STATE OF NEBRASKA, APPELLEE, V. JASON HARRIS, APPELLANT.

817 N.W.2d 258

Filed July 27, 2012. No. S-11-527.

1. **Constitutional Law: Statutes: Judgments: Appeal and Error.** The constitutionality and construction of a statute are questions of law, regarding which an appellate court is obligated to reach conclusions independent of those reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.
3. **Constitutional Law: Standing.** Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right.
4. **Constitutional Law: Convictions: Statutes.** A defendant is prohibited from attempting to circumvent or avoid conviction under a particular statute by asserting a constitutional challenge to another, collateral statute which is irrelevant to the prosecution.
5. **Constitutional Law: Statutes: Proof.** A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. But a plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications.
6. **Constitutional Law: Statutes: Waiver.** In order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash, and all defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue.
7. **Constitutional Law: Statutes: Pleas.** Challenges to the constitutionality of a statute as applied to a defendant are properly preserved by a plea of not guilty.
8. **Constitutional Law: Appeal and Error.** The Nebraska Supreme Court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.
9. **Constitutional Law: Statutes: Sentences.** Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.
10. **Constitutional Law: Criminal Law: Other Acts: Time.** The retroactive application of civil disabilities and sanctions is permitted; it is only criminal punishment that the Ex Post Facto Clause prohibits.
11. **Sentences: Statutes: Legislature: Intent.** In order to determine whether a statute imposes civil sanctions or criminal punishment, a court must apply the

two-pronged intent-effects test. It must first ascertain whether the Legislature intended the statute to establish civil proceedings. This is a question of statutory construction. If the intention of the Legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, a court must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it "civil."

12. **Sentences: Statutes: Legislature: Intent: Proof.** Because an appellate court ordinarily defers to the Legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.
13. **Sentences: Statutes: Intent.** In determining whether a statutory scheme is so punitive that it effectively transforms the statute from a civil statute to a criminal statute, a court refers to the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). The factors are neither exhaustive nor dispositive but are useful guideposts. The following seven factors serve as guideposts: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as 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.
14. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
15. **Constitutional Law: Equal Protection: Statutes: Presumptions: Proof.** Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid, and the burden of establishing the unconstitutionality of the statute is on the one attacking its validity.
16. **Equal Protection.** The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.
17. **Equal Protection: Proof.** The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim. In other words, the dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.
18. **Equal Protection: Statutes.** In an equal protection challenge to a statute, the level of judicial scrutiny applied to a particular classification may be dispositive.
19. **Constitutional Law: Statutes.** Legislative classifications involving either a suspect class or a fundamental right are analyzed with strict scrutiny, and legislative classifications not involving a suspect class or fundamental right are analyzed using rational basis review.
20. **Equal Protection: Words and Phrases.** The "right to travel" includes at least three different components: (1) the right of a citizen of one state to enter and to leave another state, (2) the right to be treated as a welcome visitor rather than an

unfriendly alien when temporarily present in the second state, and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that state.

21. **Equal Protection: Statutes.** When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.
22. **Constitutional Law: Statutes: Legislature: Intent.** Under rational basis review, an appellate court will uphold a classification created by the Legislature where it has a rational means of promoting a legitimate government interest or purpose. In other words, the difference in classification need only bear some relevance to the purpose for which the difference is made.
23. **Equal Protection: Proof.** Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Joshua W. Weir, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Jason Harris appeals his Class IV felony conviction under Neb. Rev. Stat. § 29-4011(1) (Cum. Supp. 2010) based on his failure to comply with certain registration provisions of Neb. Rev. Stat. § 29-4004(9) (Cum. Supp. 2010) of the Sex Offender Registration Act (SORA), Neb. Rev. Stat. §§ 29-4001 through 29-4014 (Reissue 2008, Cum. Supp. 2010 & Supp. 2011). Harris claims that the district court for Lancaster County erred when it rejected his constitutional challenges to SORA. We conclude that the challenges asserted by Harris are without merit, and we therefore affirm Harris' conviction.

STATEMENT OF FACTS

Harris was convicted of sexual assault of a child and third degree sexual assault in 2001. He was sentenced by the district court for Sheridan County to imprisonment for 3 to 5 years on the first count and for 1 year on the second count. The court found that Harris was not a "'violent sexual offender.'" At his sentencing, Harris was given notice that he would be required to register as a sex offender upon his release from prison and for the next 10 years thereafter. Harris began registering upon his release from prison in 2003.

