NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted July 30, 2018*
Decided July 30, 2018

Before

DIANE P. WOOD, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 17-2426

PATRICK JAMES WERNER,
Plaintiff-Appellant,

v.

CITY OF GREEN BAY,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 15-CV-216

Nancy Joseph,
Magistrate Judge.

ORDER

Patrick Werner, a sex offender who is now incarcerated, challenges municipal ordinances that restricted where he could reside while he was on parole. The district court entered summary judgment for the City. Because the ordinances do not impose retroactive punishment and Werner was not deprived of due process, we affirm the judgment.

---

* We agreed to decide this case without oral argument because the briefs and the record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. *See* FED. R. APP. P. 34(a)(2)(C).

Our decision in Werner's prior appeal recounts his struggle to secure housing as a sex offender. *See Werner v. Wall*, 836 F.3d 751 (7th Cir. 2016). As relevant here, Werner was convicted in 1999 of second-degree sexual assault of a child and attempted child enticement. Since being paroled initially in 2004, he has been reincarcerated at least four times for violating conditions of supervision. When Warner has not been incarcerated, his probation officers have required him to live in Brown County (Wisconsin), the county where he was convicted. *See id.* at 754; WIS. STAT. § 301.03(20)(a)(1). But Werner's housing options there have been limited since 2007, when the City of Green Bay enacted residency restrictions for sex offenders. *See* GREEN BAY MUN. CODE § 27.620 (repealed). The relevant ordinance prohibited sex offenders from residing within 2,000 feet of certain designated places where "children are known to congregate." It exempted residences that offenders share with relatives, and it contained procedures for seeking additional exemptions from the City's Sex Offender Residence Board.

On several occasions from 2009 to 2012, Werner sought permission to live at a particular halfway house within the restricted area. Each time the Sex Offender Residence Board, after a hearing, denied Werner's request. These denials affected Werner most significantly beginning in March 2010, when his inability to find appropriate housing resulted in his being detained in the Brown County Jail for more than a year beyond his scheduled release date. During that period, Werner was let out of jail for four hours each weekday to look for housing and employment, yet not until July 2011 did Werner finally secure housing in Bellevue, a village just outside of Green Bay. In 2012 Green Bay replaced its ordinance with a similar one that categorically exempts halfway houses from the residency restrictions. GREEN BAY MUN. CODE § 27.622. Werner later moved to the halfway house in Green Bay, where he lived until his most recent parole revocation in January 2013.

Werner alleges in this suit under 42 U.S.C. § 1983 that the application of these ordinances to him violates both the ex post facto clause of the Constitution and his right to procedural due process. A magistrate judge, presiding by consent, entered summary judgment for the City. The judge ruled that although the ordinances applied "retroactively to his convictions," that did not pose an ex post facto problem because the effects of the ordinance were not punitive. *See Smith v. Doe*, 538 U.S. 84, 92–106 (2003). The judge also rejected Werner's due-process claim, reasoning that he was not entitled to due process regarding the enactment of the ordinances, *see Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7–8 (2003), and Werner's hearings before the Sex Offender Residence Board comported with the basic requirements of due process, i.e., notice and an opportunity to be heard, *see Goss v. Lopez*, 419 U.S. 565, 579 (1975).

On appeal Werner maintains that the ordinances are impermissible ex post facto laws and violate his right to procedural due process. But we recently rejected nearly identical arguments in *Vasquez v. Foxx*, No. 17-1061, 2018 WL 3372403 (7th Cir. July 11, 2018). In *Vasquez* we considered a challenge to an Illinois statute that made it a felony for a sex offender to live within 500 feet of a day-care home. *Id.* at *1. After noting that "a statute is not an impermissible ex post facto law unless it is *both* retroactive *and* penal," *id.* at *3 (citing *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011)), we explained that the Illinois statute raised no ex post facto concerns because it had no retroactive effect at all; it applied "only to conduct occurring *after* its enactment—i.e., knowingly maintaining a residence within 500 feet of a child day-care home or group day-care home," *id.* After considering the factors in *Smith*, we added that the statute was not punitive. *Id.* at *3–5. And responding to the plaintiffs' procedural due-process argument that the statute was enforced against them without a hearing to assess whether they actually posed a threat to children, we concluded that no hearing was required because the statute applied to "*all* child sex offenders regardless of their individual risk of recidivism." *Id.* at *6.

Werner's challenges to the Green Bay ordinances fail for the same reasons. That the City of Green Bay enacted the ordinances after Werner's convictions does not pose an ex post facto problem because the ordinances have no retroactive effect. *See id.* at *3. Moreover, the penalty for violating the ordinance—a $500 fine—is minor compared to the possible three-year prison sentence faced by the plaintiffs in *Vasquez*, underscoring that the Green Bay ordinances were not punitive. *Id.* at *3–5.

