STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v BOBAN TEMELKOSKI, Defendant-Appellee.	FOR PUBLICATION October 21, 2014 9:05 a.m. No. 313670 Wayne Circuit Court LC No. 94-000424-FH Advance Sheets Version

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM.

This case is before this Court for consideration as on leave granted.[1] The people contend that the trial court erred by granting defendant's motion to be removed from the sex offender registry under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. For the reasons set forth in this opinion, we reverse.

I. FACTS AND PROCEDURAL HISTORY

In 1994, defendant, then age 19, was charged with second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (victim under 13 years of age). The charge arose from an incident in which defendant kissed and groped a 12-year-old female. The facts and circumstances of the incident are disputed.

On March 4, 1994, defendant pleaded guilty of CSC-II. Defendant was adjudicated under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*., and sentenced to three years' probation. On April 16, 1997, upon successful completion of probation, the trial court dismissed the case and defendant did not have a conviction on his record. However, defendant was required to register as a sex offender pursuant to SORA, which took effect after defendant had pleaded guilty. See MCL 28.723(1)(b); MCL 28.722(w)(*v*). Under the current version of SORA, defendant is required to register as a sex offender for life. See MCL 28.722(w)(*v*) (designating CSC-II involving a minor under age 13 as a "Tier III offense"); MCL 28.725(12) ("Except as otherwise provided . . . , a tier III offender shall comply with this section for life.").

[1] *People v Temelkoski*, 495 Mich 879 (2013).

On August 9, 2012, defendant filed a motion seeking removal from the sex offender registry. Citing *People v Dipiazza*, 286 Mich App 137; 778 NW2d 264 (2009), defendant argued that requiring him to register as a sex offender when he does not have a conviction for a sex offense constitutes cruel or unusual punishment. Defendant argued that, like the defendant in *Dipiazza*, he engaged in a consensual act with the complainant. Defendant further claimed that his status as a sex offender caused him difficulty gaining employment and adversely affected his ability to be a father to his children and caused depression. Defendant attached a psychological risk assessment conducted by a licensed psychologist who opined that defendant is at a low risk for reoffending and that he does not meet the clinical classification of a pedophile or sexual predator.

In opposing the motion, the prosecution claimed that it was well-settled law that SORA's registration and reporting requirements do not constitute "punishment" in the constitutional sense and, therefore, the requirements did not violate the constitutional proscriptions against cruel or unusual punishment. The prosecution further argued that *Dipiazza* was limited by *In re TD*, 292 Mich App 678 (2011), vacated 493 Mich 873 (2012), and that the circumstances of the underlying offense were unlike the circumstances in *Dipiazza*, making the case distinguishable.

On September 21, 2012, the trial court granted defendant's motion, stating:

> One, Holmes Youthful Trainee is not a conviction, and it's not subject to S.O.R.A.
>
> That's -- it may be in the face of the law that you have, but that's my ruling.
>
> Second thing is, this is an ex post facto law.
>
> He was not subject to the law at the time that he was sentenced.
>
> All of a sudden, they pass a law later saying that he has to register.
>
> * * *
>
> And thirdly, I'll make a ruling, so that you have a proper record for the Court of Appeals.
>
> This is a punishment.
>
> * * *
>
> . . . I'm gonna grant the motion to remove him from the Sex Registry.

On December 4, 2012, the prosecution filed a delayed application for leave to appeal in this Court, arguing that the trial court had erred by (1) holding that registration on the sex offender registry amounted to punishment, (2) holding that the punishment was cruel or unusual, and (3) holding that SORA violated the Ex Post Facto Clause.

After this Court denied the prosecution's application for leave to appeal,[2] our Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration "as on leave granted." *People v Temelkoski*, 495 Mich 879 (2013).

II. STANDARD OF REVIEW

"We review constitutional issues de novo." *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). "Statutes are presumed to be constitutional, and the courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Ayres*, 239 Mich App 8, 10; 608 NW2d 132 (1999). "The party challenging a statute has the burden of proving its invalidity." *Id.* To the extent we must interpret the applicable statutory provisions, issues involving statutory interpretation are questions of law that we review de novo. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

III. LEGAL BACKGROUND

A. RELEVANT STATUTES

Under HYTA, when a defendant between the ages of 17 and 21 pleads guilty of certain criminal offenses, [3] "the court of record having jurisdiction of the criminal offense, may, without entering a judgment of conviction . . . , consider and assign that individual to the status of youthful trainee." MCL 762.11(1). "An assignment to youthful trainee status does not constitute a conviction of a crime unless the court revokes the defendant's status as a youthful trainee." *Dipiazza*, 286 Mich App at 141-142, citing MCL 762.12. If the defendant successfully completes his or her HYTA assignment, the court "shall discharge the individual and dismiss the proceedings," MCL 762.14(1), and "all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection," MCL 762.14(4). However, an individual assigned to HYTA status "*before* October 1, 2004, for a listed offense enumerated in [MCL 28.722 of SORA][4] is required to comply with the requirements of that act." MCL 762.14(3) (emphasis added).

