowa."

Response:

Olsen has a very real requirement to registry in Iowa. There is nothing hypothetical or contingent about it. It is 20 years in length and it is currently running. It will run until 2029. The current obligation results from the 2017 Muscatine County conviction. Olsen actually registered in Iowa for almost ten years.

This is quite different from the person who has never been in Iowa but has a sex offense in another state. That person still might legitimately want to know whether the person would have to register in Iowa. Would it be reasonable to deny him the forum for modification? However you answer that question, that case is not this one.

It is doubtful that there is much risk of the courts being flooded by modification requests from out of state residents. Before they could even get to court they would have to pay the $600 fee for modification assessment. Then they would have to commence a district court action, assuming they got a favorable evaluation from the Department of Corrections.

If such a person really satisfies the criteria for modification, why not allow the person to see court approval?

II

OLSEN SATISFIES THE FIVE YEAR MINIMUM PERIOD OF REGISTRATION REQUIRED UNDER 692A.128.

Standard of Review:

Olsen agrees that the standard of review for this statutory interpretation issue would be for correction of errors of law.

Preservation of Error:

The State raised this affirmative defense before the District Court. The claim was that Olsen did not stratify the 5 year minimum requirement under the modification statue.

Without addressing the particulars, Judge Reidel denied the affirmative defense. See Ruling on application at page 3; Appx.p.27.

The Statutes

There are two statutes to consider.

The first is the part of 692A.128 providing for the minimum time on the registry, a threshold requirement for modification.

> 2. For an offender whose requirement to register as a sex offender commenced prior to July 1, 2022, an application shall not be granted unless all of the following apply:
> a. The date of the commencement of the requirement to register occurred at least two years prior to the filing of the application for a tier I offender and five years prior to the filing of the application for a tier II or III offender.
>
> 692A.128. Modification, IA ST § 692A.128 (2023)[1]

This is the requirement that the offender must be on the registry for a least so many years.

The second code section is the provision adding ten years to a person who violates 692A.

> 4. A sex offender who is convicted of violating any of the requirements of this chapter shall register for an additional ten years, commencing from the date the offender's registration would have expired under subsection 1 or, in the case of an offender who has been sentenced to a special sentence under section 903B.1 or 903B.2, commencing from the date the offender's registration would have expired under subsection 2.
> 692A.106. Duration of registration, IA ST § 692A.106

[2] In 2002, the legislature amended 692A.128. While the threshold requirements were increased for individuals whose crimes are after July 1, 2022, there were no changes for individuals such as Mr. Olsen whose obligation to register began prior to July 1, 2022.

ARGUMENT

The court should reject the affirmative defense raised by the State.

To start with it must be understood just what is being argued by the State.

Here is the State's argument. Olsen was originally required to register for 10 years. He was convicted of a registration violation about 7 years into that 10 year requirement. This, by code, added another 10 years to his registration requirement. This gives him a total duration of registration of 20 years.

The State argues that not only were the two 10 years requirement consecutive to each other, but the mandatory minimum of 5 years in 692A.128 exists independently for both requirements. The State argues that for that reason Olsen cannot even file for modification, even if he moved back to Iowa, until 15 years after his initial registration. He would have to serve the five years on the second ten year term before he can be eligible for modification under 692A.128.

The Court should reject the State's argument.

A registration violation adds an additional ten years to the duration of registration. While the additional period is consecutive to the original period, there would be no additional minimum time under 69A.128

A. As a matter of statutory construction the State's argument should be rejected.

Here are the arguments against the State's position

The statute provides that a registration violation **extends** the requirement to register by ten years. The language relied upon by the State is that this additional 10 years "**commences** from the date the offenders registration would have expired". This language just means that the additional 10 years is a consecutive term. If you have a SOR violation after 7 years of a ten year requirement, the result is a total of 20 years.

The clear reading of the two statutes is that a SOR violation **extends** the period of time by 10 years. This follows from the use of the term **"additional"** in 692A.106(4).

The language in 692A.128 sets the 5 year requirement to run from the "commencement" of the requirement to register. The argument from the Assistant Scott Count attorney was presented in one prior modification to the knowledge of appellant's counsel. That was In the Matter of Doup, Scott County CVCV294536 (Ruling May 24, 2016) (available on EDMS). Judge Mary Howes concluded at page five of the ruling that "(t)here is only one beginning to the requirement to register." In the Matter of Doup, Scott County CVCV294536 (Ruling May 24, 2016) (available on EDMS)

It makes no sense to talk about any mandatory minimum period of time for the registry violation, operating as an independent matter. The minimum period

under 692A.128 depends on the Tier level which has to do with the nature of the offense. A registration violation does not have a particular tier level. You are whatever tier you were on the original case.

It is also important to understand the risk assessment that was done in Mr. Olsen's case. Exhibit I; Conf. Appx. p. 5. It showed that the registration violation from 2017 did not change his risk. In fact, as it is discussed later, additional non-sexual offenses generally do not have a significant impact on risk as measured in the instruments that are approved by DOC.

The State would suggest that the minimum period of time for someone like Olsen should go from 5 years to 15 years. It makes no sense for that to happen for something which does not have any real effect on risk.

The legislature made the determination that modification should be available to individuals with low risk who completed treatment, It is not consistent with that position to think that the minimum period should jump from 5 to 15 years for an offense that does not really effect risk.

B. There is reason to believe that the ten year extension may be unconstitutional.

A sex offender registration violation does not materially affect risk for reoffending. Risk is basically determined by the level of risk associated with the

particular offense. The STATIC and ISORA scores in fact are mostly fixed at the point of the start of registration. (This would be when the person gets probation or is released from prison.)

