
STATE OF MONTANA,

Plaintiff and Appellee,

v.

RICHARD DENVER HINMAN,

Defendant and Appellant.

ANDERS BRIEF OF APPELLANT

On Appeal from the Montana Second Judicial District Court,
Silver Bow County, the Honorable Robert J. Whelan, Presiding

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INTRODUCTION

Upon conscientious examination of the record below, counsel hereby advises this Court that the Appellant, Richard Hinman, has no non-frivolous basis for an appeal of his convictions of failure to register. Undersigned counsel, therefore, moves this Court to allow her to withdraw from representing Mr. Hinman in this appeal in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and Mont. Code Ann. § 46-8-103(2). If this Court deems there are issues that merit briefing, counsel requests this Court specify the issues to be briefed.

Pursuant to Mont. Code Ann. § 46-8-103(2), counsel has advised Mr. Hinman of her decision regarding the merits of this appeal and informed him that he will have the right to file a response to this motion directly with the Court. Counsel also sent him a draft of this *Anders* brief in advance of filing.

STATEMENT OF THE ISSUE

Should the undersigned counsel and the Appellate Defender Division be permitted to withdraw from representing Mr. Hinman in

accord with the criteria established by the United States Supreme Court in *Anders*?

STATEMENT OF THE CASE

On June 5, 2019, the State charged Mr. Hinman with Failure to Register as a sexual offender. (District Court Document (DC) 3.) The State alleged Mr. Hinman is required to register based on a felony sexual assault conviction from July 7, 1994. (DC 1.) Mr. Hinman pled guilty, reserving his right to appeal the district court's denial of his motion to dismiss. (10/2/19 Transcript (Tr.) pp. 4, 6, 8, 14.) (A copy of the 10/2/19 transcript is attached as Appendix (App.) A.) On February 12, 2020, the court sentenced Mr. Hinman to the Department of Corrections for four years, with all four years suspended. (02/12/20 Tr. p. 7.) (A copy of his Judgment is attached as App. B¹.)

¹ The written judgment incorrectly states Mr. Hinman waived his right to appeal his conviction. (App. B., p. 2.) In his plea agreement, Mr. Hinman specifically reserved his right to appeal pre-trial motions. (DC 28.) Further, during Mr. Hinman's Change of Plea Hearing, the district court specifically noted Mr. Hinman had reserved his right to appeal pre-trial motions. (10/2/19 Tr. pp. 4, 6, 8, 14.) During the oral pronouncement of sentence, the district court reiterated its recognition that Mr. Hinman reserved his right to appeal pre-trial issues. (2/12/20 Tr. pp. 8-9.)

STATEMENT OF THE FACTS

Mr. Hinman is a hard-working individual, doing the best he can to survive. He worked for years in the mines in Butte, and now suffers from severe COPD from his work in the mines and railyards. (2/12/20 Tr. p. 7.) Still, even when he struggles because of homelessness, he always tries to maintain some form of employment. (2/12/20 Tr. p. 7.) He is also a passionate inventor and is striving to promote his invention which will aid in recycling and global warming. (2/12/20 Tr. pp. 5-6.)

The State charged Mr. Hinman with Failure to Register as a sexual offender, based on a felony sexual assault conviction from twenty-five years earlier. (2/12/20 Tr. p. 5.) Mr. Hinman had already discharged from prison, in 2000, almost twenty years before this pending charge, and had his civil rights restored. (DC 21.) Nonetheless, when he moved residences, to assist an elderly neighbor who was very ill, and did not follow up with his new address, the State charged him with Failure to Register. (2/12/20 Tr. p. 5.) Mr. Hinman has committed no criminal offenses since 1994, except another failure to register offense. (2/12/20 Tr. p. 5.)

Mr. Hinman moved to dismiss this charge. (DC 27.) He argued 1) the sexual or violent registration act is a violation of the *ex post facto* clause of the United States and Montana Constitutions; 2) the Montana Sexual Offender Registration Act (SORA) is punitive; and 3) the lifetime registration requirement for sexual offenders is punitive and cannot be applied retroactively to him. (DC 27.)

The State did not file a written response to Mr. Hinman's motion to dismiss. (App. A., p. 5.) Rather, before the October 2, 2019 change of plea hearing, the State argued, "The matter of res judicata sufficiently addresses this. The failure to register statute has been upheld by the Montana Supreme Court in the past." (App. A, pp. 5-6.) Defense counsel informed the district court he would rely on his filed brief. The court issued the following oral order:

And I am going to rule. I do believe that this is res judicata under the circumstances. I believe that the Supreme Court has already made clear on these matters. And I am going to deny it.

(App. A, p. 6.) The court provided no further factual or legal analysis.

The court also issued no written order.

The matter proceeded with a change of plea hearing. (App. A, pp. 8-12.) The court ultimately followed the plea agreement when it imposed its sentence. (See, App. B.)