SORA was enacted in 1994 and took effect on October 1, 1995. Former MCL 28.731, as enacted by 1994 PA 295. In relevant part, subject to certain exceptions, SORA currently requires the following individuals to register as sex offenders:

> (a) An individual who is convicted of a listed offense after October 1, 1995.

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[2] *People v Temelkoski*, unpublished order of the Court of Appeals, entered July 8, 2013 (Docket No. 313670).

[3] Following a 2004 amendment, HYTA no longer applies to individuals who plead guilty of CSC-II and certain other offenses. See MCL 762.11(2), as amended by 2004 PA 239.

[4] CSC-II involving a victim less than 13 years of age is a listed Tier-III offense for purposes of SORA. MCL 28.722(k) and (w)(*v*).

(b) An individual convicted of a listed offense on or before October 1, 1995 if on October 1, 1995 he or she is on probation or parole, committed to jail, committed to the jurisdiction of the department of corrections, or under the jurisdiction of the juvenile division of the probate court or the department of human services for that offense . . . . [MCL 28.723(1).]

SORA currently defines "convicted" in relevant part as follows:

(*i*) Having a judgment of conviction or a probation order entered in any court having jurisdiction over criminal offenses . . . .

(*ii*) Either of the following:

(A) *Being assigned to youthful trainee status . . . before October 1, 2004.* [MCL 28.722(b) (emphasis added).]

"The SORA, as it was first enacted, was designed as a tool solely for law enforcement agencies, and registry records were kept confidential." *Doe v Mich Dep't of State Police*, 490 F3d 491, 495 (CA 6, 2007). "As of September 1, 1999, however, the SORA was amended to create the [public sex offender registry (PSOR)] which can be accessed by anyone via the internet." *Id.*; see MCL 28.728(2). Generally, offenders required to register under SORA are included on the PSOR,[5] MCL 28.728(2), and the PSOR lists "names, aliases, addresses, physical descriptions, birth dates, photographs, and specific offenses" of registered offenders, *Dipiazza*, 286 Mich App at 143.

The United States Court of Appeals for the Sixth Circuit explained the interplay between SORA and HYTA as follows:

When the Michigan legislature enacted the SORA, it also amended the HYTA to provide that even individuals assigned to youthful trainee status were required to register as sex offenders. This . . . provision is in effect an exception to HYTA's general provision that "[u]nless the court enters a judgment of conviction against the individual . . . , all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection."

* * *

Both the original and the amended versions of the SORA . . . define the term "convicted" to reach youthful trainees charged with certain sex offenses. The SORA thus creates an exception to the HYTA's provisions that "assignment of an individual to the status of youthful trainee . . . is not a conviction for a

[5] Some juvenile offenders and some Tier I offenders are exempted from the PSOR, see MCL 28.728(4); however, these exceptions are not at issue in this case.

> crime" and that an "individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee." Notwithstanding the HYTA, the SORA thus requires youthful trainees charged with certain sex offenses to register as "convicted sex offenders" and information about their identities and "convictions" appears on the PSOR. [*Doe*, 490 F3d at 495-496 (citations omitted).]

In this case, defendant pleaded guilty of CSC-II involving a person under 13, MCL 750.520c(1)(a), a Tier-III offense for purposes of SORA, MCL 28.722(k); MCL 28.722(w)(*v*). Although defendant was assigned to and completed youthful trainee status under HYTA, because defendant's adjudication under HYTA occurred before October 1, 2004, he is considered to have been "convicted" of a listed offense for purposes of SORA and must register as a sex offender. MCL 762.14(3). As a Tier-III offender who does not qualify under any of the exceptions, defendant is required to register as a sex offender for life. MCL 28.723(1)(b); MCL 28.722(w)(*v*).

B. CONSTITUTIONAL PRINCIPLES

"The Ex Post Facto Clauses of the United States and Michigan Constitutions bar the retroactive application of a law if the law: (1) punishes an act that was innocent when the act was committed; (2) makes an act a more serious criminal offense; (3) *increases the punishment for a crime*; or (4) allows the prosecution to convict on less evidence." *People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014), citing *Calder v Bull*, 3 US (3 Dall) 386, 390; 1 L Ed 648 (1798) (emphasis added). "The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16, whereas the United States Constitution prohibits cruel *and* unusual punishment, US Const, Am VIII." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011). Thus, "[i]f a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *Id*. (quotation marks and citation omitted).

IV. ANALYSIS

Defendant argues that we should affirm the trial court's order removing him from the sex offender registry because applying SORA to him constitutes cruel or unusual punishment and violates the Ex Post Facto Clause. Necessarily, determination of whether a law violates the Ex Post Facto Clause or amounts to cruel or unusual punishment involves a threshold inquiry into whether the law imposes punishment in the constitutional sense.

