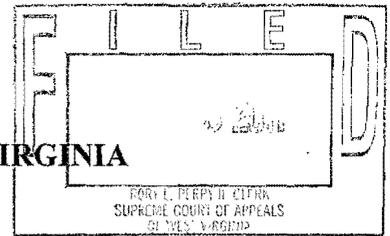


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0617



STATE OF WEST VIRGINIA

Petitioner,

v.

PAUL EDWARD BOSTIC,

Respondent.

REPLY BRIEF ON BEHALF OF THE STATE OF WEST VIRGINIA

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Comes now the State of West Virginia, by Laura Young, Assistant Attorney General, and mindful of the distaste for repetitive pleadings, files the within reply on behalf of the State.

DOES THE 1999 AMENDMENT OF WEST VIRGINIA CODE § 15-12-1 ET SEQ., AUTHORIZING THE STATE POLICE/DEPARTMENT OF PUBLIC SAFETY, UNDER CERTAIN CIRCUMSTANCES, TO IMPOSE AN INCREASE IN THE LENGTH OF SEX OFFENDER REGISTRATION FOR EARLIER CONVICTED SEX OFFENDERS, FROM TEN YEARS TO LIFE, WITHOUT NOTICE AND RIGHT TO A JUDICIAL HEARING, VIOLATE THE FEDERAL CONSTITUTION AND THE WEST VIRGINIA ART. 5 § 1, RELATING TO THE SEPARATION OF POWERS?

The respondent states that the Petitioner cannot distinguish the West Virginia sexual offender registration statute from the Ohio sexual offender registration statute, and more particularly its 2006 amendments which the Ohio Supreme Court found violative of the doctrine of separation of powers in *State v. Bodyke*, 126, 933 N.E.2d 753 (Ohio 2010). However, a careful reading of that

decision indicates that the Ohio statute, before the 2006 amendments differed substantially from the West Virginia statute, both before and after the 1999 amendments.

In West Virginia, individuals were required to register as sexual offenders based solely upon the offenses listed, except for those occasions where a judge, at disposition made the decision that a crime, for example, domestic battery, not formally a sexual offense, was sexually motivated. The restrictions of the registration provisions as to notification of change of address, license plates, vehicles and the like, were the same for all registrants. The only difference relevant to the certified questions was that prior to the 1999 amendments some individuals who were convicted of sexual offenses involving minor victims were only required to register for 10 years, if the crime was classified as a misdemeanor. The 1999 amendments kept the registry restrictions the same for all those who were required to register, but lengthened the time of registration to lifetime if the crime involved a minor, whether the offense was a misdemeanor or a felony.

As noted in *Bodyke, supra*, the state of Ohio required some form of sexual offender registry since at least 1963. In 1996, the Ohio Legislature enacted a version of “Megan’s Law” which was the first comprehensive registration and **classification** system for sexual offenders. (*Id.* at 757.) Prior to the 2006 amendments, a judge held a classification hearing for a sexual offender, and following a fact finding process, the judge exercised his discretion and assigned the offender to a classification of a sexually oriented offender, habitual sex offender and sexual predator.

Before the amendment, a sexually oriented offender was required to register annually for ten years, and there was no community notification. An habitual sex offender was required to register for 20 years, and community notification was required only if the judge deemed it appropriate. Sexual predators were required to register every 90 days for life and community notification was

required. As noted above, a court actually held a hearing and determined what classification an offender fit in, regardless of the offense, and further, public dissemination of the individual's classification also depended upon judicial discretion.

In West Virginia, the registration requirements and public dissemination of the sexual offender registry have been the same for all sexual offenders, regardless of the nature of the crime. There has never been any judicial fact finding and discretion with classifying offenders.

The evil condemned in *Bodyke* was that the amendment to the statute required the Attorney General of the State of Ohio to, in effect, sit as an appellate court, and reclassify offenders who previously had been classified after a hearing in front of a judge. Therefore, the amendments vested the "executive branch with authority to review judicial decisions, and it interferes with the judicial power by requiring the reopening of final judgments." (*Id.* at 765-66.)

