A1-039

JUN 2 8 2004

IN THE SUPREME COURT
STATE OF GEORGIA

ANTHONY MANN,	*	
	*	CASE NO.: S04A1454
Appellant,	*	
	*	
v.	*	ON APPEAL FROM THE
	*	SUPERIOR COURT OF
THE STATE OF GEORGIA; GEORGIA	*	CLAYTON COUNTY
DEPARTMENT OF CORRECTIONS;	*	
ANGELA QUARTERMAN, in her	*	
Official Capacity as a	*	DECLARATORY
Probation Officer, Department	*	JUDGMENT
of Corrections, Probation	*	
Division,	*	
	*	
Appellees.	*	

BRIEF ON BEHALF OF APPELLEES

Respectfully submitted,

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S04A1454

IN THE SUPREME COURT
STATE OF GEORGIA

ANTHONY MANN, Appellant, v. THE STATE OF GEORGIA; GEORGIA DEPARTMENT OF CORRECTIONS; ANGELA QUARTERMAN, in her Official Capacity as a Probation Officer, Department of Corrections, Probation Division, Appellees.	*	CASE NO.: S04A1454 ON APPEAL FROM THE SUPERIOR COURT OF CLAYTON COUNTY DECLARATORY JUDGMENT

BRIEF ON BEHALF OF APPELLEES

PART I

STATEMENT OF THE CASE

On September 2, 2003, Appellant filed a "Verified Complaint for Declaratory Judgment, for an Interlocutory Injunction, and for a Temporary Restraining Order" in the Superior Court of Clayton County seeking to restrain Appellees from enforcing newly enacted O.C.G.A. § 42-1-13 (hereinafter also referred to as "the 1,000' Rule") against Appellant as being unconstitutional. (Record, hereinafter designated "R.", p. 4). A hearing was conducted on

September 5, 2003, regarding Appellant's request for an interlocutory injunction where both parties were heard. (R. 56). Following the hearing, the superior court entered an order restraining Appellees from enforcing O.C.G.A. § 42-1-13 against Appellant. Id.

A final evidentiary hearing was conducted on the merits of Appellant's complaint on November 25, 2003. (R.68). Following the hearing, the superior court denied Appellant's complaint in an order filed December 19, 2003. (R. 68-72).

On January 8, 2004, Appellant filed his Notice of Appeal. (R. 1).

This appeal follows.

PART II

STATEMENT OF FACTS

On June 4, 2003, O.C.G.A. § 42-1-13 was enacted which states as follows regarding persons registered on the Georgia Sexual Offender Registry:

> (a) As used in this Code section, the term:
>
> (1) "Area where minors congregate" shall include all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, and similar

facilities providing programs or services directed towards persons under 18 years of age.

(2) "Child care facility" shall mean all public and private pre-kindergarten facilities, day-care centers, and preschool facilities.

(3) "School" shall mean all public and private kindergarten, elementary, and secondary schools.

(b) No individual required to register under Code Section 42-1-12 shall reside within 1,000 feet of any child care facility, school, or area where minors congregate. Such distance shall be determined by measuring from the outer boundary of the property on which the individual resides to the outer boundary of the property of the child care facility, school, or area where minors congregate at their closest points.

(c) Any person who knowingly fails to comply with the requirements of this Code section shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than three years.

(d) Nothing in this Code section shall create, either directly or indirectly, any civil cause of action against or result in criminal prosecution of any person, firm, corporation, partnership, trust, or association other than an individual required to be registered under Code Section 42-1-12.

It is undisputed that Appellant is required to register in accordance with O.C.G.A. § 42-1-12, the Georgia Sexual Offender Registry (see www.ganet.org/gbi/sorsch.

cgi?id=2692&fullinfo=y). Pursuant to a plea of Nolo Contendere, Appellant was convicted of Taking Indecent Liberties with a Child in the General Court of Justice, Superior Court Division, Forsyth County, North Carolina. (R. 4, Para. 2). Appellant is currently on probation which is being supervised by the Georgia Department of Corrections. Id. at Para. 1.

On August 8, 2003, Appellee Quarterman, a state probation officer, served Appellant with a notice advising him that he must move from his residence because it was within 1,000 feet of a child care facility, and thus in violation of O.C.G.A. § 42-1-13. (R. 5, Para. 3).