This Court has previously addressed whether SORA imposes punishment as applied to adult defendants. In *People v Pennington*, 240 Mich App 188, 193; 610 NW2d 608 (2000), this Court rejected the defendant's argument that SORA violated the Ex Post Facto Clause, holding that SORA's registration requirement did not constitute punishment. This Court relied on *Lanni v Engler*, 994 F Supp 849 (ED Mich, 1998), and *Doe v Kelley*, 961 F Supp 1105 (WD Mich, 1997), two federal cases holding that SORA did not constitute punishment and was instead aimed at protecting the public. *Pennington*, 240 Mich App at 193-197.

Similarly, in *People v Golba*, 273 Mich App 603; 729 NW2d 916 (2007), this Court rejected a constitutional challenge brought by an adult defendant. In *Golba*, the defendant argued that the trial court had violated his constitutional rights by ordering him to register as a sex offender on the basis of judicially found facts. *Id*. at 615. In rejecting the defendant's argument, this Court held that SORA did not offend the Constitution because registration did not amount to punishment. *Id*. at 619-620. Instead, this Court explained that the act "advances a legitimate government interest in protecting the community by promoting awareness of the presence of convicted sex offenders from whom certain members of the community may face a danger." *Id*. at 620 (quotation marks and citation omitted).

This Court has also addressed whether SORA imposes punishment as applied to a juvenile. In *Ayres*, 239 Mich App at 9-10, the juvenile respondent was adjudicated as delinquent in family court for CSC-II and was required to register as a sex offender. This Court rejected the respondent's argument that applying SORA amounted to cruel or unusual punishment. *Id*. at 18-21. In doing so, this Court held that SORA's registration requirement was not a form of punishment, adopting the reasoning set forth in *Kelley*, 961 F Supp at 1108-1112, and *Lanni*, 994 F Supp at 852-854. *Ayres*, 239 Mich App at 18-19. However, the *Ayres* Court "buttressed its conclusion" that SORA did not impose punishment "with the fact that SORA at that time exempted juveniles from the provisions requiring public notification." *Golba*, 273 Mich App at 618.

Following the creation of the PSOR, in rejecting various constitutional arguments brought by another juvenile respondent, this Court questioned the continuing validity of *Ayres*. *In re Wentworth*, 251 Mich App 560, 568-569; 651 NW2d 773 (2002). Seven years later in *Dipiazza*, 286 Mich App at 146-159, a case involving an 18-year-old HYTA defendant, this Court held that *Ayres* was no longer binding and concluded that the application of SORA to the defendant in that case amounted to cruel or unusual punishment.

In *Dipiazza*, the defendant, then age 18, was involved in a consensual sexual relationship with NT, a female who was "nearly 15 years old." *Id*. at 140. NT's parents were aware of the relationship and condoned it, but one of NT's teachers reported the defendant to the prosecuting attorney. *Id*. The defendant was adjudicated under HYTA for attempted third-degree criminal sexual conduct, and he successfully completed probation. *Id*. at 140, 154. Although his case was dismissed and he eventually married NT, the defendant was still required to register as a sex offender. *Id*. at 140.

The defendant petitioned the trial court for removal from the sex offender registry, arguing that the registry requirement amounted to cruel or unusual punishment. *Id*. at 140-141. Specifically, the defendant argued that he did not have a conviction on his record because he had successfully completed HYTA and that the registry wrongfully identified him as having been convicted of a sex offense. *Id*. at 140. The defendant argued that because of the amendments of SORA that became effective on October 1, 2004, he would not have had to register on the PSOR if he had been convicted six weeks later. *Id*. at 141. The trial court denied the defendant's request, ruling that it was bound by *Ayres*, 239 Mich App at 8. *Dipiazza*, 286 Mich App at 141.

On appeal, in addressing whether the registration and notification requirements of SORA imposed "punishment" on the defendant, this Court examined *Ayres* and then noted that *Ayres*

was decided under SORA as it was first enacted, when public access to registration was foreclosed, and that the continuing validity of *Ayres* had been questioned by this Court in *Wentworth*, 251 Mich App 560. *Dipiazza*, 286 Mich App at 144-147. This Court proceeded to apply anew the four factors[6] set forth in *Ayres* for determining whether governmental action constitutes punishment in the constitutional sense. *Id*. at 147-152.

With respect to the first factor (legislative intent), this Court noted that the amendments of SORA by 2004 PA 240, effective October 1, 2004, were motivated in part by concerns that the "reporting requirements are needlessly capturing individuals who do not pose a danger to the public, and who do not pose a danger of reoffending" and observed that

> [i]t is incongruous to find that a teen who engages in consensual sex and is assigned to youthful trainee status after October 1, 2004, is not considered dangerous enough to require registration, but that a teen who engaged in consensual sex and was assigned to youthful trainee status before October 1, 2004, is required to register. The implied purpose of SORA, public safety, is not served by requiring an otherwise law-abiding adult to forever be branded as a sex offender because of a juvenile transgression involving consensual sex during a Romeo and Juliet relationship. [*Dipiazza*, 286 Mich App at 148-149 (quotation marks and citations omitted).]