In 2009, Harris began to register as what is commonly referred to as a "transient" because he was frequently on the road either for his job as a truckdriver or for his work providing sound, light, and tour support for national bands. He maintained an office and mailing address at an apartment in which he had lived in Lincoln, Nebraska. As a transient, Harris was required under § 29-4004(9) to update his registration information at least once every 30 days.

Harris updated his registration with the Lancaster County sheriff on April 5, 2010, and was therefore required to complete his next update by May 5. Harris failed to timely provide his update. Harris asserted that he intended to update his information on May 5, but his truck broke down in Iowa that day, he arrived in Lincoln late on May 5, and he had to leave on a band tour the next day. Harris did not return to Lincoln until May 13, and he was not in Lincoln during the business hours that the sheriff's office was open to allow him to update his information. On May 14, the sheriff's office contacted Harris to inform him he had not updated his registration. Harris went to the sheriff's office to register that day; he was arrested and charged with failing to timely update his SORA registration.

The State filed an information in the district court for Lancaster County charging Harris under § 29-4011(1), which provides that "[a]ny person required to register under [SORA] who violates the act is guilty of a Class IV felony." Although the State did not cite § 29-4004(9) in the information, it used the language of § 29-4004(9) when it alleged that Harris had "fail[ed] to update his . . . registration, in person, to

the sheriff of the county in which he [was] located . . . at least once every thirty calendar days during the time he . . . remain[ed] without residence, temporary domicile, or habitual living location."

Harris filed a motion to quash the information because "the statutory scheme from which the criminal complaint arises is unconstitutional on its face and as applied to [Harris]." In the motion, he asserted two constitutional challenges to certain sections of SORA: an ex post facto challenge to §§ 29-4001.01 through 29-4006 and 29-4009 through 29-4013, and a due process challenge to §§ 29-4009 and 29-4013. Harris generally challenged amendments made to SORA by two legislative enactments—2009 Neb. Laws, L.B. 97, which became operative on May 21, 2009, and 2009 Neb. Laws, L.B. 285, which became operative on January 1, 2010. With regard to the ex post facto challenge, Harris contended that the 2009 amendments imposed retroactive and additional punishment for his 2001 convictions. With regard to the due process challenge, Harris contended that the 2009 amendments violated his due process rights by eliminating the individual assessment to determine the level of community notification and by imposing public Web site notification for all registrants.

The district court overruled Harris' motion to quash. In its order ruling on the motion, filed November 16, 2010, the court noted a case pending in the U.S. District Court for the District of Nebraska, in which the federal court had preliminarily enjoined the State of Nebraska from enforcing certain provisions of SORA as amended by L.B. 97 and L.B. 285 as to those previously convicted of sex crimes but not on probation, parole, or court-monitored supervision after January 1, 2010. See *Doe v. Nebraska*, 734 F. Supp. 2d 882 (D. Neb. 2010). The court noted in particular that the federal court had enjoined the enforcement of § 29-4006(2) (requiring consent to search and installation of monitoring hardware and software) and Neb. Rev. Stat. § 28-322.05 (Cum. Supp. 2010) (making it crime to use Internet social networking sites accessible by minors by person required to register under SORA). The district court noted that in a subsequent order, the federal court had ordered that a trial was necessary to determine the constitutionality

of § 29-4006(1)(k) and (s) (requiring disclosure of certain identifiers, e-mail addresses, electronic domains, and Internet sites); § 29-4006(2) (requiring registrant to consent to search and monitoring of hardware and software); and § 28-322.05 (making it crime to use social networking sites or chat room services accessible by minors). See *Doe v. Nebraska, supra*. The court finally noted that the federal court had concluded in *Doe* that there was no merit to the plaintiffs' constitutional challenges to all other statutory provisions enacted or amended by L.B. 97 and L.B. 285. See *Doe v. Nebraska, supra*. Based on the federal court's rulings in *Doe*, the court concluded that Harris' motion to quash should be overruled.

Thereafter, Harris entered a plea of not guilty. After the State rested its case in a stipulated bench trial, Harris renewed the objections he made in the motion to quash and the district court overruled the motion. After Harris rested his defense, he moved the court to dismiss the action as unconstitutional because it violated the Ex Post Facto, Due Process, Equal Protection, and Commerce Clauses as applied to him. The court overruled the motion and thereafter found Harris guilty of violating SORA, a Class IV felony under § 29-4011, because he had failed to update his registration in violation of § 29-4004(9). The court sentenced Harris to pay a fine of $2,500 and costs of the action.

Harris appeals his conviction.

ASSIGNMENTS OF ERROR

Harris claims that the district court erred when it rejected his constitutional challenges to SORA as amended in 2009. He specifically asserts that SORA as amended violates the Ex Post Facto, Due Process, Equal Protection, and Commerce Clauses of the U.S. and Nebraska Constitutions on its face and as applied to him.