Likewise, Werner is wrong when he asserts that the Board's denial of his requests "to reside at one specific residence ... requires a finding of [the] denial of due process." Werner is not entitled to any "hearing for an individualized risk assessment." *See id.* at *6; *see also Conn. Dep't of Pub. Safety*, 538 U.S. at 4. Yet here the Sex Offender Residence Board gave Werner several such hearings, and eventually the City changed its residency restrictions to categorically exempt the halfway house where Werner wanted to live. Moreover, Werner does not articulate any coherent argument for why he thinks the Board's procedures were inadequate.

AFFIRMED

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

July 30, 2018

Before: DIANE P. WOOD, Chief Judge
ILANA DIAMOND ROVNER, Circuit Judge
DIANE S. SYKES, Circuit Judge

No. 17-2426	PATRICK J. WERNER, Plaintiff - Appellant v. CITY OF GREEN BAY, Defendant - Appellee

Originating Case Information:

District Court No: 2:15-cv-00216-NJ
Eastern District of Wisconsin
Magistrate Judge Nancy Joseph

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

United States District Court

Eastern District of Wisconsin

JUDGMENT IN A CIVIL CASE

PATRICK JAMES WERNER,

Plaintiff,

v. **Case No. 15-CV-216**

CITY OF GREEN BAY,

Defendant.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came before the court, the issues have been decided and a decision has been rendered.

NOW, THEREFORE, IT IS ORDERED that the defendant's motion for summary judgment (Docket # 58) is **GRANTED**.

IT IS FURTHER ORDERED that this action be and hereby is **DISMISSED**.

Approved: *s/Nancy Joseph*
NANCY JOSEPH
United States Magistrate Judge

Dated: March 23, 2017

JON W. SANFILIPPO
Clerk of Court

s/Becky Ray
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

PATRICK JAMES WERNER,

Plaintiff,

v. **Case No. 15-CV-216**

CITY OF GREEN BAY,

Defendant.

DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTIONS AS MOOT

Patrick James Werner, who is representing himself, brings this lawsuit against the City of Green Bay challenging the constitutionality of the city's sex offender residency restriction ordinances. He claims that the ordinances violate the Due Process and Ex Post Facto clauses of the Constitution. He also filed several discovery related motions. Green Bay has moved for summary judgment on both of Werner's claims. For the reasons that I explain below, I will grant the defendant's motion for summary judgment and deny Werner's motions as moot.

RELEVANT FACTS[1]

Werner was convicted and sentenced on August 23, 1999, for second degree assault of a child and child enticement. (Docket # 60, ¶ 3.) He was sentenced to ten years in prison and ten years of probation for both cases. (*Id.* ¶ 4.) Werner served consecutive sentences and was paroled at the end of six years, on December 14, 2004. (*Id.* ¶ 5.)

[1] I take the facts from "Defendant's Proposed Findings of Fact in Support of Motion for Summary Judgment" (Docket # 60) and the "Affidavit of Patrick James Werner in Opposition of Defendant's Motion of Summary Judgment" (Docket # 68). The facts are undisputed unless otherwise indicated.

1. 2007 Green Bay Ordinance

On April 4, 2007, the City of Green Bay created Section 27.620 of the Green Bay Municipal Code regarding sexual offender residency restrictions. (*Id.* ¶ 8.) The ordinance contains the following relevant provisions:

> 27.620 SEXUAL OFFENDER RESIDENCY RESTRICTIONS
>
> (1) FINDING AND INTENT
> (a) Repeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Sexual offenders are extremely likely to use physical violence and to repeat their offenses; and most sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. This makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant.
>
> (b) It is the intent of this ordinance not to impose a criminal penalty but rather to serve the City's compelling interest to promote, protect, and improve the health, safety, and welfare of the citizens of the city by creating areas around locations where children regularly congregate in concentrated numbers wherein certain sexual offenders and sexual predators are prohibited from establishing temporary or permanent residence.

(*Id.* ¶ 9.) The ordinance applies to all "designated offenders" and defines designated offender to include "any person who is required to register under Wis. Stat. § 301.45 for any sexual offense against a child or any person who is required to register under Wis. Stat. § 301.45 and who has been designated a Special Bulletin Notification (SBN) sex offender pursuant to Wis. Stat. § 301.46(2) and (2m)." (*Id.*) Under the ordinance, "[i]t is unlawful for any designated offender to establish a permanent residence or temporary residence within 2,000 feet of any school, licensed day care center, park, trail, playground, place of worship, or any other place designated by the City as a place where children are known to congregate." (*Id.*)

There are exceptions that allow for designated offenders to reside within a prohibited area, including an exception if the residence is also the primary residence of the offender's parents. (*Id.*)