With respect to the second factor (the design of the legislation), this Court noted that the federal decisions (*Lanni* and *Kelley*) concluded that the notification scheme in SORA was "purely regulatory and remedial" and did not inflict "suffering, disability or restraint." *Id*. at 149. Yet this Court went on to distinguish the federal decisions, concluding that the defendant in the matter at hand did suffer a disability and loss of privileges:

> That defendant is suffering a disability and a loss of privilege is further confirmed by the fact that there are not strict limitations on public dissemination . . . . Searches on the sex offender registry are no longer limited . . . to the searcher's zip code, but rather the registry provides a searcher with information about every person registered as a sex offender living in every zip code in the state. [*Id*. at 151.]

With respect to the third factor (historical treatment of analogous measures), this Court found that none existed, and with respect to the fourth factor (the effects of the legislation), this Court held that SORA negatively affected HYTA's purpose and the defendant, who had successfully completed his probation:

> While the government has always had the authority to warn the public about dangerous persons and such warnings have never been understood as imposing

[6] These factors include (1) the legislative intent, (2) the design of the legislation, (3) the historical treatment of analogous measures, and (4) the effects of the legislation. *Dipiazza*, 286 Mich App at 147, citing *Ayres*, 239 Mich App at 14-15.

> punishment, in this case, the warning is not about the presence of an individual who is dangerous. . . . [T]he government is effectively warning the public that defendant is dangerous, thus publicly labeling defendant as dangerous. Such warning or "branding" in the context of this case clearly constitutes punishment.
>
> Further, the basic premise of HYTA is "to give a break to first-time offenders who are likely to be successfully rehabilitated" by having the offender's act not result in a conviction of a crime and by requiring that the offender's record not be available for public inspection. However, the PSOR provides a "Conviction Date" . . . for defendant. Consequently, requiring defendant to register for 10 years forces him to retain the status of being "convicted" of an offense, thus frustrating the basic premise of HYTA. [*Id*. at 152 (citations omitted).]

This Court also set forth the "devastating" effects on the defendant caused by the requirement to register and concluded that the registration requirements under SORA, "as applied to defendant," constituted punishment. *Id*. at 152-153.

Next, this Court addressed whether the punishment imposed by SORA was cruel or unusual as applied to the defendant and concluded that, "considering the gravity of the offense, the harshness of the penalty, a comparison of the penalty to penalties imposed for the same offense in other states, and the goal of rehabilitation, . . . requiring defendant to register as a sex offender for 10 years is cruel or unusual punishment." *Id*. at 156.

Following this Court's decision in *Dipiazza*, the Legislature again amended SORA in 2011 PA 18 and added a "consent exception" for certain offenders who can prove that they engaged in a consensual sexual act. That exception is codified at MCL 28.728c(3) and (14), and provides as follows:

> (3) An individual classified as a tier I, tier II, or tier III offender who meets the requirements of subsection (14) . . . may petition the court under that subsection for an order allowing him or her to discontinue registration under this act.
>
> * * *
>
> (14) The court shall grant a petition properly filed by an individual under subsection (3) if the court determines that the conviction for the listed offense *was the result of a consensual sexual act between the petitioner and the victim* and any of the following apply:
>
> (a) All of the following:
>
> (*i*) The victim was 13 years of age or older but less than 16 years of age at the time of the offense.
>
> (*ii*) The petitioner is not more than 4 years older than the victim.

(b) All of the following:

(*i*) The individual was convicted of a violation of [MCL 750.158, MCL 750.338, MCL 750.338a, or MCL 750.338b].

(*ii*) The victim was 13 years of age or older but less than 16 years of age at the time of the violation.

(*iii*) The individual is not more than 4 years older than the victim.

(c) All of the following:

(*i*) The individual was convicted of a violation of [MCL 750.158, MCL 750.338, MCL 750.338a, MCL 750.338b, or MCL 750.520c].[7]

(*ii*) The victim was 16 years of age or older at the time of the violation.

(*iii*) The victim was not under the custodial authority of the individual at the time of the violation. [Emphasis added.]

In addition, in *TD*, 292 Mich App 678, a case involving a juvenile defendant convicted by jury of CSC-II, this Court rejected the defendant's argument that SORA amounted to cruel or unusual punishment. This Court differentiated *Dipiazza*, noting that "[t]he *Dipiazza* Court's analysis was limited to the specific facts in that case." *Id*. at 689. However, our Supreme Court vacated this Court's opinion and dismissed *TD* as moot because the defendant was "no longer required to register under the amended [SORA]." *TD*, 493 Mich at 873. *TD*, therefore, has no precedential value, and the prosecution's reliance on the case is misplaced.