Appellant does not own his residence but leases it from his parents. (R. 15, Memorandum of Law in Support of Verified Complaint, p. 3; Transcript of November 25, 2003, Hearing, pp. 3, 7; Appellant's Brief, p. 3). There is no evidence in the record setting forth the terms of the lease. (R. 71). The lease arrangement has only been described as "in exchange for working around the house and for sharing in household expenses, [Appellant's] parents allow [Appellant] to live in the home and have his own

space there." (R. 15, Memorandum of Law in Support of Verified Complaint, p. 3; Appellant's Brief, p. 3).

Further facts will be developed as necessary to address Appellant's Enumeration of Errors.

PART III

ARGUMENT AND CITATION OF AUTHORITY

1A. THERE IS NO VIOLATION OF THE TAKINGS CLAUSE AS APPELLANT'S LEASEHOLD INTEREST IN HIS PARENT'S PROPERTY IS OUTWEIGHED BY THE STATE'S INTEREST IN PROTECTING THE PUBLIC FROM CONVICTED SEX OFFENDERS.

(Enumeration of Error No. 1A).

The trial court properly denied Appellant's takings claim on the facts presented because Appellant's leasehold interest in his parent's property was outweighed by the State's interest in protecting the public from a convicted sex offender pursuant to the State's police powers. In denying this claim, the trial court ruled:

> [Appellant] is an adult male who lives in his parents' house and claims to have lived there for thirty-seven years. [Appellant] does not own the property where he resides. No lease was tendered into evidence. [Appellant's] brief states that his parents allow him to live in the home in exchange for working around the house and sharing

> in household expenses. Plaintiff is at most a tenant at will in the property in question, and this court finds that that is not a significant enough property interest to outweigh the State's interest.

(R. 71).

The State's interest in enacting the 1,000' Rule is to protect minors from convicted sex offenders through reducing the likelihood that a child will become a new victim of a convicted sex offender by creating at least a 1,000 foot distance between an area where children congregate and the residence of a convicted sex offender. Thus, by virtue of O.C.G.A. 42-1-13, children are protected from being placed in a location where an already convicted sex offender may surveil them 24 hours a day, enabling the offender to learn the children's' habits and schedules, from a locale of which the sex offender is entitled to permanently remain as a result of his or her residency. Thus, this statute operates in such a way so as to lessen the likelihood that a child will be victimized by a person who has previously demonstrated both the means and intent to commit a sex crime.

The takings issue before this Court is not one of eminent domain where property is taken for public use, but rather one of regulation preventing the use of the property in a manner detrimental to the public interest. In other words, in enacting the 1,000' Rule, the General Assembly was acting pursuant to its police power. That legislative power "extends to the protection of the lives, health and property of the citizen, and to the preservation of good order and public morals and is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of public interest." Pope v. Atlanta, 242 Ga. 331, 333 (1978)(citing McCoy v. Sanders, 113 Ga. App. 565 (1966)).

"Uncompensated obedience to a regulation enacted for the public safety under the police power of the State is not a taking or damaging without just compensation of private property, or of private property affected with a public interest." McCoy v. Sanders, 113 Ga. App. at 567 (citing Cleveland v. City Council of Augusta, 102 Ga. 233, 240 (1897). Thus, pursuant to McCoy, the application of

42-1-13 to Appellant so as to prohibit his residency is not a taking.

To ensure that the State has not exceeded its police power, a statute regulating land use must bear some "reasonable relation" to the public health or safety. Pope v. Atlanta, 242 Ga. 331, 334 (1978). As stated previously, the relation to public safety in this instance is to reduce the likelihood that a child would be sexually victimized by a convicted sexual offender by removing the sex offender from a location which would allow the offender unlimited opportunity to surveil the habits and practices of congregated minors. As such, this statute is reasonably related to the goal of protecting Georgia's children and as a valid exercise of the State's police power, its operation does not affect a taking.[1]

Alternatively, even under a regulatory takings analysis the claim still fails. "Regulatory takings

[1] "The legislature is not required to draft its statutes with mathematical precision." State v. Old S. Amusements, Inc., 275 Ga. 274, 276 (2002). "[I]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results

jurisprudence . . . is characterized by 'essentially ad hoc, factual inquiries,' designed to allow 'careful examination and weighing of all the relevant circumstances.'" Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 532 U.S. 302, 321 (2002)(Cit. omitted). These factors include the economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

There is no evidence in the record that Appellant would suffer any adverse economic effect by operation of the statute nor does he have any reasonable investment-backed expectations to which the statute might interfere. Appellant was an adult living in a house owned by his parents. An informal lease arrangement was alluded to in Appellant's pleadings indicating that Appellant did some chores and helped with household expenses as some sort of apparent rent. No such lease was ever admitted into evidence.