STANDARD OF REVIEW

[1] The constitutionality and construction of a statute are questions of law, regarding which we are obligated to reach conclusions independent of those reached by the court below. *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011).

ANALYSIS

Only Challenges to §§ 29-4004(9) and 29-4011 Are at Issue in This Case.

[2] We note first that a statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality. *Sarpy Cty. Farm Bureau v. Learning Community*, 283 Neb. 212, 808 N.W.2d 598 (2012). We note that Harris makes constitutional arguments regarding various provisions of SORA. As an initial matter, we must determine which constitutional provisions and which portions of SORA are properly at issue in this appeal.

Harris argued to the district court in his motion to quash that SORA as amended in 2009 violated the Ex Post Facto and Due Process Clauses on its face. Harris additionally argued in his motion to dismiss at trial that the act violated the Ex Post Facto, Due Process, Equal Protection, and Commerce Clauses as applied to him. Harris' arguments on appeal encompass SORA as a whole, whereas his motion to quash limited his challenge to §§ 29-4001.01 through 29-4006 and 29-4009 through 29-4013 as violative of ex post facto rights and §§ 29-4009 and 29-4013 as violative of due process rights and his motion to dismiss, while less focused on certain SORA provisions, expanded his constitutional "as applied" rationale. Much of Harris' appellate argument focuses on the public notification provisions of §§ 29-4009 and 29-4013.

[3,4] Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right. *State v. Cushman*, 256 Neb. 335, 589 N.W.2d 533 (1999). A defendant is prohibited from attempting to circumvent or avoid conviction under a particular statute by asserting a constitutional challenge to another, collateral statute which is irrelevant to the prosecution. *Id.* Although Harris was subject to the public notification and other provisions of SORA, and although he may therefore have had standing to challenge the entirety of SORA in an action for declaratory judgment, in this criminal

case, he had standing to challenge only those statutes that were relevant to the prosecution.

The State charged in the information that Harris violated § 29-4011(1), which provides that "[a]ny person required to register under [SORA] who violates the act is guilty of a Class IV felony." Although the State did not cite § 29-4004(9) in the information, it used the language of § 29-4004(9) when it alleged that Harris had failed to update his registration within the time required under this section. Because §§ 29-4004(9) and 29-4011 were the only portions of SORA that were relevant to this prosecution, we conclude that they were the only statutes for which Harris had standing in this action to raise constitutional challenges. To the extent Harris' arguments relate to SORA in its entirety or to portions of SORA other than §§ 29-4004(9) and § 29-4011, they are not relevant in this appeal. Accordingly, conclusions in this appeal are limited to §§ 29-4004(9) and 29-4011 and do not determine the constitutionality of SORA as a whole or necessarily determine the outcome of different challenges to §§ 29-4004 and 29-4011 or constitutional challenges to other sections of SORA.

[5-7] We also note that Harris challenges the statutes at issue under various constitutional provisions and that he fashions such challenges as facial or as-applied challenges, or both. We therefore comment on the difference between facial and as-applied challenges and the differing procedures by which such challenges are raised and preserved. A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011). But a plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications. *Id*. In order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash, and all defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue. See *State v. Kanarick*, 257 Neb. 358, 598 N.W.2d 430 (1999). A motion to quash is the proper method to challenge

the constitutionality of a statute, but it is not used to question the constitutionality of a statute as applied. *State v. Perina, supra*. Instead, challenges to the constitutionality of a statute as applied to a defendant are properly preserved by a plea of not guilty. *Id*. With these principles in mind, we note that while Harris preserved the as-applied challenges that he raised to the district court when he pled not guilty, the only facial challenges that Harris preserved for appeal are those he raised in the motion to quash.

Harris' Facial Challenge Is Limited.

In his motion to quash, Harris stated that the specific statutes he was challenging were: "Neb. Rev. Stat. §§ 29-4001.01 through [29-]4006, and [29-]4009 through [29-]4013 (now constituting an ex post facto statutory scheme); Neb. Rev. Stat. §[§] 29-4009 and [29-]4013 (now eliminating the individual assessment to determine the level of community notification and imposing website notification for all registrants)." The challenges he raised in the motion to quash were therefore an ex post facto challenge to various provisions of SORA and a due process challenge to the notification provisions of §§ 29-4009 and 29-4013, the latter two of which, as noted, are not at issue in this case.