STANDARD OF REVIEW

The grant or denial of a motion to dismiss in a criminal case is a question of law which this Court reviews *de novo*. *State v. Hamilton*, 2007 MT 167, ¶5, 338 Mont. 142, 164 P. 3d 884 *citing State v. Mount*, 2003 MT 275, ¶15, 317 Mont. 481, 78 P. 3d 829.

ARGUMENT

Issues that arguably support an appeal.

- I. The district court violated Mr. Hinman’s constitutional rights, under both the United States and Montana Constitutions, when it denied his motion to dismiss.**
 - A. Given the punitive impact of the SORA, retroactive application of the Act is unconstitutional.**
 - 1. SORA history and analysis by this Court.**

In 1989, Montana enacted the Sexual Offender Registration Act. SORA mandates that convicted sex offenders register as sex offenders in their communities, at which time their communities are notified of the offenders' presence. *Mount*, ¶ 5. In 1997, the Legislature amended

the Act to make its registration and disclosure requirements retroactive to “sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989.” *Mount*, ¶ 7.

In *Mount*, the defendant was convicted of sexual intercourse without consent in 1994 and discharged his sentence in 1996. *Mount*, ¶¶9, 10. He was subsequently arrested for failing to register as a sexual offender. *Mount*, ¶ 11. *Mount* moved to dismiss the charge, and the district court held SORA, as applied to *Mount*, was in violation of the constitutional prohibition against *ex post facto* laws. *Mount*, ¶ 12. On appeal, this Court relied upon *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. ed. 2d 164 (2003) and held the SORA does not violate the *ex post facto* clauses of either the United States or Montana Constitutions. *Mount*, ¶90. *Smith* addressed Alaska’s sexual offender registration act, which this Court found similar to Montana’s SORA. *Mount*, ¶ 30.

The Court in *Mount* first held the intent to SORA was nonpunitive. *Mount*, ¶ 49. The Court then analyzed the effect of the law and determined it was nonpunitive. *Mount*, ¶¶ 50, 89. The Court

analyzed the following factors to determine whether effect of the law was punitive:

(1) whether the law imposes an affirmative restraint or disability; (2) the historical treatment of the law; (3) a finding of scienter; (4) whether the law was traditionally aimed at punishment; (5) whether the law applies to criminal behavior; (6) whether the law has a nonpunitive purpose; and (7) the excessiveness of the law in application.

Mount, ¶ 50 citing *Smith*, 123 S. Ct. at 1149 (citing *Kennedy v.*

Mendoza–Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)).

Ultimately, applying the totality of these circumstances, the Court held the effect of the act is nonpunitive. *Mount*, ¶ 89.

2. It is appropriate for this Court to revisit *Mount*.

Subsequent to *Mount* and *Smith*, numerous states have considered the issue of whether their state SORA laws violate their state constitutional prohibitions against *ex post facto* laws. Notably, after *Smith*, the Supreme Court of Alaska, notwithstanding the *Smith* decision based on federal law, held Alaska’s SORA violated the *ex post facto* clause of the state constitution. *Doe v. State*, 189 P. 3d 999 (Alaska 2008). The Court applied the same factors used by the Court in

Smith, and found, under the Alaska’s *ex post facto* clause, Alaska’s SORA was punitive. *Doe*, 189 P. 3d at 1007. The Court concluded “ASORA’s effects are punitive, and convincingly outweigh the statute’s non-punitive purposes and effects” and thus violate the protection against *ex post facto* laws under the Alaska Constitution as applied to defendants who committed their crimes before the legislature enacted ASORA. *Doe*, 189 P. 3d at 1018-1019.

This Court, in *Mount*, relied on the *Smith* Court’s determination that Alaska’s SORA law was regulatory and not punitive in nature. The Alaska Supreme Court’s holding in *Doe* significantly narrows and undercuts the *Smith* decision. Multiple other states have followed *Doe* and have rejected *Smith* and have held retroactive application of the states’ SORA laws violated the *ex post facto* laws of their state constitutions because the effects of the SORA acts were punitive. *See, Starkey v. Oklahoma Dept. of Corrections*, 305 P. 3d 1004 (Oklahoma 2013) (applied the *Mendoza-Martinez* factors evaluated in *Smith* and concluded the retroactive application of the SORA’s registration is punitive and outweighs its non-punitive purpose and, therefore, is inconsistent with the *ex post facto* clause in the Oklahoma

Constitution); *Wallace v. Indiana*, 905 N.E. 2d 371, 378 (Ind. 2009) (the Indiana Supreme Court held that a sex offender registration act was unconstitutional under the state constitution as applied to the defendant, even when using the federal test); *Doe v. Dept. of Public Safety and Correctional Services*, 61 A. 3d 123, 132, 143 (Md. 2013) (rejecting *Smith* and holding retroactive application of the Maryland SORA had essentially the same effect upon Petitioner's life as placing him on probation and imposing the punishment of shaming for life, thus tantamount to imposing an additional sanction for Petitioner's crime, and therefore, in violation of the *ex post facto* prohibition contained in the Maryland Declaration of Rights).