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in some inequality.'" Hanson v. State, 275 Ga. 470, 472 (2002)(Cits. Omitted).

In actuality it appears that Appellant had no property interest whatsoever in his parents home but was residing there as a matter of his parents' grace. Thus, as recognized by the trial court, Appellant's property interest is de minimus at best and the operation of O.C.G.A. § 42-1-13 cannot amount to a compensable taking.

As far as the character of the government action, operation of the statute prohibits residency only. It does not amount to a physical occupation of the property by the government. Appellant is free (with his parents' permission) to visit the property, purchase it, lease it, or conduct a business there--the statute only prohibits Appellant from residing there. Thus, the character of the government action does virtually nothing to reduce the value of the property.

Given this analysis, the trial court was correct in concluding that Plaintiff's property interest was not impacted in such a way so as to amount to a compensable taking. For these reasons, Appellees submit that this enumeration is without merit.

1B. O.C.G.A. 42-1-13 IS NOT OVERBROAD AS ITS PROHIBITION IS LIMITED SOLELY TO RESIDENCY WITHIN 1,000' FEET OF DESIGNATED LOCATIONS.

(Enumeration of Error 1B).

The trial court properly denied Appellant's claim that O.C.G.A. § 42-1-13 is unconstitutionally overbroad as the statute only prohibits residency and only in certain designated locations.

A statute is unconstitutionally over-broad if it reaches a substantial amount of constitutionally protected conduct. Johnson v. State, 264 Ga. 590, 591 (1) (1994); State v. Miller, 260 Ga. 669, 673 (2) (1990). In this case O.C.G.A. 42-1-13 does not reach a substantial amount of constitutionally protected conduct as it only prohibits residency within 1,000' of a child care facility, school, or an area where minors congregate. Residency is physical presence with the intent to remain. Thus, *even within* the 1,000' zone, a convicted sex offender may still own the property, lease it, visit it, or conduct any type of business on the property. In other words, a convicted sex offender may engage in every type of constitutionally

protected conduct within the 1,000' zone with the exception of actually residing there.

Moreover, the 1,000' zone only applies to child care facilities, schools, and "area[s] where minors congregate." Contrary to Appellant's argument the definition of an "area where minors congregate" does not include locations where two or more minors gather through happenstance. To the contrary, it is limited to "public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, and similar facilities providing programs or services directed towards persons under 18 years of age." O.C.G.A. § 42-1-13(a). As will subsequently be set forth in Appellees' response to Appellant's vagueness argument, this definition is sufficiently narrow.

Thus, contrary to Appellant's assertions, the 1,000' Rule applies only to residency and only within a limited and specifically defined area. As such, this enumeration is without merit.

1C. THE TERMS "AREA WHERE MINORS CONGREGATE" AND "CHILD CARE FACILITY" ARE NOT UNCONSTITUTIONALLY VAGUE.

(Enumeration of Error 1C).

The trial court properly denied Appellant's claim that O.C.G.A. § 42-1-13 is unconstitutionally vague as the terms used therein, when examined in their entire context, have a commonly understood meaning. Rouse v. Dept. of Natural Resources, 271 Ga. 726, 729 (2)(a) (1999).

> [The] prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness for "[i]n most English words and phrases there lurk uncertainties."... All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden. [Cit.]

Lindsey v. State, 277 Ga. 772, 773 (1) (2004)(citing Wilson v. State, 245 Ga. 49, 53 (1) (1980)). Moreover, the legislature is not required to draft its statutes with mathematical precision. Hargrove v. State, 253 Ga. 450 (1) (1984).

According to Appellant's complaint in the trial court, his probation officer, Appellee Quarterman, advised "him

that he must move from his home of thirty-seven years because his home is within 1,000 feet of a **child care facility**." (R. 5, Para. 3)(Emphasis added). Thus, the only term actually in dispute before the superior court was "child care facility."

In this regard, the statute specifically defines the term "child care facility" as "all public and private pre-kindergarten facilities, day-care centers, and preschool facilities." O.C.G.A. § 42-1-13(a)(2). Certainly, persons of ordinary intelligence will have a common understanding of the term "child care facility" given the statutory definition set forth above.