The ordinance contains a provision for an appeal to a Sex Offender Residence Board ("Board"), made up of "five citizens, three of whom shall constitute a quorum," appointed by the Mayor for five year terms. (*Id.*) An affected party files the appeal with the City Clerk's Office, who forwards the request to the Board, which receives reports from the Police Department on the appeal. (*Id.*) The Board "convene[s] and consider[s] the public interest as well as the affected party's presentation and concerns." (*Id.*) After deliberation, the Board forwards its decision in writing to the City of Green Bay Inspection Division, the Green Bay Police Department, and the affected party. (*Id.*)

The Board had guidelines to follow when enforcing the ordinance, and it was allowed to consider both the public interest and the appellant's presentation and concerns. (*Id.* ¶ 10.) The Board could grant an exception to the ordinance by considering whether the offender (1) had shown remorse, (2) had rehabilitated, or (3) could re-offend. (*Id.* ¶ 11.)

Werner was incarcerated when the 2007 Ordinance was passed. (*Id.* ¶ 12.) When he was released from prison in March 2008, Werner lived at a halfway house on Shawano Avenue for ten days as an emergency placement while the Board considered his appeal to live with his mother. (*Id.* ¶ 13.) The Board granted Werner's appeal in 2008, and he lived with his mother for about thirteen months until he was reincarcerated for parole revocation. (*Id.* ¶ 14.)

Prior to his release in March 2010, probation and parole told Werner that if he did not have a place to live, he would be detained at the Brown County Jail until suitable housing was found. (*Id.* ¶ 20.) Prior to his anticipated release, Werner filed an appeal with the Board seeking to again live at the halfway house on Shawano Avenue. (*Id.* ¶ 16.) He did not provide an alternative residence in his request. (*Id.*) The Board held a hearing on November 11, 2009, and Werner appeared by telephone and presented his request before the Board. (*Id.* ¶ 17.) After discussion, the Board denied Werner's request, based in part on his multiple parole violations. (*Id.*) The Board notified Werner of its decision on November 17, 2009. (*Id.*)

2. 2009 Green Bay Ordinance

On December 1, 2009, the City of Green Bay repealed and recreated Section 27.620 of the Green Bay Municipal Code, Sexual Offenders Residency Restrictions. (*Id.* ¶ 18.) The new ordinance still allowed the Board to grant an exemption for the offender after notice and a hearing. (*Id.*)

When Werner was released from prison on March 16, 2010, he was taken to the Brown County Jail and housed there at taxpayer expense until he moved into a residence in another municipality on July 1, 2011. (*Id.* ¶ 19.) Werner remained at the Brown County Jail because no other residential facilities were available. (*Id.*)

In April 2010, Werner asked the Board for permission to live at the halfway house on Shawano Avenue, but the Board refused after notice and a hearing. (*Id.* ¶ 21.) The Board informed Werner that they would consider alternative options if he requested them. (*Id.*) However, Werner did not present any alternatives to the Board. Werner's parole agent,

Amanda Martin, did not provide Werner any residence options other than the halfway house on Shawano Avenue. (*Id.* ¶ 22.) Werner believed that one of the functions of a parole agent is to assist a person who is released from jail to find housing, but the Department of Corrections represented to Werner that its role is to release and monitor him, not locate housing for him. (*Id.* ¶¶ 24-25.)

Once he was at the Brown County Jail, Werner had four hours per day, Monday through Friday, to search for an apartment or residence that would accept him. (*Id.* ¶ 23.) While searching for his own housing, Werner violated the Brown County Jail's policies by returning to the jail with a paper clip from a rental application. (*Id.* ¶ 27.) At the time, Werner had a possibility to live in a residence in Allouez, but Martin did not allow this. (*Id.* ¶ 28.) Instead, Martin revoked Werner and sent him to Columbia Correctional Institution for an "Alternative to Revocation," which meant he stayed incarcerated for two additional months. (*Id.*)

On March 15, 2011, Werner asked the Board for permission to live in the halfway house on Shawano Avenue. (*Id.* ¶ 29.) After notice and a hearing held April 13, 2011, the Board refused. (*Id.*) The Board once again informed Werner that they would consider alternative options if he requested them. (*Id.*)

Ultimately, Werner found a residence in the Village of Bellevue and moved in during July 2011. (*Id.* ¶ 30.) In November 2011, Werner was apprehended and detained at the Brown County Jail for violating the terms of his supervision; his parole agent at the time was Erin Murto. (*Id.*) Werner returned to prison and served the remainder of his sentence; he was discharged on November 16, 2012. (*Id.* ¶ 32.)