As discussed above, the only statutes that Harris had standing to challenge in this prosecution were §§ 29-4004(9) and 29-4011. Harris did not raise a facial challenge to § 29-4004(9), regarding periodic registration, and § 29-4011, regarding the Class IV felony consequence of violating SORA based on due process; therefore, the only facial challenge properly raised and preserved in this action was an ex post facto challenge to §§ 29-4004(9) and 29-4011, which were within the range of statutes Harris specified in his motion to quash with regard to his ex post facto challenge. With regard to his facial challenge, for completeness, we note that after the State rested its case at trial, Harris purportedly raised a facial challenge, arguing that SORA "violates his due process rights and it also constitutes an ex post facto law on its face." This reference to due process was not effective in expanding his facial challenge previously circumscribed by his motion to quash.

Harris' As-Applied Challenge Is Limited.

With regard to Harris' as-applied challenges, we note that after he rested his defense, Harris moved "to dismiss this action as unconstitutional, a violation of his due process rights as an ex post facto law." He further moved that "this is a violation of his equal protection of rights and it's also in violation of the commerce clause." Harris argued that § 29-4004(9) singles out registrants who are transients and discriminates against them by placing an undue burden on them by its requirement to register every 30 days as opposed to nontransients who are not required to register as frequently. He also argued that the requirement to register every 30 days placed an undue burden on his interstate travel and commerce as a person who travels frequently as part of his work. Having pled not guilty and as a result of these arguments at trial, Harris preserved his as-applied constitutional challenges based on the Equal Protection and Commerce Clauses.

With these principles and background in mind, we proceed to analyze Harris' constitutional challenges as they relate to §§ 29-4004(9) and 29-4011.

Harris Has Not Shown That Either § 29-4004(9) or § 29-4011 Is an Ex Post Facto Punishment Either on Its Face or as Applied.

Harris first claims that the district court erred when it rejected his facial and as-applied challenges based on the Ex Post Facto Clauses of the Nebraska and U.S. Constitutions. Although Harris aims his arguments at SORA as a whole, as noted above, the only statutes properly challenged in this action are §§ 29-4004(9) and 29-4011. We reject Harris' ex post facto challenges to these statutes.

[8] Harris first urges is to adopt the proposition that the Nebraska Constitution's ex post facto clause provides greater protection than does the equivalent clause in the U.S. Constitution. We decline to do so. As we have stated, we ordinarily construe Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution. *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010). See, also, *In re Interest of A.M.*, 281 Neb. 482, 797

N.W.2d 233 (2011), *cert. denied* 565 U.S. 919, 132 S. Ct. 341, 181 L. Ed. 2d 214. Harris has not provided a convincing reason to depart from our ex post facto jurisprudence in our analysis of Harris' ex post facto challenges to §§ 29-4004(9) and 29-4011, and therefore the same analysis applies to both the Nebraska and the U.S. provisions.

[9] Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts. *State v. Simnick, supra*.

Section 29-4011 clearly imposes a criminal penalty because it provides that a person who violates SORA is guilty of a Class IV felony. However, § 29-4011 on its face and as applied to Harris does not punish behavior that occurred before the statute's enactment. Instead, it operates prospectively to punish violations of SORA requirements occurring after its enactment. Section 29-4011 is not additional punishment for the crimes that resulted in a person's being subject to SORA; instead, it punishes the act of failing to comply with SORA once a person is subject to its requirements. Because § 29-4011 does not punish an offense that occurred before its enactment, we reject Harris' ex post facto challenges—facial and as-applied—to § 29-4011.

[10,11] By contrast, § 29-4004(9), like other portions of SORA, imposes requirements on persons based on their past crimes. The retroactive application of civil disabilities and sanctions is permitted; it is only criminal punishment that the Ex Post Facto Clause prohibits. See *In re Interest of A.M., supra*. Thus, we must determine whether § 29-4004(9) imposes civil sanctions or criminal punishment. To do so, we apply the two-pronged intent-effects test. See *In re Interest of A.M., supra*. We must first ascertain whether the Legislature intended the statute to establish civil proceedings. This is a question of statutory construction. *Id*. If the intention of the Legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory

scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it "civil." *Id.*

[12,13] Because we ordinarily defer to the Legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty. *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011), *cert. denied* 565 U.S. 919, 132 S. Ct. 341, 181 L. Ed. 2d 214. In determining whether the statutory scheme is so punitive that it effectively transforms the statute from a civil statute to a criminal statute, we refer to the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). The factors are neither exhaustive nor dispositive but are useful guideposts. *In re Interest of A.M., supra*. The following seven factors serve as our guideposts: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as 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.*

This court has had previous occasions to consider ex post facto challenges with regard to SORA. In *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004), we considered whether lifetime registration requirements for an aggravated offense violated the Ex Post Facto Clause. In the intent phase of the analysis, we concluded that "the Legislature intended to create a civil regulatory scheme to protect the public from the danger posed by sex offenders." 268 Neb. at 84, 680 N.W.2d at 161. In the effects phase of the analysis, we concluded that the defendant had "failed to show by the clearest proof that [SORA's] registration provisions are so punitive in either purpose or effect as to negate the State's intention." 268 Neb. at 88, 680 N.W.2d at 163.

