

IN THE IOWA DISTRICT COURT FOR WASHINGTON COUNTY

STATE OF IOWA,)
) Criminal No. AGIN006718
)
 Plaintiff,)
)
 vs.)
)
 KEITH FREDERICK SEERING,)
)
 Defendant.)

RULING

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CLERK OF DISTRICT COURT
WASHINGTON COUNTY IOWA

BE IT HEREBY REMEMBERED, on March 20, 2003, and April 17, 2003, this case came before the Court for contested hearing on the Motion to Dismiss for Failure to State a Constitutional Claim, filed by the defendant on February 10, 2003, and the Resistance thereto, filed by the State on February 14, 2003. The State was represented by Washington County Attorney Barbara Edmondson. The defendant was personally present with his attorney, Eric Tindal.

The defendant called as witnesses in support of his motion Nancy Seering, the defendant's wife, and Dawneta Seering, the defendant's daughter, and offered into evidence Defendant's Exhibits A-1 through A-7, B, and B2. The State called as witnesses in support of its resistance Joanne K. Tinker, Program Planner with the Iowa Department of Public Safety; Dr. David McEchron, a general practice psychologist; Ron Mullen, Probation/Parole Officer for the Eighth Judicial District; Pete Buckingham, Geographic Information System (GIS) Coordinator for Washington County; and Sergeant Lyle Hansen, Detective for the City of Washington Police Department. The State also offered into evidence State's Exhibits 1 through 9 and 11 (CV for Dr. David McEchron), which were received by the Court. In addition, the State made an offer of proof with respect to State's Exhibits 9 and 11 (map), 12, 13, and 14.

After considering the testimony of the witnesses, the evidence submitted, and the applicable law, the Court makes the following:

FINDINGS OF FACT

The defendant, Keith Frederick Seering, is fifty years old (DOB 12/04/52). The defendant has been married for approximately thirty years to his wife, Nancy Seering. He has at least three children referred to in the record, including Dawneta Seering, aged twenty-one, who testified on his

behalf. During the course of his marriage to Mrs. Seering, the defendant has generally lived together with his family.

Keith Seering has a prior criminal conviction for Lascivious Contact With a Minor in violation of Iowa Code Section 709.14. This conviction occurred in Johnson County District Court in October of 2000. The victim in this crime was the defendant's daughter, Dawneta, who was fifteen years old at the time of the offense. The defendant received a suspended sentence for this crime and was placed on probation. His probation was later revoked, and he was sentenced to serve the remainder of his time at Hope House in Iowa City.

On or about July 1, 2002, Mrs. Seering and her daughter Dawneta moved to a trailer located at 209 North Washburn Street, Riverside, Iowa. Mrs. Seering and her family had not previously lived in Washington County. Mrs. Seering testified that she and her daughter moved into this trailer because she could not keep up with the payments at a prior residence. Mrs. Seering, her daughter Dawneta, and her son moved in with persons identified as Dale and Diana Cavin and their two children. The Cavins are close friends of the Seering family. The defendant was released from incarceration in August of 2002 and joined his family at the 209 North Washburn Street address.

On August 9, 2002, the defendant met with Sergeant Lyle Hansen, a detective for the City of Washington Police Department. Sergeant Hansen is the law enforcement official designated to register sex offenders in Washington County. Sergeant Hansen testified that he completed the paperwork for registry on August 9, 2002. See: State's Exhibit 7. Sergeant Hansen took note of the defendant's address and told the defendant that his current residence would be in violation of the "2000-foot rule" enacted by the Iowa legislature, which became effective July 1, 2002. The defendant informed Sergeant Hansen that the address would be temporary and that he was seeking a more permanent address in Johnson County.

Sergeant Hansen then procured a map of Riverside showing "sex offender buffer zones." This map was prepared by Pete Buckingham, Geographic Information System Coordinator for Washington County. See: Defendant's Exhibit A-5. According to the map, the 209 North Washburn address was not a legally acceptable address for the defendant to live. Sergeant Hansen met the defendant at his home at 209 North Washburn Street in Riverside on September 4, 2002. According to his testimony, Sergeant Hansen informed the defendant that he would need to find another place to live within one week.