In August 2012, prior to his release, Werner once again tried to get permission to move to the halfway house on Shawano Avenue. (*Id.* ¶ 34.) After notice and a hearing, the Board denied Werner's appeal because the members were concerned that Werner could re-offend after acknowledging that Werner was re-incarcerated for additional sexual offenses. (*Id.)*

3. *2012 Green Bay Ordinance*

On August 21, 2012, the City of Green Bay repealed Section 27.620 of the Municipal Code and created Sections 27.621 and 27.622 relating to sexual offender proximity and residency restrictions. (*Id.* ¶ 35.) Relevant revisions included exempting halfway houses, including the one on Shawando Avenue, from the residency restrictions. (*Id.*) The new ordinance continued to have a method to appeal the Board's decisions. (*Id.*)

After Werner's release on November 16, 2012, parole and probation arranged for Werner to live at the halfway house on Shawano Avenue. (*Id.* ¶ 36.) He lived there for three months. (*Id.* ¶¶ 36-37.) Werner did not have to go in front of the Board because the halfway house was now exempt from the Green Bay ordinance. (*Id.* ¶ 38.)

In January 2013, Werner was revoked and reincarcerated for having an active Facebook page or account without his agent's knowledge, for having a romantic relationship with a woman in another country, and for talking to an underage female in California. (*Id.* ¶ 39-40.) He remains incarcerated. (*Id.* ¶¶ 40-41.)

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Ames v. Home Depot U.S.A., Inc.*, 629 F.3d 665, 668 (7th Cir. 2011). "Material facts" are those under the applicable substantive law that "might affect the outcome of the suit." *Anderson*, 477 U.S. at 248. A dispute over "material fact" is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A party asserting that a fact cannot be disputed or is genuinely disputed must support the assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

ANALYSIS

Werner challenges the City of Green Bay's sex offender residency restriction ordinances on two grounds. First, he argues that the ordinances violate the Due Process

Clause. Second, he argues that the ordinances violate the Ex Post Facto Clause. Green Bay moves for summary judgment on both claims. I will address each in turn.

1. Due Process Claim

The Due Process Clause of the Fourteenth Amendment provides that the government shall not "deprive any person of life, liberty or property without due process of law." In this case, Werner alleges that his due process rights were violated in two ways: first, he "received no due process as the law was enacted after his crimes, conviction, and sentencing." (Docket # 67 at 6); second, the Board's procedures did not comport with due process.

1.1 Due Process for Ordinance Enactment

In regards to Werner's claim that he received no due process prior to the enactment of the ordinance, the Supreme Court's decision in *Connecticut Department of Public Safety v. Doe*, 538 U.S.1 (2003) controls. In that case, the convicted sex offender argued that the state should have afforded him the opportunity to demonstrate that he was not dangerous and that, as a result, the registration requirement should not apply to him. *Id.* at 5-6. The Court recognized that in cases such as *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), and *Goss v. Lopez*, 419 U.S. 565 (1975), due process required the state to provide a pre-deprivation hearing to create the opportunity to prove or disprove facts pertinent to the deprivation to be imposed. *Doe*, 538 U.S. at 7. But the Court concluded that Connecticut's sex offender registration requirements applied to sex offenders by virtue of their convictions, without regard to whether the offender was dangerous at the time of registration and, therefore, a hearing would be fruitless because there would be no facts relevant to the decision. *Id.* at 7-

8. States "are not barred by principles of 'procedural due process' from drawing" classifications among sex offenders and other individuals. *Id.* At 8.

Like the Connecticut sex offender registry law, the City of Green Bay ordinances apply to Werner by virtue of his convictions. As a result, he was entitled to no due process with regard to their enactment.

1.2 Due Process in Board Appeals

Next, Werner argues that the Board's denials of his requests to live in the City of Green Bay on four occasions, November 2009, April 2010, April 2011, and August 2012, did not comport with due process.

The record does not support that the Board violated Werner's right to due process. Each time the Board received an appeal from Werner, it followed the procedure set forth in the ordinance and provided notice, a hearing, and a written decision. First, in preparation for and after his release on March 16, 2010, the Board twice denied Werner placement in the halfway house on Shawano Avenue, once under the 2007 ordinance and once under the 2009 ordinance. Werner presented no alternative residences and, as a result, he was held in custody at the Brown County Jail for almost sixteen months. Each time he appealed to the Board, he received notice and a hearing. He was told each time that the Board would consider alternative options if Werner asked them to.

Werner blames his parole agent for his failure to present alternatives to the Board, but he also could have found and requested alternative residences. In fact, he was released from the Brown County Jail for four hours each week day to look for a residence. Whether the fault lies with Werner or his parole agent, the City of Green Bay is not responsible for Werner's lack of an approved residence. Nor is the City of Green Bay responsible for the

actions of individual members of the Board, none of whom Werner named as defendants in this action.

Next, after his time in the Brown County Jail and an Alternative to Revocation at Columbia Correctional Institution, Werner was scheduled to be released in July 2011. Prior to his release, Werner again asked the Board to live at the halfway house on Shawano Avenue. After notice and a hearing, the Board denied Werner's appeal but again told him they would consider alternatives if he requested them. Thus, the Board followed the procedures in the ordinance and did not violate due process.