In *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004), we again considered a challenge to SORA's registration provisions as well as to its notification provisions. We reaffirmed that the legislative intent was as set forth in *Worm*. *Slansky v. Nebraska State Patrol, supra*. We further concluded that the adverse effects of SORA's notification provisions were "limited and not so punitive as to negate the Legislature's intent to enact a civil regulatory scheme." 268 Neb. at 383, 685 N.W.2d at 354.

In *Welvaert v. Nebraska State Patrol*, 268 Neb. 400, 683 N.W.2d 357 (2004), a notification case, we rejected additional arguments and again concluded that punishment was not the intent of the Legislature in enacting SORA and that the effects of the notification provisions were not so punitive as to negate such intent. Compare *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010), (holding that lifetime community supervision pursuant to Neb. Rev. Stat. § 83-174.03 (Reissue 2008) was punishment and was ex post facto as applied to crime committed before its enactment).

Section 29-4004(9) is part of the registration requirements of SORA. Our holding in *Worm* that the registration requirements of SORA were not punitive in intent or effect applied to the statute as it then existed. However, SORA has been amended, and therefore, we must consider whether the Legislature intended the 2009 amendments to SORA to be a punishment or whether the effects of such amendments are so punitive as to negate a legislative intent to create a civil regulatory scheme. As noted earlier in this opinion, § 29-4004(9) is the only portion of SORA's registration provisions that is at issue in this case and the notification provisions are not at issue. Therefore, our analysis does not consider whether any of the 2009 registration or notification amendments other than the amendment of § 29-4004(9) were punitive in intent or effect.

Section 29-4004(9) is sometimes referred to as applying to "transients." After the 2009 amendments, it provides:

> Any person required to register or who is registered under the act who no longer has a residence, temporary domicile, or habitual living location shall report such change in person to the sheriff of the county in which he or she

> is located, within three working days after such change in residence, temporary domicile, or habitual living location. Such person shall update his or her registration, in person, to the sheriff of the county in which he or she is located, on a form approved by the sex offender registration and community notification division of the Nebraska State Patrol at least once every thirty calendar days during the time he or she remains without residence, temporary domicile, or habitual living location.

Subsection (9) was not part of § 29-4004 at the time of our decision in *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004). The general substance of the present subsection (9) was first added to the statute by 2006 Neb. Laws, L.B. 1199, and was substantially similar to its current form, except that a registrant was allowed 5 working days to report a change and was not required to report a change or an update to his or her registration in person. L.B. 1199 made amendments to various provisions of the law regarding sex offenses and convicted sex offenders. With respect to the addition of what is now § 29-4004(9), the Introducer's Statement of Intent stated that L.B. 1199 was intended in part to "[c]larif[y] certain requirements under [SORA]." Judiciary Committee, 99th Leg., 2d Sess. (Feb. 16, 2006). The introducer's comments to the Judiciary Committee stated that the bill "clarifies the obligations of homeless offenders relating to address notification." Committee Statement, L.B. 1199, 99th Leg., 2d Sess. 4 (Feb. 16, 2006). We determine that the Legislature's intent in enacting § 29-4004(9) in 2006 was to clarify the existing civil regulatory scheme and that its intent was not punitive.

Regarding the amendments to § 29-4004(9), which changed 5 days to 3 days and added the in-person reporting requirement, the Statement of Intent for L.B. 285 in 2009 stated that SORA was being amended to comply with federal guidelines and that the amendments had the purpose of creating "a more comprehensive, nationalized system for registration of sex offenders." Judiciary Committee, 101st Leg., 1st Sess. 1 (Mar. 18, 2009). Similar to our holding in *Worm*, we believe that the Legislature's intent with the addition and amendment to § 29-4004(9) was to clarify and expand the already established

civil regulatory scheme for sex offenders and that it was not the Legislature's intent to punish.