On September 25, 2003, Sergeant Hansen paid a follow-up visit to the 209 North Washburn address to ascertain whether the defendant was still living at that address. Sergeant Hansen met the defendant at the 209 North Washburn address. The defendant informed Sergeant Hansen that he was sleeping in his car. Sergeant Hansen observed no signs that the defendant actually was living out of his car. The defendant was thereafter arrested for Violation of the Registration Requirements for Sex Offenders, an aggravated misdemeanor, and this case was filed.

Sergeant Hansen acknowledged that he had had additional concerns about the defendant residing at the 209 North Washburn address, apart from the "2000-foot rule." Sergeant Hansen's concerns related to the fact that minor children lived at that address and the defendant's prior victim, his daughter Dawneta, also lived at that address. Sergeant Hansen further acknowledged, however, that the defendant was not on probation or parole at the time he was arrested. The defendant was arrested because his residence was located within 2000 feet of a school or childcare facility in Riverside. The defendant's choice to live with his prior victim and with minor children would not otherwise violate Iowa law.

The defendant's wife, Nancy Seering, testified that after the defendant was arrested, she attempted to make arrangements to move to a residence which could accommodate the defendant without being in violation of the 2000-foot rule. In October of 2002, Mrs. Seering found an address in Lone Tree, Iowa, and was able to park a fold-down camper in the yard. The Seering family lived at the Lone Tree address from October of 2002 through early January of 2003. At that point the owner of the Lone Tree real estate wanted the Seering's camper removed from the property.

Mrs. Seering thereafter returned to the 209 North Washburn address in Riverside, understanding that the defendant could not live at the Riverside address because of the residency restrictions. Mrs. Seering further testified that she had made diligent efforts to find an appropriate residence for the family. She stated that she had driven around looking for places to live. Many of the residences she located were unaffordable for the Seerings because of the deposit requirements. Mrs. Seering was able to find some available and affordable residences. None of them were acceptable because of the 2000-foot rule.

Mrs. Seering further testified to the reasons that the Seering family is on a limited income. Mrs. Seering receives social security disability payments. The defendant is capable of working, but at that time worked only part-time hours at ACT in Iowa City. Mrs. Seering does not drive. The

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family car is in need of repairs, is unreliable, and cannot be counted on for long distance commutes. Mrs. Seering further testified that if the defendant was released, she would want him to live with her again, although she now resides at a homeless shelter.

Dawneta Seering, the defendant's daughter and former victim, testified on the defendant's behalf. She testified that the Seering family has generally tried to live together. She testified that her immediate family unit consists of her mother, father, and brother. Another sister does not live with the family. When her family lived in the Lone Tree camper, she testified that the family was short of space, but that she was willing to tolerate the cramped living conditions because she wanted to be with her dad.

After the defendant's arrest in this case, he was initially released on his own recognizance. On November 7, 2002, the defendant's conditions of release were modified, requiring him to be supervised by the Department of Corrections and follow the Department's rules. It was a further condition of his release that he not visit or be within 100 feet from the property line at the residence of 209 North Washburn Street. On January 22, 2003, an Application to Revoke the Defendant's Pretrial Release was filed by the Department of Corrections. According to the Department's allegations, the defendant did not maintain a suitable residence and had moved several times without the permission of his supervising officer. The defendant's pretrial release was therefore revoked on January 22, 2003. The defendant has remained in jail on a \$10,000 bond since that date.

CONCLUSIONS OF LAW

The defendant has been charged with Violation of Registration Requirements for Sex Offenders, an aggravated misdemeanor, in violation of Sections 692A.1(4)(c), 692A.2(1), 692A.3(1), and 692A.2A(2) and (3) of the Iowa Criminal Code of 2001 as amended by the 97th General Assembly, 2002. Defendant's counsel challenges the constitutionality of residency restrictions enacted by the legislature in 2002 and codified in Iowa Code Section 692A.2A. This statute states, in relevant part, as follows:

692A.2A(1) For purposes of this section, 'person' means a person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor.