Most recently, Werner was released from custody on November 16, 2012. Prior to his release, Werner again tried to get permission to move into the halfway house on Shawano Avenue. Prior to his release, he received notice and a hearing under the 2009 ordinance, and the Board denied his request because of a concern he would re-offend based on his re-incarceration for additional sexual offenses.

However, prior to Werner's release, the City of Green Bay repealed the 2009 ordinance and created the 2012 ordinances relating to sexual offender proximity and residency restrictions. These new ordinances exempted halfway houses, including the one on Shawano Avenue, from the residency restrictions. As a result, Werner was able to go to the halfway house on Shawano Avenue upon his release, without the need for Board involvement or approval. On these facts, Werner's due process violation claim cannot survive.

Nonetheless, Werner argues that the Board's hearings were not sufficient because they were not judicial trials. He describes them as "mock-type of hearing[s]" in which Robert's Rules of Order were utilized and the majority was an affirmative vote. (Docket #

68, ¶ 76.) Not every hearing needs to be a formal trial before a judge. Many administrative hearings are sufficient to satisfy due process. Each time Werner presented a proposed residence to the Board, there was notice and a hearing, with the plaintiff in attendance, discussion of the option, a written opinion, and minutes memorializing some of the conversation. That is enough. The basic requirements of due process are notice and an opportunity to be heard. *See Goss*, 419 U.S. at 579 (At the very minimum there must be "some kind of notice" and "some kind of hearing.").

Additionally, Werner argues that the process was insufficient because the minutes do not contain a full transcript of each hearing; they leave out some of the discussions Board members had with Werner or each other. Werner also suggests that the comments of one Board member show his unwillingness to have Werner live in the City of Green Bay. However, full transcripts of hearings are not required for there to be due process. Further, the comments reflected in the minutes show the Board members evaluating the factors required by the ordinance, *i.e.*, whether the offender had shown remorse, had rehabilitated or could re-offend.

The City of Green Bay's ordinances provided for due process from the Board when it considered appeals, and the Board carried out the process provided in the ordinances when it considered Werner's appeals. The defendant is entitled to summary judgment on Werner's due process claims.

2. Ex Post Facto Claim

Werner claims that the ordinances violate the Ex Post Facto Clause because by allowing sex offenders to live in only five to ten percent of the City of Green Bay, they

impose retroactive punishment on him even though he was convicted prior to the enactment of the ordinances.

The Ex Post Facto Clause of Article I, Section 10 of the Constitution prohibits the States from enacting laws that impose a punishment for an act that was not punishable at the time that it was committed or increase punishment for criminal acts after they have been committed. *Weaver v. Graham*, 450 U.S. 24, 28, (1981). To prevail on his claim, Werner must show that the ordinances apply retroactively to his convictions and that the ordinances constitute punishment. The first part of what must Werner must show, the question of retroactivity, is easily addressed. Werner was convicted of multiple counts of sexual assault to a child back in 1999. The City's Sex Offender Residency Restriction Ordinance originally went into effect eight years after Werner was sentenced. It therefore follows that the application of the ordinances to Werner was an unlawful ex post facto law if the ordinances imposed a punishment.

2.1 Legislative Intent

Although neither the Supreme Court nor the Seventh Circuit has addressed ex post facto challenges to similar residency restrictions, in *Smith v. Doe*, 538 U.S. 84 (2003), the Supreme Court set the framework for determining whether a regulatory scheme imposes a punishment. In that case, the Court addressed the constitutionality of requiring compliance with Alaska's sex offender registry law by persons who committed offenses before it became law. *Id.* at 89. In determining whether such a law constitutes punishment, the first question to be decided is what the legislature intended: if the intent was to impose a punishment, the retroactive application of the law is invalid. *Id.* at 92. If the intent was to enact a regulatory scheme that is "civil and nonpunitive," however, the court must dig deeper to determine

"whether the statutory scheme is so punitive either in purpose or effect as to negate [the] intention to deem it civil." *Id.* "Only the clearest proof" will transform what the legislature has denominated a civil regulatory measure into a criminal activity. *Id.*

With respect to the first question, the legislative intent, I must look to the ordinances' text and structure. *Id.* I "'must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.'" *Id.* at 93 (quoting *Hudson v. United States*, 522 U.S. 93, 99 (1997)). Here, the ordinances expressly state that their purpose was "not to impose a criminal penalty but rather to serve the City's compelling interest to promote, protect, and improve the health, safety, and welfare of the citizens of the City by creating areas around locations where children regularly congregate in concentrated numbers wherein certain sexual predators are prohibited from establishing temporary or permanent residence." (Docket # 60, ¶ 9.) Because there is nothing in the record to contradict the stated purpose to protect the health and safety of the citizens, especially the children of Green Bay, I conclude that the City's purpose in passing the ordinances was regulatory and nonpunitive.

