

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Appellant,

v.

TIMOTHY LYNN SMITH,

Appellee.

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NOT FOR PUBLICATION

Case No. S-2009-944

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

OCT 28 2010

SUMMARY OPINION

LUMPKIN, JUDGE:

MICHAEL S. RICHIE  
CLERK

Appellee, Timothy Lynn Smith, was charged by Information February, 18, 2009, in the District Court of Roger Mills County, Case No. CF-2009-4, with Failure To Register As Sex Offender (57 O.S.Supp.2008, § 583). At preliminary hearing, held October 14, 2009, the magistrate refused to bind Appellee over, finding that the State had presented insufficient evidence to support the charge. The magistrate also found that, at the time that Appellee entered his plea and received a deferred sentence, the Sex Offender Registration Act (57 O.S.Supp.1998, §§ 582, 583) did not require Appellee to register. Alternatively, the magistrate found that if the current statutes, requiring registration, were applied to Appellee such application would violate the constitutional prohibitions against *ex post facto* laws and bills of attainder. The State attempted to appeal the magistrate's order.

As set forth in this Court's Order of February 19, 2010, the State waived its right to appeal the magistrate's decision concerning the sufficiency of the evidence by failing to timely perfect its appeal. 22 O.S.2001, § 1089.3.

Instead, this appeal proceeds on the issue of the constitutionality of the Sex Offender Registration Act pursuant to 22 O.S.2001, § 1053.1.

A claim that a statute is unconstitutional on its face is separate and distinct from a claim that a statute is unconstitutional as applied. *Bouie v. City of Columbia*, 378 U.S. 347, 352, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). The magistrate in the present case did not determine that the statutes were unconstitutional on their face. Instead, the magistrate determined that application of the 1999 and subsequent amendments of the Sex Offender Registration Act to Appellee was unconstitutional. Therefore, we do not decide whether the statutes are constitutional on their face. We review the reserved question of law presented by the magistrate's order. 22 O.S.2001, § 1053.1.

Because the reserved question of law raises a question of statutory interpretation, it presents a question of law we review de novo. *Smith v. State*, 2007 OK CR 16, ¶ 40, 157 P.3d 1155, 1169. We find that the magistrate properly determined that the 1999 and subsequent amendments to the Sex Offender Registration Act do not apply to Appellee.

On August 17, 1999, Appellee entered a nolo contendere plea to Lewd Molestation (21 O.S.Supp.1992, § 1123) in the District Court of Beckham County Case No. CF-99-61. The District Court of Beckham County deferred sentencing for a period of five (5) years with two (2) years of DOC supervision.<sup>1</sup> At that time, the Sex Offender Registration Act only applied to those persons who had suffered a conviction for one of the enumerated offenses committed

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<sup>1</sup> Appellee complied with the rules and conditions of his probation. His case was dismissed and expunged by and order entered on August 19, 2004. (State's Ex. No. 3: Tr. 32).

within the state after November 1, 1989. 57 O.S.Supp.1998, §§ 582, 583. The Legislature amended the Act effective November 1, 1999 requiring those persons who either suffer a conviction or receive any probationary term for one of the enumerated offenses committed within the state to register as a sex offender. 57 O.S.Supp.1999, §§ 582, 583, 584, 585. Effective November 1, 2000, Sections 583 and 584 were amended to specifically include any person “receiving a deferred sentence imposed in violation of subsection G of Section 991c of Title 22 of the Oklahoma Statutes.” 57 O.S.Supp.2000, §§ 583(A)(1), 584(H)(1). The statutes have been amended on numerous occasions since that time. 57 O.S.Supp.2008, §§ 582, 583, 584, 585. If any of these amendments apply retroactively, they would require Appellee to register as a sex offender.