692A.2A(2) A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.

692A.2A(3) A person who resides within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility, commits an aggravated misdemeanor.

This statute carries a strong presumption of constitutionality. See: Saadig v. State, 387 N.W.2d 315, 320 (Iowa 1986). A defendant who challenges the constitutionality of a statute bears the burden to overcome the presumption that it is constitutional. If the constitutionality of a statute is fairly debatable, the reviewing court must allow it to stand. "Thus a statute will not be declared unconstitutional unless it clearly, palpably, and without doubt infringes the Constitution." See: State v. Duncan, 414 N.W.2d 91, 95 (Iowa 1987).

The defendant's attorney asserts numerous legal theories in support of his contention that the above statute is unconstitutional, and the Court will consider each theory in turn.

I. The Defendant's Allegation that the Residency Restrictions Contained in Iowa Code Section 692A.2A Violate Substantive Due Process

The defendant's attorney first alleges that Iowa Code Section 692A.2A infringes upon the defendant's right to substantive due process pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Due Process Clause prohibits states from "depriving any person of life, liberty, or property without due process of law." See: United States Constitution, Fourteenth Amendment. The Iowa Constitution similarly states, "No person shall be deprived of life, liberty, or property without due process of law." See: Iowa Constitution, Article I, Section 9.

A long line of United States Supreme Court cases indicates that freedom of personal choice in matters of marriage and family life are some of the liberties protected by substantive due process. See: Albright v. Oliver, 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d. 114 (1994); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 847-849, 120 L.Ed.2d. 674, 112 S.Ct. 2791 (1992); Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) 97 S.Ct. 1932, 52 L.Ed.2d. 531 (1977); Zablocki v. Redhail, 434 U.S. 374, 383-85, 98 S.Ct. 673, 679-81, 54 L.Ed.2d. 618 (1978); Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d. 15 (1972).

The United States Supreme Court has recognized the right to choice and privacy in one's family relationships as a fundamental right. See: Roberts v. United States Jaycees, 104 S.Ct. 3244 (1984). In the Roberts case, the United States Supreme Court stated:

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships, a substantial measure of sanctuary from unjustified interference by the State... The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of family -- marriage, child birth, the raising and education of children, and cohabitation with one's relatives... Family relationships by their nature involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one's life. *Id.* at 3250 (citations omitted.)

There is no question but that the statute at issue in this case infringes upon one of the defendant's fundamental rights; specifically, the right of the defendant to live with his wife and children and to carry on his daily routine within the shelter and support of his family. When a fundamental right is infringed upon, the reviewing Court must exercise "strict scrutiny" of the statute to determine if the statute is constitutional. *See: Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d. 600 (1968). It becomes the burden of the State, not the defendant, to demonstrate the compelling need for the statute. *See: Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d. 597 (1976).

The government must satisfy certain criteria in order for a statute to survive the strict scrutiny analysis. *See: Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). First, the State must show that the government has intended the statute to further a very strong interest. Second, the statute must be narrowly tailored to meet the State's objective, using the least restrictive means possible. *See: Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 597 (1976); *Wygart v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d. 260 (1986). Constitutionally significant infringement must be more than a "de minimus" intrusion before strict scrutiny analysis will be applied. *See: Clements v. Flashing*, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d. 508 (1972); *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d. 92 (1972).

The intrusion upon one of the defendant's fundamental rights in this case was not "de minimus." It was in fact a significant intrusion. Because of the 2000-foot rule, the defendant was

unable to live with his wife and children in what was then the family home. It is true that this home was only of recent origin and that the defendant's wife and children were living with family friends at the time the defendant was released from incarceration and joined them. However, the defendant's wife testified that the family at that time was impoverished, and had looked for another home in Washington County without success. The Seering family was unable to find another home which was both available and affordable. The Seering's ability to search for an alternative residence was further limited by an unreliable car and the constraints of maintaining a reasonable commuting distance.