Moreover, Appellant's argument that a private residence may somehow transform itself into a "child care *facility*" is disingenuous. (Emphasis added).
The Court of Appeals of Georgia has recognized the definition of "facility" to mean "something that is built or installed to perform some particular function but it also means something that promotes the ease of any action or course of conduct." Raynor v. American Heritage Life Ins. Co., 123 Ga. App. 247, 250 (1971). Clearly, a

personal residence is not constructed for the particular function of providing pre-kindergarten, day-care, or preschool functions. It is constructed for the particular function of becoming someone's home. As such, this enumeration is without merit.

To the extent that Appellant argues that the phrase "area where minors congregate" is unconstitutionally vague, that term was not properly before the trial court as Appellee Quarterman did not advise Appellant that he was within 1,000' of such a location. Nevertheless, Appellees submit that said phrase is not excessively vague since the statutory definition of the term provides clear direction to persons of ordinary intelligence.

The definition at issue is as follows:

> "Area where minors congregate" shall include all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, and similar facilities providing programs or services directed towards persons under 18 years of age.

O.C.G.A. § 41-1-13(a)(1).

The definition is not exhaustive, but it includes a number of specifically enumerated locations which persons of ordinary intelligence will readily comprehend.

Moreover, the definition concludes with the phrase "and similar facilities providing programs or services directed towards persons under 18 years of age." Thus, each specifically enumerated location as well as those not specifically enumerated must be "facilities providing programs or services directed towards persons under 18 years of age."

As stated previously, a facility is "something that is built or installed to perform some particular function." Thus, in order to be an "area where minors congregate," the area must be built with the particular purpose of providing programs or services directed toward persons under 18 years of age.

None of the hypothetical scenarios posed by Appellant involve the *intentional* construction of an area to provide programs or services. Appellant's scenarios may describe places where children may happen to play, such as a backyard sandbox. However, none of those locations involve the providing of programs or services directed toward persons under 18 years of age in a vein similar to those programs and services provided by "public and private parks

and recreation facilities, playgrounds, skating rinks, neighborhood centers, [and] gymnasiums." This similarity is a necessary prerequisite to fall within the statutory definition and is lacking in the hypotheticals posed by Appellant.

Thus, this enumeration is without merit.

1D. O.C.G.A. § 42-1-13 IS PROSPECTIVE IN ITS APPLICATION AND DOES NOT VIOLATE THE PROHIBITION AGAINST EX POST FACTO LAWS.

(Enumeration of Error No. 1D).

The trial court properly denied Appellant's claim that O.C.G.A. § 42-1-13 violates the prohibition against ex post facto laws as the statute is prospective in its application.

It is undisputed that Appellant committed the crime which requires him to register with the Georgia Sex Offender Registry prior to the enactment of O.C.G.A. § 42-1-13. However, in Denson v. State, No. A04A0498, 2004 Ga. App. LEXIS 703 (May 20, 2004), the Court of Appeals of Georgia rejected an identical ex post facto claim. In rejecting the claim, the court held as follows:

> Denson can only be punished under O.C.G.A. § 42-1-13 if he prospectively chooses to violate the law by continuing to reside at his current address. The fact that Denson's prior conviction subjects Denson to possible punishment under O.C.G.A. § 42-1-13 does not somehow convert the statute into an unconstitutional ex-post-facto law as applied to Denson.

Id.

Thus, as the statute is not retroactive in its operation, Appellant's ex post facto claim is without merit.

Alternatively, were this Court to find that the statute operates retroactively, it must still reject Appellant's claim as the statute does not increase Appellant's punishment for his underlying conviction.

Recently, the United States Supreme elaborated upon the scope of the federal Ex Post Facto Clause as applied to Alaska's statutory sex offender registration system. Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140 (2003). There, the registration system applied retroactively, included a criminal punishment for failure to register, and yet the Court found that the system did not violate the Ex Post Facto Clause. "If the intention of the legislature was to

impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so 'punitive either in purpose or effect as to negate (the State's) intention' to deem it 'civil.'" Id. at 1146-1147 (quoting United States v. Ward, 448 U.S. 242, 248-249 (1980)). However, "[t]he Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." Id. at 1153.

Official Code of Georgia Annotated Section 42-1-13 survives ex post facto scrutiny under both Constitutions because it is solely regulatory and reflects no intention on the part of the Georgia General Assembly to retroactively inflict criminal punishment or deny a substantial right.