Contrary to *Mount*, these cases have all held, pursuant to their state constitutions, that their state registration acts have a punitive effect and therefore retroactive application is unconstitutional. Given the trend of states applying their state constitutions to find the SORA punitive, this Court should overrule *Mount* and its progeny, and hold, pursuant to the Montana Constitution, the retroactive application of the SORA is unconstitutional.

B. The lifetime registration requirement violates Mr. Hinman's due process rights.

This Court in *Mount*, in reaching its conclusion that the effect of the act was nonpunitive, repeatedly found it important that Mount could eventually petition a court for an order relieving him of the registration requirement. *Mount*, ¶¶ 56, 74, 87. Pursuant to the SORA, Mr. Hinman must register his entire lifetime. Mont. Code Ann. § 46-23-506(1). Since he has been designated a level two sexual offender, he cannot even petition to be relieved of the duty to register until after twenty-five years of registration. Mont. Code Ann. § 46-23-506(3)(b).

Recently in *Powell v. Keel*, the Supreme Court of South Carolina held South Carolina's SORA's lifetime registration requirement, without judicial review, violates due process. *Powell v. Keel*, --- S.E. 2d --- (June 9, 2021). The Court concluded, although the State has a legitimate interest in requiring sex offender registration, the lifetime registration requirement, without judicial review, violates due process because it is arbitrary and cannot be deemed rationally related to the purpose of protecting the public from those with a high risk of re-offending. *Powell*, *8. See also, *State v. Letalien*, 985 A. 2d 4 (Me. 2009)

(retroactive application of the Maine SORA unconstitutional without, at a minimum, affording those offenders any opportunity to petition to be relieved of the duty); *Doe v. State*, 111 A. 3d 1077, 1101 (N.H. 2015) (lifetime registration, without review, provision of New Hampshire's SORA makes the Act sufficiently punitive to overcome the presumption of its constitutionality.)

Although Montana's SORA is not as restrictive as South Carolina's act, for Mr. Hinman, it is just as punitive. Mr. Hinman will be sixty-one years old with no new offenses (other than failure to register) by the time he is even able to petition the court to be relieved of the duty to register. Montana's SORA, which imposes a duty to register for twenty-five years before a level two offender can even have an opportunity to petition for judicial review, is excessive and violates the due process rights of citizens such as Mr. Hinman.

II. Since Mr. Hinman has discharged his sentence and has had his civil rights fully restored, retroactive application of SORA to Mr. Hinman violates the Montana Constitution.

Mr. Hinman also would like to argue that his constitutional rights are violated since the State has forced him to register for an offense for which the State has fully restored his civil rights. Mr. Hinman fully

discharged his prison sentence for his sexual assault conviction on July 14, 2000. (DC 21.) At the time of his discharge, the State fully restored his rights. Article II, Section 28(2), of the Montana Constitution provides: “Full rights are restored by termination of state supervision for any offense against the state.” Additionally, Mont. Code Ann. § 46–18–801(2), provides:

[I]f a person has been deprived of a civil or constitutional right by reason of conviction for an offense and the person's sentence has expired or the person has been pardoned, the person is restored to all civil rights and full citizenship, the same as if the conviction had not occurred.

“Full rights,” as provided in the Constitution, includes all civil and political rights. *Mount*, ¶95.

In *Mount*, this Court held the SORA did not deprive Mount of any rights under Article II, Section 28 of the Montana Constitution. *Mount*, ¶100. (*See also, Wagner v. State*, 2004 MT 31, 319 Mont. 413, 85 P. 3d 750 (sex offender registration did not violate parolee’s right to full restoration of rights under Montana Constitution). Nonetheless, Mr. Hinman would like to argue the SORA continues to punish people who have paid their debt to society by subjecting them, for the rest of their lives, to relentless government involvement and surveillance. Without

question, lifetime monitoring by the State is a substantial and onerous restrictions on individual liberty. Mr. Hinman's requests this Court overrule *Mount* and *Wagner* and determine that the SORA, imposed on individuals who already have completed their sentences, violates the Montana Constitution's guarantee of restoration of "all civil rights and full citizenship, the same as if the conviction had not occurred."

CONCLUSION

Counsel has not identified any non-frivolous issues for direct appeal. Counsel requests this court allow counsel to withdraw. If this Court determines there are issues warranting an appeal brief, counsel requests the Court set them out in its Order.

Respectfully submitted this 12th day of July, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *Anders* brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,512, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kristina L. Neal
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APPENDIX

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CERTIFICATE OF SERVICE

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