There is a significant factor in risk calculation for what is referred as "time free behavior." Under that calculation, there is a chart where your STATIC Score is reduced. If you commit any nonsexual offense, your time free scores is reduced by 3.3. years. Ex. 5; Hanson, R.K., Harris, A.J.R., Letourneau, E., Helmus, L.M., & Thornton, D. (2017). Reductions in Risk Based on Time Offense Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender. *Psychology, Public Policy, and Law.* http://dx.doi.org/10.1037/law0000135

That reduction happens whether you have one offense or three. It is the same reduction for a registration violation or for a theft or burglary or a drug case.

What is significant however is that the fact that Olsen had a registration violation did not materially affect his risk which even the State recognized was low.

This takes us back to the 1990's.

The Iowa legislature imposed a loss of license for any drug possession charge, regardless of whether the defendant was driving. The legislature provided that the revocation of a driver's license for possession of a controlled substance

would be handled separately, administratively, and after the conviction, by the Department of Transportation.

The Iowa Supreme Court addressed this legislation in two cases. First there was Hills v. Iowa Dept. of Transp. and Motor Vehicle Div., 534 N.W.2d 640 (Iowa 1995). In Hills the Iowa Supreme Court addressed the question in the context of an *ex post facto* challenge. The DOT revoked the license under the statute, despite the fact the statute did not go into effect until the crime had been committed.

> The question then is whether Hills' license revocation, based on the controlled substance violation, was civil or criminal in nature. The answer turns on whether the essential aim of the controlled substance revocation was to promote highway safety. We think in this respect it differs from the "habitual offender" revocation statute we considered in Funke.
>
> In contending the revocation is civil in nature, the DOT argues there is a "direct connection" between the possession of controlled substances, driving, and public safety. The district court did not perceive such a connection and neither do we. Persons who illegally possess drugs are of course subject to appropriate criminal punishment. But many such persons choose not to drive. When they do not, they do not affect highway safety. Any connection between drugs, driving, and public safety is at most indirect. The amended statute authorizing this license revocation was aimed essentially at enhancing punishment for controlled substance possession. (emphasis added) As such it was quasi-criminal and not civil in nature. Ex post facto principles therefore prohibit application of the amended statute. The district court was correct in so holding.
> Hills, at pages 641-642.

The second case was Dressler v. Iowa Dept. of Transp., 542 N.W.2d 563 (Iowa 1996) In that case the DOT sanction and the crime both occurred after the statute was enacted. The question presented was not *ex post facto*, but double jeopardy. Here was the conclusion of the Court:

> Our conclusion in Hills that section 321.209(8) enhances punishment of a controlled substance possession, dispenses with the State's assertion that this section is not a penal statute. Because section 321.209(8) twice punishes Dressler for the same offense—possession of a controlled substance—in a separate proceeding, we conclude it unconstitutionally contravenes Dressler's double jeopardy guarantees. Dressler, at page 566.

These cases led to the legislature to change the statute and provide that the Court, as part of sentencing, should take the driver's license for a person convicted of possession of a controlled substance. This eliminated any double jeopardy concerns. The ex post facto problem went away over time.

In 2009, the Iowa Legislature amended the registration statue, adding a provision that any registration violation under 692A would carry an additional 10 year period of registration. This additional sanction is not imposed by the court. Rather, it is imposed administratively by the Department of Public Safety (DPS). Given the fact that a registration violation has little or no effect on risk, it would follow that the imposition of the additional 10 years is essentially punitive.

While there is no *ex post facto* problem presented for someone like Olsen, there is the double jeopardy claim set out in Dressler case. Olsen was punished once by the Muscatine court. He then was punished a second time by the Department of Public Safety adding the 10 years to his registration requirement. A court could readily conclude that the addition by DPS of the additional 10 years of registration, violates double jeopardy.

This constitutional objection was not raised before the district court. However, the State chooses to interject the statue in question into this appeal, as it was raised as an affirmative defense before the district court.

Statues should be interpreted to be consistent with the constitution. Given the potential double jeopardy argument, the court should conclude that there should not be an additional 5 years or 10 years for that minimum period under 692A128.

CONCLUSION

Nathan Olsen currently lives in Illinois. Illinois like Wisconsin where the conviction was from does not require Olsen to register as a sex offender.

Olsen did live in Iowa for about 10 years from 2009 to 2019. He had to register because that is what the Iowa registration statue said. He violated the

registration statue in 2017 in Muscatine County. This violation extended the duration of his obligation in Iowa, as calculated by the DPS, from 10 to 20 years.

At that point, Olsen moved someplace where he did not have to register.

He wishes, however, to come back to Iowa for a variety of reasons. The district court that because of the way the modification statue was written, Olsen could not proceed. The action was not filed in his county of residence. He did not even reside in Iowa.

Olsen's case requires the court to address what that apparent venue provision means, when a registrant has moved out of state.

For the reasons stated in his briefs Olsen requests this court to find he is constitutionally entitled to bring a modification action in Iowa, to contest his Iowa registration requirement. Denying him any forum is unreasonable and in violation of the Privileges and Immunity clauses of the Iowa and United States Constitutions..

The State also raises an additional defense based on the requirement in the modification statue that he register for a minimum of 5 years before coming to court. The State wants to read that statue to mean that Olsen's case has to wait 15 years. There is no statutory basis for this reading.

This Court should reverse the district court's finding that it could not entertain the modification request. The matter should be returned to the district court to exercise its discretion under the modification statue.

RESPECTFULLY SUBMITTED,

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ATTORNEY'S CERTIFICATE OF COSTS

I, Philip B. Mears, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant's Page Proof Reply Brief was $3.20.

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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:

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/s/ Philip B. Mears — 2-16-2023
Signature — Date