Having determined that the Legislature did not intend § 29-4004(9) as punishment, we look to the seven factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), to determine if the effect of the challenged statute is punitive. Regarding the *Kennedy* factors, Harris claims, summarized, that the registration requirements of § 29-4004(9) as amended are onerous, punitive, excessive, and impose a disability. Again, we note that only the clearest proof of a punitive effect will suffice to overcome our view that the Legislature intended § 29-4004(9) to operate as a civil statute.

Foremost among Harris' arguments that § 29-4004(9) is punitive is his claim that the in-person reporting requirement is punitive in effect, generally and specifically, as applied to him because his work requires extensive travel. As a transient, Harris is required under § 29-4004(9) as amended to report his whereabouts to the county sheriff in person at least once every 30 days. He states that the incident that gave rise to the charge against him in this case resulted from his failure to report, which was caused by a vehicle breakdown in Iowa that delayed his return to Nebraska and caused him to miss the 30-day in-person registration deadline in Nebraska.

In response to Harris' claim that the in-person registration requirement is punitive, the State notes in its appellate brief that § 29-4004(9) requires only that a transient registrant update his or her registration in person "'to the sheriff of the county in which he or she is located.'" Brief for appellee at 11. The State says in its brief that "the county sheriff to whom Harris must report is where he is located at the time regardless if it is a county in Nebraska or not." *Id.* at 52. The State repeated this interpretation at oral argument. With respect to the incident that gave rise to this case, the State asserts that Harris could have updated his registration in Iowa. In this regard, because on this record there is no indication that Harris attempted to register in Iowa, we make no comment involving a scenario in which a registrant has in fact unsuccessfully attempted to register in a location outside of Nebraska. The

State further notes that § 29-4004(9) provides that a transient registrant update his or her registration "*at least once* every thirty calendar days" rather than "every thirty calendar days," meaning that the updating does not have to be done on a specific day and can be done more than once during any particular 30-day period. Therefore, if a transient registrant knows that it will be difficult to go to a county sheriff on a particular day or period of days, he or she may update his or her registration in advance of that time.

We have reviewed the statutory language of § 29-4004(9). We agree with the State's reading of the requirements of § 29-4004(9) and conclude that the in-person registration requirement of § 29-4004(9) is not limited to presenting oneself to a sheriff in a county in Nebraska. Given our shared understanding of the statute, we conclude that the in-person feature of the statute is not excessive nor punitive in effect. We agree with the observation that "[a]ppearing in person may be more inconvenient, but requiring it is not punitive." *U.S. v. W.B.H.*, 664 F.3d 848, 857 (11th Cir. 2011). This observation is especially apt where the in-person requirement is not limited by geography.

We have examined Harris' remaining arguments that § 29-4004(9) is punitive in effect under the *Kennedy* factors and find them to be without merit. Section 29-4004(9) imposes no affirmative disability or restraint; it does not prohibit a sex offender from doing anything he or she would otherwise be able to do. See *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). Section 29-4004(9) does not further the traditional punitive justifications of retribution or deterrence; registration is a legitimate nonpunitive governmental objective. See *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004). There are alternative purposes for § 29-4004(9) other than punishment, such as protecting the public and enhancing future law enforcement efforts. In *Worm*, we observed that the two main reasons for originally enacting SORA were the recognition that sex offenders present a high risk to commit repeat offenses and, prior to SORA, law enforcement agencies lacked current information. See *American Civil Liberties Union of Nevada v. Masto*, 670 F.3d 1046 (9th Cir. 2012) (discussing reasons for

enacting sex offender registration statutes). The Nebraska statute is well tailored to further these purposes, and the burdens in § 29-4004(9) are not onerous. For completeness, we note that an ex post facto challenge to other provisions of SORA as amended was rejected in *Doe v. Nebraska*, 734 F. Supp. 2d 882 (D. Neb. 2010), and the reasoning in *Doe* is consistent with our analysis.

We recognize that some of the *Kennedy* factors may weigh in favor of § 29-4004(9) as being considered punishment. We conclude, however, that most of the factors weigh in favor of § 29-4004(9) as being a civil statute. Certainly, the evidence to the contrary does not rise to the clearest proof standard. In this regard, we have considered Harris' arguments that the effects of § 29-4004(9) as applied to him are punitive and we find them unconvincing. We conclude that § 29-4004(9) is not punitive and thus does not violate the Ex Post Facto Clause.

Having determined that Harris has failed to show that either § 29-4004(9) or § 29-4011 is unconstitutional on its face or as applied to him, we conclude that the district court did not err when it rejected Harris' ex post facto challenges.

Harris Makes No Due Process Challenge to §§ 29-4004(9) and 29-4011.