In this case, defendant was not a juvenile at the time he was assigned to youthful trainee status under HYTA. HYTA applies to individuals between the ages of 17 and 21. Thus, assignment under HYTA is not indicative of whether an individual is a juvenile under the law. However, *Pennington*, 240 Mich App 188, and *Golba*, 273 Mich App 603, are not controlling in this case because, unlike the defendants in *Pennington* and *Golba*, defendant was assigned to youthful trainee status under HYTA.

Defendant argues that *Dipiazza* is controlling. He contends that, like the defendant in *Dipiazza*, he engaged in a consensual act with the complainant and was adjudicated under HYTA. Defendant argues that requiring him to register as a sex offender is punishment because he does not have a conviction for a sex offense.

[7] For purposes of SORA, defendant is considered to have been "convicted" of CSC-II under MCL 750.520c; because the complainant in this case was not 16 at the time of the offense (she was 12), the consent exception of MCL 28.728c(3) and (14)(c) does not apply to defendant.

Dipiazza is not controlling in this case. First, the facts of this case are distinguishable. Defendant was not involved in consensual relationship similar to the one at issue in *Dipiazza*, which involved an 18-year-old and a female who was "nearly" 15-years-old. *Dipiazza*, 286 Mich App at 140. In contrast, in this case, defendant was 19 when he committed the offense and the complainant was only 12 years old. This was not an ongoing Romeo and Juliet relationship condoned by the complainant's parents. Second, the *Dipiazza* Court analyzed whether SORA constituted punishment *before* the Legislature amended the act in 2011 and added the consent exception discussed above. This exception addressed a primary concern the *Dipiazza* Court had with SORA—i.e., requiring a youthful trainee to register as a sex offender after he engaged in a consensual sexual relationship with a peer. Because the *Dipiazza* Court did not have the opportunity to consider if the 2011 amendment had any effect on whether SORA constitutes punishment, its constitutional analysis is outdated.

To determine whether SORA is a form of punishment as applied to defendant, we turn to *Earl*, 495 Mich 33, our Supreme Court's most recent decision addressing whether a statutory scheme imposes punishment for purposes of the Constitution.

In *Earl*, our Supreme Court explained that determining whether a legislative scheme imposes punishment involves a two-part inquiry:

> The court must begin by determining whether the Legislature intended the statute as a criminal punishment or a civil remedy. If the Legislature's intention was to impose a criminal punishment, . . . the analysis is over. However, if the Legislature intended to enact a civil remedy, the court must also ascertain 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 38 (citations omitted) (alteration in original).]

The first step in this inquiry—"determining whether the Legislature intended for a statutory scheme to impose a civil remedy or a criminal punishment"—requires examining the statute's text and its structure to determine whether the Legislature "indicated either expressly or impliedly a preference for one label or the other." *Id*. (quotation marks and citations omitted). "If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal." *Id*. at 38-39 (quotation marks and citations omitted). In contrast, "a statute is intended as a civil remedy if it imposes a disability to further a legitimate governmental purpose." *Id*. " '[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." ' " *Id*. at 42-43, quoting *Smith v Doe*, 538 US 84, 93-94; 123 S Ct 1140; 155 L Ed 2d 164 (2003) (citation omitted).

If the Legislature did not intend for an act to impose punishment, the second part of the analysis is to determine whether the act is " 'so punitive either in purpose or effect as to negate the State's intention to deem it civil.' " *Earl*, 495 at 43, quoting *Smith*, 538 US at 92. In determining "whether an act has the purpose or effect of being punitive, courts consider seven factors noted in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963)." *Earl*, 495 Mich at 43-44. The *Mendoza-Martinez* factors are

> "[1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned." [*Id*. at 44, quoting *Mendoza-Martinez*, 372 US at 168-169 (second alteration added).]

These factors are "useful guideposts" and are "neither exhaustive nor dispositive." *Earl*, 495 Mich at 44 (quotation marks and citation omitted). Moreover, "courts will 'reject the legislature's manifest intent [to impose a civil remedy] only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect [as] to negate the . . . intention to deem it civil.' " *Id*. (citation omitted) (first alteration in original).

A. LEGISLATIVE INTENT

MCL 28.721a sets forth the Legislature's intent in enacting SORA as follows:

> The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.

This statutory provision indicates that the Legislature was acting pursuant to its police powers to protect the citizenry against individuals it deemed pose a danger of recidivism by providing police and the public with a means of monitoring those individuals. " '[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." ' " *Earl*, 495 Mich at 42-43, quoting *Smith* 538 US at 93-94 (citation omitted). The Legislature did not intend that SORA impose punishment; "[t]he Legislature's intent as set forth in express terms was not to chastise, deter, or discipline an offender, but rather to assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." *Dipiazza*, 286 Mich App at 148 (quotation marks and citation omitted).