Because of the significant intrusion upon a fundamental right, this Court is required to exercise "strict scrutiny" analysis. The Court first examines whether there is a compelling state interest to justify this statute. There is no legislative history in this case to provide the Court with information as to the compelling State need for the 2000-foot rule. As there is no statement of legislative intent to guide the Court, the Court relies on the testimony of the State's witnesses as to the State's interest in the statute. The State's witnesses testified to their opinions that the governmental interest behind the statute was "public safety" and the "protection of children from potential harm by convicted sex offenders."

Clearly, these are laudable goals and furthering these goals constitutes an appropriate exercise of the State's police powers. Statistics provided by Joanne Tinker, Program Planner with the Department of Public Safety, show that there are 4,692 minor victims of registered sex offenders in the State of Iowa. See: State's Exhibit 5. Of all registered sex offenders, 87 percent had victims under the age of thirteen. Clearly, the State has a compelling governmental interest to reduce the number of minor victims in this state and to protect current victims from further abuse.

Exercising strict scrutiny analysis, the question next becomes whether the statute is narrowly tailored to meet the State's objectives using the least restrictive means possible. See: Washington v. Glucksberg, 521 U.S. 702, 721, 117 S.Ct. 2258, 117 S.Ct. 2302, 138 L.Ed. 772. (1997). The Court finds that the State has failed to satisfy this prong of the strict scrutiny test.

As argued by defendant's counsel, there are simply no facts which prove or even suggest children will be rendered more safe from the predations of sex offenders because of the 2000-foot residency restriction. The defendant's attorney reviewed numerous studies concerning offender recidivism. See: Defendant's Brief, page 5. The defendant's attorney concludes, "The undersigned

has not found a single study showing a relationship between a residence, distances from a school or day care, and the risk to reoffend." See: Defendant's Brief, page 5. The defendant offered into evidence a document entitled "The Iowa Sex Offender Registry and Recidivism," prepared by the Iowa Department of Human Rights, Division of Criminal and Juvenile Justice Planning and Statistical Analysis Center. See: Defendant's Exhibit B. One conclusion of this study was as follows:

The Iowa Sex Offender Registry appeared to have mixed effects on recidivism rates, at least over a period of 4.3 years. Sex offense recidivism was low at 3 percent for the registry sample and 3.5 percent for the pre-registry sample... These differences in recidivism were not found to be statistically significant. See: Defendant's Exhibit B, page 19.

This Iowa study does not purport to study the effect of residency restrictions on the recidivism rate for sex offenders. According to defense counsel, no such studies appear to be available, nor has the State cited any such research studies. The State did, however, call a number of witnesses who attempted to link the 2000-foot rule to compelling State objectives.

Dr. Dave McEchron, a Ph.D. psychologist in private practice, testified on behalf of the State. Dr. McEchron has been a private psychologist for thirty-five years. Dr. McEchron's general practice has included the treatment of sex offenders for over twenty-five years. He has done sex offender evaluations for court and has conducted research in the field of sex offender treatment. Dr. McEchron testified that it is reasonable to restrict access to children if the sex offender had child victims. He further testified that "reducing opportunity" is the biggest factor in reducing the incidence of child sexual abuse. Dr. McEchron stated, "If you keep someone away from a playground, you reduce opportunity and temptation." However, Dr. McEchron went on to state, "There are no good hard data on what is the 'safe distance' for sex offenders to stay away from children." This testimony contradicts the State's assertion that the statute is narrowly tailored to reduce the opportunity and temptation for sex offenders to reoffend.

Several of the State's witnesses directly testified that the 2000-foot rule could actually hinder, rather than enhance, the State's objective of protecting children from sex offenders. Dr. McEchron testified that a restriction that lasts forever, regardless of a sex offender's progress in treatment, "does not sound fair. It does not motivate the individual." He went on to explain that the 2000-foot

rule does not allow any consideration of a positive response to sex offender treatment. Sex offenders who had successfully completed treatment and were still not allowed to live in the home of their choice could become depressed and therefore become more likely to reoffend. Dr. McEchron also emphasized that sex offenders are more likely to do well if they have strong family ties. Laws which prevent sex offenders from living with their families, could lead sex offenders to reoffend because of the lack of family support to encourage self control.