Harris next claims that the district court erred when it rejected his due process challenges. As noted above, Harris' facial challenge based on the Due Process Clause, as set forth in his motion to quash, was limited to an argument regarding the notification provisions of §§ 29-4009 and 29-4013. As further explained above, neither of those statutes is relevant to the present criminal prosecution, and in resolving the present case, we specifically make no comment on whether those statutes comport with constitutional due process.

Harris does not make a facial due process challenge to the only statutes at issue in this case—§§ 29-4004(9) and 29-4011. We further note that Harris does not make any argument with regard to §§ 29-4004(9) and 29-4011 as being in violation of the Due Process Clause as applied to him. We therefore conclude that the district court did not err when it rejected Harris' due process challenge.

Harris' Commerce Clause Challenge Has Been Abandoned and Harris' Equal Protection Challenge Is Without Merit.

As his final two assignments of error, Harris claims that the district court erred when it rejected his Equal Protection and Commerce Clauses challenges to SORA.

Although Harris asserts that SORA violates the Equal Protection Clauses of the Nebraska and U.S. Constitutions and the Commerce Clause of the U.S. Constitution on its face and as applied to him, as we noted above, Harris did not preserve a facial challenge based on the Equal Protection and Commerce Clauses, because he did not include such challenges in his motion to quash. Therefore, Harris has only preserved as-applied challenges based on these constitutional provisions.

Harris' Commerce Clause Challenge Has Been Abandoned.

[14] With regard to his Commerce Clause challenge, Harris refers to "the Commerce Clause of the U.S. Constitution" in his assignment of error on appeal; however, in the argument section of his brief, he does not cite the Commerce Clause and does not cite to authority that relies on the Commerce Clause. Instead, in the argument section, he asserts that SORA violates his right to travel and he cites cases that deal with an infringement of the fundamental right to travel as a violation of the Due Process Clause. It is unclear whether Harris made an argument with regard to the Commerce Clause to the district court. In any event, to the extent Harris raised a Commerce Clause challenge below and assigned error to it on appeal, he has failed to argue a challenge based on the Commerce Clause and has abandoned such challenge on appeal. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011). Therefore, to the extent Harris has made a challenge based on the Commerce Clause elsewhere in these proceedings, we do not address it on appeal. However, we note that the argument he makes with regard to a fundamental right to travel is relevant to the equal

protection challenge and will be considered in connection therewith below.

Harris' Equal Protection Challenge Is Without Merit.

In regard to the equal protection challenge, we note Harris' argument on appeal is directed to § 29-4004(9) and is properly at issue in this case. We also note that although Harris did not preserve a facial equal protection challenge, he did preserve an as-applied equal protection challenge, which we consider below. In this regard, we recognize that the analysis necessary to address Harris' as-applied challenge to some extent requires us to employ the vocabulary of a facial challenge. Harris argues that that statute's requirement that he update his registration in person at least once every 30 days is a violation of equal protection, because it classifies registrants who are transient differently from registrants who have a regular residence and imposes additional reporting requirements on transient registrants. He asserts that the additional requirements infringe on certain fundamental rights, particularly, in his case, the right to travel.

[15-17] Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid, and the burden of establishing the unconstitutionality of the statute is on the one attacking its validity. *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009). The Equal Protection Clause of the 14th Amendment, § 1, mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike. *State v. Rung, supra*. The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim. *Id*. In other words, the dissimilar treatment of dissimilarly situated persons does not violate equal protection rights. *Id*.

[18,19] In an equal protection challenge to a statute, the level of judicial scrutiny applied to a particular classification may be dispositive. *Id*. Legislative classifications involving either a suspect class or a fundamental right are analyzed with strict scrutiny, and legislative classifications not involving a suspect class or fundamental right are analyzed using rational basis review. *Id*.

Harris contends that § 29-4004(9) classifies and treats differently registrants who are transients compared to registrants generally. Harris argues that as a registrant who travels for work, § 29-4004(9) as it applies to him denies him equal protection. Harris does not attempt to argue that such classification targets a suspect class. Instead, he argues that the classification should receive strict scrutiny because it jeopardizes the exercise of fundamental rights, including the right to travel.

We have recognized that the right to interstate travel has been characterized as fundamental and that therefore, courts examine statutes impairing that right using the strict scrutiny standard of review. *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008). We determine that the reporting requirements of § 29-4004(9) do not impair such right.

[20] The U.S. Supreme Court has stated that the "'right to travel'" includes at least three different components: (1) the right of a citizen of one state to enter and to leave another state, (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state, and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State. *Saenz v. Roe*, 526 U.S. 489, 500, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999). Harris does not argue that § 29-4004(9) infringes the second or third component of the right to travel noted by the U.S. Supreme Court; instead, he argues that it infringes the first component, because he cannot travel freely outside Nebraska and into other states for his work because he is required to report in person every 30 days.