2.2 *Punitive Effect*

I must next consider whether, despite the stated purpose, the actual effects of the ordinances are punitive. In *Smith*, the Supreme Court pointed to "useful guideposts" for determining whether a law has a punitive effect. *Smith*, 538 U.S. at 97. In analyzing the effect of the Alaska sex offender registration law, the Court in *Smith* pointed to five (of seven) factors drawn from *Kennedy v. Mendoza–Martinez*, 372 U.S. 144, 168–69, (1963), as particularly relevant: whether the law has been regarded in our history and traditions as

punishment, whether it promotes the traditional aims of punishment, whether it imposes an affirmative disability or restraint, whether it has a rational connection to a nonpunitive purpose, and whether it is excessive with respect to that purpose. *Smith*, 538 U.S. at 97. These factors are "neither exhaustive nor dispositive," *Id.* (quotation omitted). In the end, the ultimate question is whether the punitive effects of the law are so severe as to constitute the "clearest proof" that a statute intended by the legislature to be nonpunitive and regulatory should nonetheless be deemed to impose ex post facto punishment. *Id.* at 92.

Turning to whether the residency restrictions have been regarded in our history and tradition as punishment, I find that this factor weighs against a finding that the ordinances are punishment. To begin, laws restricting where sex offenders may live are relatively new. The closest historical analogue courts have compared residency restrictions to is banishment. *See Doe v. Miller*, 405 F.3d 700, 719-20 (8th Cir. 2005) (rejecting the comparison of Iowa's sex offender residency restriction statute to traditional banishment); *Shaw v. Patton*, 823 F.3d 556, 566 (10th Cir. 2016) (rejecting the comparison of Oklahoma's sex offender residency restriction statute to traditional banishment), *But see Does #1-5 v. Snyder*, 834 F.3d 696, 701-703 (finding that residency restrictions of Michigan's Sex Offenders Registration Act met the general definition of punishment, had much in common with banishment and public shaming, and has a number of similarities to parole and probation.). Historically, banishment resembled deportation, taking the form of "expulsion, or deportation by the political authority on the ground of expediency; punishment by forced exile, either for years or for life; a punishment inflicted upon criminals, by compelling them to quit a city, place or country, for a specified period of time." *Shaw*, 823 F.3d at 566

(citations omitted). "Twentieth-century examples of banishment in American courts have also ordinarily involved complete expulsion from a geographic area such as a town, a county, or a state." *Id.* at 467 (collecting examples). Moreover, "[t]he common feature of banishment, throughout the ages, has been the complete expulsion of an offender from a community." *Id.*

In this case, while the ordinances have substantially affected Werner's residential choices within the City of Green Bay, he has not been expelled from the entire city. Specifically, while the 2,000 feet restriction made it undeniably difficult for Werner to find housing in the city, as difficult as a challenge that posed, he was not expelled from the city entirely. Indeed, the 2012 version of the ordinance exempted certain halfway houses which allowed Werner to reside in the City of Green Bay. Additionally, unlike banishment, the ordinances restrict only where offenders may reside; they do not restrict the movement of offenders within the city for other purposes.

The second factor that I consider is whether the law promotes traditional aims of punishment—deterrence and retribution. *Smith*, 538 U.S. at 102. It is difficult to evaluate the deterrent effect of the residency restrictions. Even if one accepts that the restrictions deter sex offenses, deterrence is not unique to punishment. Civil regulations may also have some deterrent effect. *Id.* ("Any number of governmental programs might deter crime without imposing punishment."). Accordingly, any deterrent effect the residency restrictions possesses is not so strong as to favor a finding that the ordinances are punitive. *See Doe*, 405 F.3d at 702 (concluding that residency restrictions lack a strong deterrent effect because they do not alter a sex offender's "incentive structure").

As to retribution, a statute is retributive if it is intended to express condemnation for a crime or to restore moral balance. *Graham v. Florida*, 560 U.S. 48, 71 (2010). The ordinances are thus retributive to the extent they reflect societal condemnation. In *Smith*, in examining the retributive effect of the Alaska sex offender registration law, the Court emphasized that the reporting requirements were "reasonably related to the danger of recidivism" in a way that was "consistent with the regulatory objective." *Smith*, 538 U.S. at 102. Here, while the residency restrictions may reflect societal condemnation, like the registration requirement in *Smith*, the ordinances are consistent with the stated objective of protecting the health and safety of the citizens of the City of Green Bay. Accordingly, this factor also does not weigh in favor of finding that the ordinances are punitive.