The 1999 amendments do not fall afoul of the separation of powers because the executive is not reviewing judicial decisions and final judgments are not reopened. The Legislature, in a valid exercise of its authority, determined that all individuals who commit sexual offenses against minors should register for life. No individual is reclassified, as West Virginia has never classified its sexual offenders, and no judicial decisions are reviewed. Therefore, the statutory schemes in Ohio and West Virginia differed significantly from one another and *Bodyke* is inapposite.

There is no judicial or legislative responsibility assigned to the executive branch in the administration of the registration requirements, whether the period of registration is for ten years or for life. Therefore, the answer to this certified question is no, as determined by the circuit court.

DOES THE 1999 AMENDMENT OF THE WEST VIRGINIA CODE § 15-12-1 ET SEQ., WHICH RETROACTIVELY INCREASED THE REGISTRATION PERIOD FOR CERTAIN SEX OFFENDERS FROM TEN YEARS TO LIFE

BASED UPON THE AGE OF THE VICTIM, VIOLATE THE STATE CONSTITUTION, AR. 3, § 4, AND FEDERAL CONSTITUTION, ART. I, PROHIBITING IMPAIRMENT OF EXISTING OBLIGATIONS, THE CONTRACT OBLIGATIONS HEREIN HAVING BEEN CREATED UNDER A 1997 PLEA AGREEMENT BETWEEN THE STATE OF WEST VIRGINIA AND THE RESPONDENT A SIGNIFICANT PART OF WHICH REQUIRED REGISTRATION AS A SEX OFFENDER FOR A PERIOD OF ONLY TEN YEARS, AND NOT LIFE?

As noted in the State's original brief, while a plea agreement is a contract between the State and a criminal defendant, and both sides are entitled to specific performance of that contract, and further, if a party breaches the plea agreement, the other party is entitled to relief, a prosecuting attorney may not legally enter into a plea agreement which would permit the respondent to avoid complying with the law.

The plea agreement between the State and the respondent was fulfilled. There was no promise made to the respondent that the registration requirement would never change. Further, those courts which have addressed the issue of whether a change in the registry provisions constitutes an unconstitutional impairment of a contract between the State and a criminal defendant have decided that issue squarely against the respondent's position. Those cases are cited in the petitioner's original brief and will not be repeated herein. However, it is important to repeat the finding of the Ohio Court in *Burbrink v. Ohio*, 923 N.E.2d 626 (Ohio, 2009). Whatever the law in effect at the time a plea was reached, a legislature retains the power to amend the law and not only do those statutes existing at the time of the contract fix the obligations between the parties, but the "reservation of essential attributes of sovereign power is also read into contracts. . ." (*Id.* at 628). Further, a sex offender has "no reasonable expectation that his sex offenses would never be made the subject of future sex-offender legislation and no vested right concerning his registration duties.

. . .The state could not and did not contract to bar the legislature from modifying sex offender registration and notification statutes.” (*Id.* at 628-629.)

Again, the answer to this certified question, is no.

CONCLUSION

Therefore, for the reasons stated herein and in petitioner’s original brief, the State respectfully requests that the Court affirm the judgement of the Circuit Court of Pleasants County answering each of the certified questions in the negative.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Petitioner

by counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



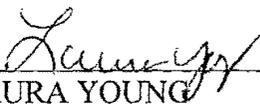
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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Laura Young, Assistant Attorney General and counsel for the Petitioner herein, do hereby certify that I have served a true copy of the *Reply Brief on Behalf of the State of West Virginia* up counsel for the Respondent by depositing said copy in the United States mail, with first-class postage prepaid, on this 3rd day of August, 2011, addressed as follows:

To: John Butler, Esq.
109 Clay Street
Saint Marys, WV 26170



LAURA YOUNG