Although the in-person reporting requirement admittedly places some burden on Harris, "mere burdens on a person's ability to travel from state to state are not necessarily a violation of their right to travel." *Doe v. Moore*, 410 F.3d 1337, 1348 (11th Cir. 2005). In *Doe v. Moore*, the Court of Appeals for the 11th Circuit rejected an argument that a sex offender registry requirement that the registrant notify law enforcement in person of a permanent or temporary change of residence infringed the right to travel. The court determined that although the requirement was "burdensome," it was not "unreasonable by constitutional standards, especially in light of the reasoning behind such registration." *Id.* at 348. We similarly determine that although the requirement of § 29-4004(9) places some burden on registrants like Harris by requiring them to update their registrations in person at least once every 30 days, we do not think it is an unreasonable burden, considering the purpose of the registration is to keep track of the whereabouts of known sex offenders.

The burdens of § 29-4004(9) are less onerous than Harris appears to perceive them to be. As noted above in our ex post facto analysis, the State suggests, and we agree, that the statute should be construed such that the registrant may update his or her registration with the sheriff of the county in which he or she is located, whether that county is the county in which he or she normally resides and whether or not the county is in Nebraska or another state. Further, an update must be made "at least once" every 30 days rather than exactly every 30th day; therefore, the update may be done sooner than 30 days after the last update if necessary for the registrant who plans to travel. In light of this construction, § 29-4004(9) does not place an unreasonable burden on a registrant's right to travel between Nebraska and other states. See *Doe v. Nebraska*, 734 F. Supp. 2d 882, 929 (D. Neb. 2010) (in case challenging Nebraska's SORA after 2009 amendments, federal district court was "not persuaded that SORA's in-person reporting requirements create an actual barrier to travel").

Harris also asserts in his appellate brief that SORA implicates other fundamental rights; however, other than the right to travel, Harris does not identify fundamental rights specifically

implicated by § 29-4004(9). We therefore determine that, other than the right to travel, Harris has not shown that the classification in § 29-4004(9) involves a fundamental right.

[21-23] Because Harris asserts no suspect classification and because the statute does not jeopardize a fundamental right, the classification in § 29-4004(9) treating transient registrants different than registrants with a regular residence is subject to a rational basis review for equal protection purposes. When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009). Under rational basis review, we will uphold a classification created by the Legislature where it has a rational means of promoting a legitimate government interest or purpose. *Id.* In other words, the difference in classification need only bear some relevance to the purpose for which the difference is made. *Id.* Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification. *Id.*

On its face, § 29-4004(9) creates a classification based on whether a registrant "has a residence, temporary domicile, or habitual living location" and requires that if a registrant does not, he or she is subject to more frequent updating of his or her registration than registrants who have a regular residence. As noted in connection with our ex post facto analysis, the legislative purpose behind SORA is to create a civil regulatory scheme to protect the public from the danger posed by sex offenders. This is a legitimate government interest or purpose, and we determine that the classification created by § 29-4004(9) is rationally related to such purpose. In order to protect the public, the registration system is used by law enforcement to keep track of the whereabouts of known sex offenders. Insofar as it is more difficult to keep track of registrants who do not have a regular residence, domicile, or living location than it is for those registrants who have a regular

residence, it is rational to require such persons to update their registration more frequently than other registrants.

In his as-applied challenge, Harris contends that because he travels frequently for work, he is more heavily burdened than other registrants by frequent registration requirements. However, in terms of equal protection analysis, Harris' travel profile makes the classification more compelling. Measured against Harris' facts, the classification is rationally related to SORA's purpose.

We conclude that Harris has not met his burden to show that § 29-4004(9) violates equal protection standards. The district court did not err when it rejected Harris' equal protection challenge to the statute.

CONCLUSION

We conclude that the district court did not err when it rejected the constitutional challenges that were properly raised by Harris in this criminal proceeding that implicated §§ 29-4004(9) and 29-4011. We therefore affirm Harris' Class IV felony conviction under § 29-4011(1) based on his failure to comply with § 29-4004(9) of SORA.

AFFIRMED.

STEPHAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
TIMOTHY GASKILL, APPELLANT.
817 N.W.2d 754

Filed July 27, 2012. No. S-11-528.

1. **Constitutional Law: Statutes: Judgments: Appeal and Error.** The constitutionality and construction of a statute are questions of law, regarding which an appellate court is obligated to reach conclusions independent of those reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.