While it is true that because of his previous conviction, Appellant may not now reside within 1,000 feet of a child care facility, school, or area where minors congregate, this is only a retroactive regulatory

application--not retroactive punishment. Only if Appellant prospectively violates the statute will he have committed a crime. His punishment for that new crime will be a new, subsequent sentence, and not an increase to his previous statutory rape sentence. "Even though a statute, passed after a conviction, uses the conviction as an element of a future offense, this is not an ex post facto law, because the defendant's punishment for his earlier conviction is not increased." State v. Dean, 235 Ga. App. 847, 849 (2) (1998). See also Landers v. State, 250 Ga. 501 (4)(1983) (finding no ex post facto violation where conviction for felon in possession of a firearm was based on a felony conviction occurring prior to enactment of the felon/firearm statute).

As argued previously, the fact that registered sex offenders may no longer reside within the designated areas is a valid exercise of the State's police power. By its terms, O.C.G.A. § 42-1-13 prohibits convicted sex offenders required to register in accordance with O.C.G.A. § 42-1-12, from "residing" within 1,000 feet of certain designated areas. Through this regulatory limitation on residency,

sex offenders will no longer be able to permanently remain in locations where children congregate, thus reducing the likelihood that these convicted sex offenders will re-offend against innocent child victims. Additionally, the statute protects children in that it allows children to attend traditional learning and activity forums with a reduced likelihood that a convicted sex offender will have ready and permanent access to locations where he could place the child under constant predatory surveillance.

This is not retroactive punishment--it is a valid, prospective exercise of the General Assembly's police power in accordance with its obligations to protect the citizens of Georgia. Were the General Assembly to have intended a punitive impact, it is more likely that it would have included the new statute within Title 16 "Crimes and Offenses" rather than its location in Title 42 which concerns the administrative functioning of the State's prison system. "[W]here a legislative restriction 'is an incident of the State's power to protect the health and safety of its citizens,' it will be considered 'as evidencing an intent to exercise that regulatory power, and

not a purpose to add to the punishment." Smith v. Doe, 123 S.Ct. at 1147 (quoting Hawker v. New York, 170 U.S. 189 (1898)). "[N]othing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm." Smith v. Doe, 123 S.Ct. at 1147 (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)).

Thus, since O.C.G.A. § 42-1-13 is a regulatory mechanism which operates to protect the citizens of this State, is does not run afoul of the Ex Post Facto Clause of the Georgia and United States Constitutions. As such, this enumeration of error is without merit.

1E. O.C.G.A. § 42-1-13 DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

(Enumeration of Error 1E).

In his final enumeration of error, Appellant contends that O.C.G.A. § 42-1-13 empowers state probation officers "to function as judicial officers" since the probation officers will notify probationers, like Appellant, that they must move their residence if they live within the prohibited 1,000' zone. This argument is disingenuous.

If a probation officer, an executive branch employee, advises a probationer to move their residence and the probationer refuses, the probation officer has statutory authority to arrest the probationer for violating O.C.G.A. § 42-1-13. See O.C.G.A. § 42-8-38(a). Following such an arrest, a judge will make a determination as to whether the probationer has violated the terms of his or her probation by allegedly violating O.C.G.A. § 42-1-13. See O.C.G.A. § 42-8-38(b, c). Thus, the probation officer has no authority to ultimately decide whether a probationer has violated O.C.G.A. § 42-1-13 nor to revoke any probation. Such decisions are left completely to the judicial branch as part our three branch system of government. There is simply no judicial power being exercised by the executive branch--the probation officer is merely taking steps to ensure that the law is faithfully executed. As such, this enumeration is without merit.

CONCLUSION

Wherefore, for the above and foregoing reasons, Appellees respectfully request that this Court affirm the order of the Superior Court of Clayton County.

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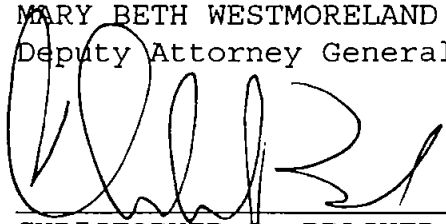

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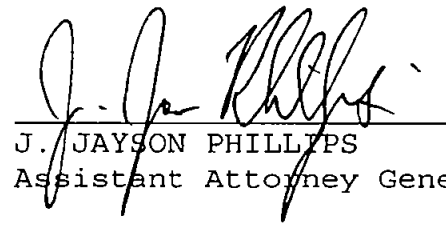

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CERTIFICATE OF SERVICE

I do hereby certify that I have served the within and foregoing BRIEF, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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This 28TH day of June, 2004.

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