Ron Mullen, a parole/probation officer for the Eighth Judicial District, testified that he has lengthy experience in working with sex offenders as a counselor in the sex offender treatment unit in Mt. Pleasant. He stated that the goal of sex offender treatment is to establish internal controls for sex offenders and to develop an individualized relapse prevention plan for such offenders. Mr. Mullen further testified that external controls, such as restrictions on living arrangements, are very important for sex offenders early on in their treatment. As treatment progresses, however, the external controls need to be relaxed so that the sex offender can gain more internal controls. External controls include restricting the sex offender's access to pornography and the internet, preventing sex offenders from driving aimlessly around and picking up hitchhikers, and prohibiting sex offenders from associating with minors or going to places where minors might be, such as fast food restaurants, arcades, and schools.

Mr. Mullen stated that the 2000-foot restriction creates a problem for treatment of sex offenders. The residency restriction means that it is very difficult to find appropriate residences for sex offenders while they are still on parole or probation. Thus, according to Mr. Mullen, the Department "loses the opportunity to see people function in the community before they leave probation." The sex offender may leave probation or parole before the Department has had an opportunity to assess if the probationer has actually acquired internalized controls.

Mr. Mullen further testified that in treating sex offenders, each person's circumstances are considered individually. If a sex offender wants to move into a proposed residence, the Department considers that residence and its appropriateness on an individual basis. Mr. Mullen stated that within the Department there are no guidelines concerning the number of feet from a school or day care because such a restriction creates "a false indication of safety." Mr. Mullen further testified that he is not aware of any studies or literature that would indicate that 2000 feet is somehow a guarantee of safety against the predation of sex offenders. Mr. Mullen's testimony echoed Dr. McEchron's

testimony that there are simply no studies showing a correlation between a sex offender's residence and the safety of children.

Sergeant Lyle Hansen, a detective for the Washington Police Department, also testified as to his understanding of the basis for the 2000-foot rule. Sergeant Hansen is the designated Washington County law enforcement officer to register sex offenders. According to Sergeant Hansen, the statute theoretically could be an important tool for enhancing public safety by reducing sex offender recidivism. In practice, however, Sergeant Hansen's concern is that sex offenders will simply choose not to register at all, knowing that they may be prosecuted for revealing their residence. The statute's possible "chilling effect" on registry may lead to less available and accurate information as to the actual location of sex offenders.

The Court concludes that the statute restricting the residence location of sex offenders is not narrowly tailored to meet the State's objective and does not use the least restrictive means possible to attain State objectives. As both Dr. McEchron and Ron Mullen testified, the population of sex offenders is not a uniform population. Some sex offenders respond well to treatment, and the likelihood of reoffense is low. Other sex offenders do not respond well or at all to treatment. The State's goal for such sex offenders should simply be to protect the community for as long as possible. Both witnesses also referred to the sex offender civil commitment process, which has as its objective long-term protection from the most serious sex offenders who are at high risk to reoffend and are unamenable to treatment. The civil commitment process is narrowly tailored to protect the community from the most dangerous sex offenders for as long as possible.

The 2000-foot rule, by contrast, is not narrowly tailored to protect the community from sex offenders who are amenable to treatment and who are less likely to reoffend. The statute restricts only where a sex offender can live, not where he can travel or work. Basically, such a residency restriction is unlikely to enhance public safety when a sex offender can walk past a school or day care as often as he/she chooses, be in the neighborhood of a school or day care, and be employed in a school or day care center.

In conclusion, the Court determines that Iowa Code Section 692A.2A, as applied to this defendant, violates one of his fundamental rights: the right to live with his family members. The statute therefore must pass the constitutional strict scrutiny test in order to survive. There is undoubtedly a compelling State interest to protect children from convicted sex offenders. The Court