The *Dipiazza* Court reasoned that the Legislature's stated intent as expressed in MCL 28.721a had been "frustrated" because "[t]he implied purpose of SORA, public safety, is not served by requiring an otherwise law-abiding adult to forever be branded as a sex offender because of a juvenile transgression involving consensual sex during a Romeo and Juliet

relationship." *Id*. at 148-149. The 2011 amendment addressed the *Dipiazza* Court's concern. Specifically, the 2011 amendment added a consent exception to SORA that provides some youthful offenders relief in situations involving consensual sexual acts. See MCL 28.728c(3) and (14). While the exception does not apply in this case because the complainant was only 12 years old and defendant was 19, the Legislature could have reasonably concluded that the public should be protected and informed of individuals, including HYTA trainees, who commit sexual offenses against persons under age 13, irrespective of whether the complainant consented. Failure to extend the consent exception to include situations involving complainants under the age of 13 does not make SORA punitive in nature.

In sum, we conclude that the Legislature intended SORA as a civil remedy to protect the health and welfare of the public.

B. PURPOSE AND EFFECTS

Having determined that the Legislature intended SORA as a civil remedy, we must determine whether SORA nevertheless is " 'so punitive either in purpose or effect as to negate the State's intention to deem it civil.' " *Earl*, 495 Mich at 44, quoting *Smith*, 538 US at 92. This inquiry involves applying the relevant *Mendoza-Martinez* factors. In *Smith*, 538 US at 97, the United States Supreme Court applied these factors to Alaska's sex offender registration act (ASORA) and concluded that the purpose and effects of ASORA did not negate the state's intent to deem it civil. The *Smith* Court applied the following five factors in reaching this conclusion: "whether, in its necessary operation," ASORA (1) "has been regarded in our history and traditions as a punishment," (2) "imposes an affirmative disability or restraint," (3) "promotes the traditional aims of punishment," (4) "has a rational connection to a nonpunitive purpose," and (5) "is excessive with respect to this purpose." *Id*. These five factors are relevant in this case, and they govern our analysis.

1. HISTORICAL FORM OF PUNISHMENT

With respect to whether SORA has been regarded historically and traditionally as punishment, sex offender registration and notification laws are a relatively new form of legislation. See *Kelley*, 961 F Supp at 1106-1107. Today, all 50 states and the federal government have enacted some form of sex offender registration and notification provisions, see *id*., and a body of law has developed on a range of issues related to the legislation, including whether the legislation constitutes punishment.

Smith, 538 US 84, is the preeminent case holding that a sex offender registration and notification law, as applied to an adult defendant, is not a form of punishment. The *Smith* Court noted that "an imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective and has been historically so regarded." *Id*. at 93 (quotation marks and citation omitted); see also *Helman v State*, 784 A2d 1058, 1078 (Del, 2001) (noting that "in their brief history most courts seem to regard notification statutes as remedial in nature"). Indeed, consistently with *Smith*, courts from various jurisdictions have held that as applied to adult defendants, sex offender registration and notification laws are nonpunitive in nature. See, e.g., *Cutshall v Sundquist*, 193 F3d 466, 477 (CA 6, 1999); *Femedeer v Haun*, 227 F3d 1244, 1253 (CA 10, 2000); *People v Malchow*, 193 Ill 2d 413, 421; 250 Ill Dec 670; 739

NE2d 433 (2000); *State v Seering*, 701 NW2d 655, 667-669 (Iowa, 2005); *State v Pentland*, 296 Conn 305, 314; 994 A2d 147 (2010) (noting that the state's sex offender legislation did not impose punishment in the constitutional sense). But see *Commonwealth v Baker*, 295 SW3d 437, 447 (Ky, 2009); *Wallace v State*, 905 NE2d 371, 384 (Ind, 2009); *Starkey v Oklahoma Dep't of Corrections*, 2013 Okla 43, ¶ 77; 305 P3d 1004 (2013) (concluding that respective states' sex offender registry and notification laws imposed punishment).

In addition, unlike traditional forms of public shaming, such as branding and banishment, publicity and stigma are not integral parts of SORA; instead, "[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender," and "the attendant humiliation is but a collateral consequence of a valid regulation." *Smith*, 538 US at 99. As this Court previously noted in *Ayres*:

> "The notification provisions themselves do not touch the offender at all. While branding, shaming and banishment certainly impose punishment, providing public access to public information does not. . . . And while public notification may ultimately result in opprobrium and ostracism similar to those caused by these historical sanctions, such effects are clearly not so inevitable as to be deemed to have been imposed by the law itself. [*Ayres*, 239 Mich App at 16, quoting *Kelley*, 961 F Supp at 1110.]