In *Smith v. Doe*, 538 U.S. 84, 105, 123 S.Ct. 1140, 1154, 155 L.Ed.2d 164 (2003), the United States Supreme Court reviewed the state of Alaska’s sex offender registration act and determined that its retroactive application was nonpunitive and did not violate the *Ex Post Facto* Clause. This Court interprets the *ex post facto* provisions in Article II, Section 15 of the Oklahoma Constitution consistent with federal jurisprudence. *Maghe v. State*, 1967 OK CR 98, ¶¶ 33-34, 429 P.2d 535, 540. A statute must first be given retroactive application before it may violate the prohibition against *ex post facto* laws. See *Castillo v. State*, 1998 OK CR 9, ¶¶ 7-8, 954 P.2d 145, 147 (“Petitioner cannot complain that the Act violates the constitutional prohibitions against *ex post facto* laws when the sentencing matrixes of the Act are not retroactive in application.”). Similarly, a statute must apply retroactively to constitute a bill

of attainder. See *Cummings v. State of Missouri*, 71 U.S. 277, 323, 4 Wall. 277, 323, 18 L.Ed. 356 (1866) (“A bill of attainder is a legislative act which inflicts punishment without a judicial trial.”). Therefore, we must first decide if the amendments to the Oklahoma Sex Offender Registration Act are applied retroactively.

“Intervening changes in the law and new legislative enactments should only be applied prospectively from their effective date, unless they are specifically declared to have retroactive effect.” *Nestell v. State*, 1998 OK CR 6, ¶ 5, 954 P.2d 143, 144 (citing Okla. Const. art. 5, § 58.). “The general common law rule of statutory construction is that statutes and amendments are to be construed to operate only prospectively unless the legislature clearly expresses an intent to the contrary.” *State v. Watkins*, 1992 OK CR 50, ¶ 5, 837 P.2d 477, 478 (citing *Welch v. Armer*, 1989 OK 117, ¶ 27, 776 P.2d 847, 850).

There is no indication in any of the subsequent amendments to the Act that the Legislature clearly intended retroactive application for those amendments requiring persons who receive any probationary term for one of the enumerated offenses committed within the state to register as a sex offender. 57 O.S.Supp.2008, §§ 582, 583, 584, 585. As there is not any clear indication that the amendments were to be given retroactive effect, the amendments only apply prospectively.

This Court has adopted the procedural remedial exception to the rule on nonretroactivity for pending cases. *Cartwright v. State*, 1989 OK CR 41, ¶ 11, 778 P.2d 479, 482-83. A remedial or procedural statute that does not create,



enlarge, diminish, or destroy vested rights is generally held to operate retrospectively. *Watkins*, 1992 OK CR 50, ¶ 5, 837 P.2d at 478; *Welch*, 1989 OK 117, ¶ 27, 776 P.2d at 850. An amendment is substantive and not procedural or remedial if it alters the rights and obligations of the individual. *Id.*, 1989 OK 117, ¶ 28, 776 P.2d at 850; *Cartwright*, 1989 OK CR 41, ¶ 11, 778 P.2d at 482-83.

In the present case, the amendments to the statutes are substantive. The amendments do not simply alter or clarify the procedure or method of registration. If the amendments were given retroactive effect they would create an obligation that Appellee register. As retroactive application of the amended statutes would alter Appellee's obligations, the amendments are substantive and, without a clear expression from the Legislature that the amendments were to be given retroactive effect, must only be applied prospectively.

The amendments to the Sex Offenders Registration Act which became effective after Appellee's plea and the order deferring sentence are not applicable to him. Because the amendments are not applicable to Appellee, we do not decide the issues of whether the Sex Offender Registration Act is punitive in violation of the *Ex Post Facto* Clause or the prohibition against bills of attainder as applied to Appellee.

Therefore, finding the District Court properly determined that the amendments to the Sex Offender Registration Act which went into effect after Appellee's plea and the order deferring sentence did not apply to Appellee, the

State's appeal is denied and the matter is remanded to the District Court for further proceedings consistent with this Opinion.

**DECISION**

The order of the District Court of Roger Mills County refusing to bind Appellee over on the offense of Failure to Register as a Sex Offender is **AFFIRMED**. The matter is **REMANDED** for further proceedings consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF ROGER MILLS COUNTY  
THE HONORABLE JOE L. JACKSON, ASSOCIATE DISTRICT JUDGE

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**OPINION BY: LUMPKIN, J.**

C. JOHNSON, P.J.: CONCUR  
A. JOHNSON, V.P.J.: CONCUR  
LEWIS, J.: CONCUR  
SMITH, J: CONCUR

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