The third factor is whether the law imposes an affirmative disability or restraint. Imprisonment is the "paradigmatic" affirmative disability or restraint, *Smith*, 538 U.S. at 100, but other restraints, such as probation or occupational debarment, also can impose some restriction on a person's activities. *Id.* at 100–01. While restrictive laws are not necessarily punitive, they are more likely to be so; by contrast, "[i]f the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* at 100. For example, sex offender registration laws, requiring only periodic reporting and updating of personal information, do not have a punitive restraining effect. *Id.* at 102. At the same time, civil commitment of the mentally ill, though extremely restrictive and disabling to those who are committed, does not necessarily impose punishment because it bears a reasonable relationship to a "legitimate nonpunitive objective," namely protecting the public from mentally unstable individuals. *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997).

Here, although Werner faced substantial hardship finding residency within the City of Green Bay after his releases, he has not shown that his failures to get housing during that period of time was due to the residency restrictions. The record shows that Werner only asked the Board to reside at the halfway house on Shawano Avenue. In each instance, this was the only location Werner's parole agent provided him as a place to live. Although the Board denied those requests, it informed Werner that it would consider other addresses, but Werner never provided the Board with any. On this record, Werner has not shown that the ordinances (rather than the lack of assistance from his parole agents or his failure to identify alternatives for the Board to consider) so disabled his residency choices as to be considered punitive. This factor also weighs against a finding of punitive effect.

Finally, I consider whether the ordinances have a "rational connection to a nonpunitive purpose." *Smith*, 538 U.S. at 102. This is the "most significant factor" in the ex post facto analysis. *Id.* "A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id.* at 103. Here, the stated purpose of the ordinances was "not to impose a criminal penalty but rather to serve the City's compelling interest to promote, protect, and improve the health, safety, and welfare of the citizens of the City by creating areas around locations where children regularly congregate in concentrated numbers wherein certain sexual predators are prohibited from establishing temporary or permanent residence." (Docket # 60 ¶ 9.) It is not excessive with respect to the nonpunitive purpose for the City of Green Bay to conclude that all sex offenders convicted of certain crimes be prevented from living too close to areas where children regularly congregate in concentrated numbers. "The Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified

crimes should entail particular regulatory consequences." *Smith*, 538 U.S. at 103. All the relevant factors considered, the ordinances are not punishment and thus do not violate the Ex Post Facto Clause.

2.3 Recent Seventh Circuit Guidance

Finally, as I indicated earlier, the Seventh Circuit has not ruled on an ex post facto challenge to a sex offender residency restriction. Nonetheless, its recent decision in *Belleau v. Wall*, 811 F.3d 929, 937 (7th Cir. 2016), in which it addressed an ex post facto challenge to a Wisconsin statute mandating lifetime GPS tracking for sex offenders convicted of certain times, is worth noting here. Particularly relevant, the Seventh Circuit cited the seriousness of sexual molestation of children. *Id.* at 932. The court also discussed the compulsiveness of that type of criminal activity and highlighted that Federal Rules of Evidence 414 and 415 allow evidence of a defendant's other crimes, or acts, of sexual molestation of children to be introduced in evidence in a criminal or civil case in which the defendant is accused of such molestation, in contrast to the rules governing cases involving other crimes. *Id.* at 933.

The Seventh Circuit found that it was logical for legislatures to treat certain kinds of sex offenders differently and impede on their privacy by requiring them to wear a GPS monitor on their leg and submit to monitoring. *Id.* at 934-36. The court noted the "Supreme Court held that civil commitment of sex offenders who have completed their prison sentences but are believed to have a psychiatric compulsion to repeat such offenses is not punishment as understood in the Constitution; it is prevention." *Id.* at 937 (citing *Hendricks*, 521 U.S. at 368-69). It then concluded that the aim of the GPS monitoring statute is the

same and the difference between having to wear a monitor and being civilly committed is that the GPS monitoring is far less likely to be perceived as punishment than being imprisoned in an asylum for the criminal insane. *Id.* If civil commitment is not punishment, then it follows that neither is having to wear a GPS monitor. *Id.* "It is not excessive with respect to the nonpunitive purpose for Wisconsin to conclude that all formerly committed sex offenders pose too great a risk to the public to be released without monitoring." *Id.* (quotation omitted).

Thus, in addition to the reasons discussed above, a logical extension of *Belleau* is that having to comply with sex offender residency requirements is prevention, not punishment. For all these reasons, the defendant is also entitled to summary judgment on Werner's ex post facto claim.

PLAINTIFF'S MOTIONS

Werner also filed a number of motions. On March 11, 2016, Werner filed a motion to order non-defendant to provide specific materials, a motion to order non-defendant to allow plaintiff to have and keep his computer disk, a motion for extension of time, and a request for return of exhibits. Then, on March 22, 2016, the court received the plaintiff's motion to depose defendants and non-defendants, the plaintiff's motion to depose non-defendant, and the plaintiff's motion for a new risk assessment. On April 12, 2016, Werner filed seven depositions upon written questions, as well as a motion to compel discovery, a motion for psychological examination, and a supplemental motion for extension of time for discovery and summary judgment. On May 27, 2016, Werner filed a supplemental motion to compel discovery and a supplemental motion for extension of time, as well as a motion to

allow plaintiff access to a color copier and printer. Most recently, on January 31, 2017, Werner filed another motion to compel discovery.