In considering the "historical treatment of analogous measures," the *Dipiazza* Court concluded that "no analogous measures exists, nor is there an historical antecedent that relates to requiring a defendant to register as a sex offender when the defendant was a teenager engaged in consensual sex and . . . was assigned to youthful trainee status . . . ." *Dipiazza*, 286 Mich App at 151. The *Dipiazza* Court considered the historical treatment of SORA in the context of the unique facts of that case, so the reasoning is inapplicable in this case. Furthermore, given that the 2011 amendment added a consent exception, this reasoning is no longer applicable.

In short, we conclude that SORA is unlike traditional forms of punishment and the first *Mendoza-Martinez* factor weighs in favor of finding that SORA is nonpunitive in its purpose and effects as applied to defendant.

2. AFFIRMATIVE DISABILITY OR RESTRAINT

The second relevant factor concerns whether SORA imposes an affirmative disability or restraint. *Smith*, 538 US at 97. The *Smith* Court noted that, in applying this factor, "we inquire how the effects of the Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id*. at 99-100. The Court concluded that ASORA did not impose an affirmative disability or restraint. *Id*. at 100. ASORA did not resemble imprisonment because it did not impose physical restraints, it did not limit the offender's ability to change jobs or residences, and the effects were less harsh than occupational debarment, which the Court had previously held to be nonpunitive. *Id*. The Court rejected the argument that ASORA imposed a severe restraint in that it likely would render offenders "completely unemployable," explaining that even absent ASORA, employers and landlords could obtain the same information by conducting "routine background checks." *Id*. The Court stated, "Although the public availability of the information may have a lasting and painful

impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Id*. at 101. Moreover, unlike probation or supervised release, which "entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction," under ASORA, offenders were "free to move where they wish and to live and work as other citizens, with no supervision," and any prosecution for an infraction was separate from the original offense. *Id*. at 101-102.

Defendant argues that SORA has imposed significant hardships on him and his family, including "loss of employment, loss of ability to be a father to his children, harassment, and depression." Apart from the information available under SORA, defendant argues that a criminal background check would not reveal any conviction for a sexual offense.

In addition, SORA " 'inflicts no suffering, disability or restraint.' " *Pennington*, 240 Mich App at 195, quoting *Kelley*, 961 F Supp at 1109. Although defendant certainly experiences adverse effects from being listed on the PSOR, these effects stem from the commission of the underlying act, not SORA's registration requirements. While secondary effects may flow indirectly from the PSOR, " 'punishment in the criminal justice context must be reviewed as the *deliberate imposition by the state* of some measure *intended* to chastise, deter or discipline. Actions taken by members of the public, lawful or not, can hardly be deemed dispositive of whether legislation's purpose is punishment.' " *Pennington*, 240 Mich App at 196, quoting *Kelley*, 961 F Supp at 1111. The central purpose of SORA is not intended to chastise, deter, or discipline; rather, it is a remedial measure meant to protect the health, safety, and welfare of the general public.

The *Dipiazza* Court found that the defendant in that case did suffer a disability and loss of privilege in part because SORA no longer contained "strict limitations on public dissemination as there were in *Lanni*." *Dipiazza*, 286 Mich App at 151. However, the 2011 amendment narrowed the scope of SORA by allowing certain individuals to petition the court for removal from the registry because they had engaged in a consensual sexual act. While the Legislature did not extend the exemption to individuals who commit sexual offenses against children under the age of 13, this does not serve to transform SORA into punishment. Rather, this furthers SORA's purpose of protecting the public. In short, *Dipiazza*'s reasoning with respect to this factor is inapplicable in the present case, and we conclude that the second *Mendoza-Martinez* factor weighs in favor of finding that SORA does not impose punishment as applied to defendant.

3. TRADITIONAL AIMS OF PUNISHMENT

The third relevant factor also fails to indicate a punitive purpose because SORA does not promote the traditional aims of punishment, such as retribution and deterrence. See *Earl*, 495 Mich at 46; *Smith*, 538 US at 97. The *Smith* Court reasoned that although ASORA might deter future crime, this alone was not indicative of punishment given that "[a]ny number of governmental programs might deter crime without imposing punishment." *Smith*, 538 US at 102. The Court noted, " 'To hold that the mere presence of a deterrent purpose renders such sanctions "criminal" . . . would severely undermine the Government's ability to engage in effective regulation.' " *Id*. (citations omitted). And although the length of the reporting requirement was tied to categories of offenders, the registration obligations were not retributive,

but instead were "reasonably related to the danger of recidivism," which was "consistent with the regulatory objective." *Id*.

Smith's reasoning is persuasive and applies in this case. While SORA might deter future sexual offenses, that is not the primary purpose of the act and it does not render SORA punitive. Further, while SORA exempts certain individuals from the registry requirements in situations involving a consensual act and categorizes offenders into tiers depending on the severity of the underlying offense, as in *Smith* these mechanisms are "reasonably related to the danger of recidivism," which is "consistent with the regulatory objective." *Id*.