In his briefing regarding the defendants' motion for summary judgment, Werner referenced his pending motions and said that he needed the evidence requested to "finalize this case," but he did not say that he was unable to respond to the defendant's motion for summary judgment. (Docket # 67 at 14.) He filed an adequate response containing a brief and a detailed affidavit with sixty-eight pages of exhibits, as well as a surreply brief.

Werner's motions relate primarily to discovery, scheduling, and financial and other accommodations regarding litigating this case. Generally speaking, Werner was trying to obtain discovery from non-parties and had trouble with the correct procedures. The type of discovery Werner was seeking would not alter the outcome of the defendant's motion for summary judgment. For example, I do not need a psychological examination or risk assessment to determine whether Werner received due process or whether the sex offender ordinances were ex post facto laws. Similarly, Werner's materials from a prior case and/or attempts to get information regarding the roles of parole agents from Department of Corrections employees do not inform the questions central to Werner's claims against the City of Green Bay.

Because I have granted the defendant's motion for summary judgment, I will deny each of Werner's motions as moot.

ORDER

NOW, THEREFORE, IT IS ORDERED that the defendant's motion for summary judgment (Docket # 58) is **GRANTED**. The Clerk of Court is directed to enter judgment accordingly.

IT IS FURTHER ORDERED that Werner's motion to order non-defendant to provide specific materials (Docket # 34) be and hereby is **denied as moot**.

IT IS FURTHER ORDERED that Werner's motion to order non-defendant to allow plaintiff to have and keep his computer disk (Docket # 35) be and hereby is **denied as moot**.

IT IS FURTHER ORDERED that Werner's motion for extension of time (Docket # 36) be and hereby is **denied as moot**.

IT IS FURTHER ORDERED that Werner's request for return of exhibits (Docket # 36) be and hereby is **denied moot**.

IT IS FURTHER ORDERED that Werner's motion to depose defendants and non-defendants (Docket # 37) be and hereby is **denied as moot**.

IT IS FURTHER ORDERED that Werner's motion to depose non-defendant (Docket # 38) be and hereby is **denied as moot**.

IT IS FURTHER ORDERED that Werner's motion for new risk assessment (Docket # 38) be and hereby is **denied as moot**.

IT IS FURTHER ORDERED that Werner's motion to compel discovery (Docket # 46) be and hereby is **denied as moot**.

IT IS FURTHER ORDERED that Werner's motion for psychological examination (Docket # 47) be and hereby is **denied as moot**.

IT IS FURTHER ORDERED that Werner's motion for extension of time (Docket # 48) be and hereby is **denied as moot**.

IT IS FURTHER ORDERED that Werner's supplemental motion to compel discovery (Docket # 54) be and hereby is **denied as moot**.

IT IS FURTHER ORDERED that Werner's supplemental motion for extension of time (Docket # 54) be and hereby is **denied as moot**.

IT IS FURTHER ORDERED that Werner's motion to allow plaintiff access to a color copier and printer (Docket # 57) be and hereby is **denied as moot**.

IT IS FURTHER ORDERED that Werner's motion to compel (Docket # 75) be and hereby is **denied as moot**.

This order and the judgment to follow are final. A dissatisfied party may appeal this court's decision to the Court of Appeals for the Seventh Circuit by filing in this court a notice of appeal within **30 days** of the entry of judgment. *See* Federal Rule of Appellate Procedure 3, 4. This court may extend this deadline if a party timely requests an extension and shows good cause or excusable neglect for not being able to meet the 30-day deadline. *See* Federal Rule of Appellate Procedure 4(a)(5)(A).

Under certain circumstances, a party may ask this court to alter or amend its judgment under Federal Rule of Civil Procedure 59(e) or ask for relief from judgment under Federal Rule of Civil Procedure 60(b). Any motion under Federal Rule of Civil Procedure 59(e) must be filed within **28 days** of the entry of judgment. The court cannot extend this

deadline. *See* Federal Rule of Civil Procedure 6(b)(2). Any motion under Federal Rule of Civil Procedure 60(b) must be filed within a reasonable time, generally no more than one year after the entry of the judgment. The court cannot extend this deadline. *See* Federal Rule of Civil Procedure 6(b)(2).

A party is expected to closely review all applicable rules and determine, what, if any, further action is appropriate in a case.

Dated at Milwaukee, Wisconsin this 23rd day of March, 2017.

BY THE COURT:

s/Nancy Joseph
NANCY JOSEPH
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.