4. RATIONAL CONNECTION TO NONPUNITIVE PURPOSE

SORA has a rational connection to a nonpunitive purpose, and therefore the fourth relevant factor weighs in favor of finding that the act does not impose punishment. *Smith*, 538 US at 97. The *Smith* Court noted that ASORA "has a legitimate nonpunitive purpose of 'public safety, which is advanced by alerting the public to the risk of sex offenders in their communit[y].' " *Id*. at 102-103 (citation omitted) (alteration in original). SORA has the same legitimate nonpunitive purpose of public safety. See *Doe*, 490 F3d at 505 (noting that "[t]his court has previously concluded that the state's interests in protecting public safety and in aiding effective law enforcement are advanced by the SORA's registration requirements").

5. EXCESSIVE WITH RESPECT TO NON-PUNITIVE PURPOSE

The fifth and final relevant factor for purposes of our analysis concerns whether SORA is excessive with respect to its nonpunitive purpose of protecting the safety and welfare of the general public. *Smith*, 538 US at 97. In weighing this factor, the *Smith* Court reasoned that neither the duration of the reporting requirements nor the broad dissemination of information to the public was excessive. *Id*. at 104-105. Alaska's public-notification scheme was passive and required individuals to search for information, and the website warned users that they would be prosecuted for committing criminal acts against offenders. *Id*. at 105. The Court stated, "Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment." *Id*.

We find *Smith*'s analysis regarding this factor persuasive and equally applicable in the context of Michigan's SORA as applied to defendant. The PSOR is passive and requires individuals to seek out information on sex offenders. The registry warns members of the public not to use information from the PSOR to "injure, harass, or commit a crime against" individuals listed on the registry and warns that those acts could lead to prosecution.[8] Moreover, the duration of the registry requirements are reasonably tied to the legitimate regulatory purpose of protecting the public. SORA categorizes offenders into tiers, with the more serious offenses requiring lifetime registration. Furthermore, SORA contains exceptions for certain offenders

[8] Michigan Public Sex Offender Registry <http://communitynotification.com/cap_main.php?office=55242/> (accessed August 1, 2014) [http://perma.cc/5WBM-222J].

who engaged in a consensual sexual act, limiting the effect of the registry to those individuals who the Legislature deemed posed a greater threat to the public.

Although HYTA requires certain individuals to register under SORA on the basis of what, at first blush, appears to be an arbitrary date of adjudication (October 1, 2004), there was a rational basis underlying this provision. Notably, when the Legislature amended HYTA to require youthful trainees assigned to that status before October 1, 2004, to comply with SORA and exempted youthful trainees assigned on or after that date, the Legislature also amended HYTA to provide that, beginning in 2004, individuals who pleaded guilty of more serious sexual offenses (including first- and second-degree criminal sexual conduct) were no longer eligible for youthful trainee status under HYTA. See 2004 PA 239, amending §§ 11 and 14 of HYTA. Therefore, the class of youthful trainees assigned under HYTA before October 1, 2004, includes individuals who pleaded guilty of more serious sexual offenses, whereas the class of youthful trainees assigned on or after October 1, 2004, did not. Thus, it was reasonable for the Legislature to require the pre-October 2004 class of HYTA youthful trainees to comply with SORA—i.e., it could have concluded that this class contained individuals who were more likely to reoffend and posed a greater threat to the public. This statutory scheme is not overly excessive, and instead "[t]he 2004 amendments continue to advance public safety goals while simultaneously 'weeding out' those youthful trainees who have been deemed least likely to reoffend." *Doe*, 490 F3d at 505.

The *Dipiazza* Court found that the effects of SORA were "devastating" to the defendant in that case. *Dipiazza*, 286 Mich App at 152. However, unlike *Dipiazza*, this case involves different circumstances. Defendant here was not engaged in a consensual relationship with the 12-year-old complainant. Thus, the adverse effects that flow from SORA in this case are not "overly excessive" as compared to its regulatory purpose, and this factor weighs in favor of finding that SORA is nonpunitive as applied to defendant.

V. CONCLUSION

In sum, the relevant *Mendoza-Martinez* factors indicate that SORA does not impose punishment as applied to defendant. SORA has not been regarded in our history and traditions as punishment, it does not impose affirmative disabilities or restraints, it does not promote the traditional aims of punishment, and it has a rational connection to a nonpunitive purpose and is not excessive with respect to this purpose. Defendant therefore has failed to show by "the clearest proof" that SORA is "so punitive either in purpose or effect" that it negates the Legislature's intent to deem it civil. *Earl*, 495 Mich at 44 (quotation marks and citation omitted). Accordingly, as applied to defendant, SORA does not violate the Ex Post Facto Clause or amount to cruel or unusual punishment because it does not impose punishment.

Reversed.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly