UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2394

September Term, 2011

JOHN DOE

v.

STATE OF MARYLAND ET AL.

Woodward,
Graeff,
Kehoe,

JJ.

Opinion by Kehoe, J.

Filed: January 26, 2015

"John Doe," a pseudonym, has appealed from a judgment of the Circuit Court for Baltimore City dismissing his complaint for a declaratory judgment and related relief. At issue is whether Doe is required to register as a sexual offender pursuant to Maryland's sexual offender registration law ("the Act"), codified as Title 11, subtitle 7 of the Criminal Procedure Article, Md. Code Ann. (2001, 2008 Repl., 2013 Supp.). The appellees are the State and the State Department of Public Safety and Correctional Services (the "Department").

In 2009, Doe, a Maryland resident, was attending college in Minnesota. He was accused of sexually assaulting a fellow student and eventually pled guilty to a misdemeanor, namely, violating Minn. Stat. § 609.3451, which prohibits "criminal sexual conduct in the fifth degree." Doe was sentenced to a brief term of incarceration and, after its completion, returned to Maryland. In September 2010, Doe contacted the Department to inquire whether he was required to register as a sexual offender. The Department informed him that he was not required to register at that time. The Department noted, however, that the General Assembly had enacted amendments to the Act in order to comply with the Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. § 16901 *et seq*. and 18 U.S.C. § 2250, and that Doe would be required to register as soon as those amendments became effective on October 1, 2010.

Doe then filed the current action, challenging the application of the Act to him on a variety of grounds. The State and the Department moved to dismiss Doe's complaint, or, in the alternative, for summary judgment. The circuit court granted the motion and ordered that

Doe "is required to register as a 'tier I sex offender' in accordance with Maryland's sex offender registry laws." The court stayed the effect of its judgment pending Doe's appeal.

At the present juncture, the parties agree that the merits of their controversy are governed by two recent decisions of the Court of Appeals, *Doe v. Department of Public Safety & Correctional Services*, 430 Md. 535 (2013) ("*Doe I*"), and *Department of Public Safety & Correctional Services v. Doe*, 439 Md. 201 (2014) ("*Doe II*"). (The "John Doe" of *Doe I* and *Doe II* is a different individual than the "John Doe" in the present case. To avoid confusion, we will refer to the John Doe of *Doe I* and *II* as "Doe I/II").[1] In *Doe I*, a plurality of the Court concluded that retroactive application of the Act violated Maryland Declaration of Rights Article 17's prohibition against *ex post facto* laws. 430 Md. at 568.[2]

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[1] The present "John Doe" filed an amicus curiarum brief in *Doe II* and is referred to in that opinion as "Amicus." 439 Md. at 214 n.9.

[2] *Doe I* was a plurality decision: Chief Judge Bell and Judge Eldridge joined Judge Greene's opinion. It is worth noting that, in a separate opinion, Judge McDonald, joined by Judge Adkins, also concluded that retroactive application of the Act was unconstitutional, albeit for different reasons:

> [T]he cumulative effect of 2009 and 2010 amendments of the State's sex offender registration law took that law across the line from civil regulation to an element of the punishment of offenders. It was certainly within the General Assembly's purview to make the registration law more onerous for offenders. In my view, however, in light of both Article 17 of the Declaration of Rights and Article I, § 10 of the federal Constitution, like other new laws affecting punishment for offenses, those amendments may not be applied retroactively.

530 Md. at 578 (citations omitted) (McDonald, J., concurring).

The *Doe I* Court explicitly declined to address whether Doe I/II was required to register as a sexual offender pursuant to federal law, specifically, SORNA. 430 Md. at 544. The Court addressed this issue in *Doe II.* After reviewing the pertinent legislative history of SORNA, guidelines promulgated by the Department of Justice, and two relevant decisions by the United States Court of Appeals for the Fourth Circuit, *Kennedy v. Allera*, 612 F.3d 261, 263 (4th Cir. 2010), and *United States v. Gould*, 568 F.3d 459, 465 (4th Cir. 2009), the Court reached several relevant conclusions. The first was that SORNA imposes an "'independent duty to register as a sex offender,'" 439 Md. at 228 (quoting *Kennedy*, 612 F. 3d at 267–68). Second, SORNA "expressly addresses the possibility of a conflict between SORNA's provisions and a state constitution 'as determined by a ruling of the jurisdiction's highest court.'" *Id.* at 229 (quoting 42 U.S.C. § 16925(b)). Third, SORNA does not require a state to register an individual as a sex offender if registration would violate a state constitutional provision but that, in such circumstances, SORNA requires the State "to establish reasonable alternative procedures, if any, that are both 'consistent with the purposes of SORNA' and permissible under the Maryland Declaration of Rights." *Id.* at 231 (quoting Office of the Attorney General, *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. at 38,048 (July 2, 2008). From this, the *Doe II* Court concluded:

> Where Appellees would only be required to register in Maryland, and where we have held that the retroactive application of the Maryland registry is unconstitutional, they, and individuals similarly situated in Maryland, cannot be required to register in Maryland. The language of SORNA expressly providing for a conflict between the federal law and state constitutions, as well as the available federal guidance on the topic, leads us to the conclusion that

> so long as Appellees are in Maryland, they cannot be required to register as sex offenders in Maryland, notwithstanding the registration requirements imposed directly on individuals by SORNA.

439 Md. at 235.

Returning to the case before us, Doe committed the crime for which he was convicted on February 15, 2009, before the effective date of the 2010 Amendments to the Act. *Doe I* instructs us that requiring him to register as a sexual offender would offend Article 17 of the Declaration of Rights. Consistent with *DOE II,* we conclude that "so long as [Doe is] in Maryland, [he] cannot be required to register as [a] sex offender[] in Maryland, notwithstanding the registration requirements imposed directly on individuals by SORNA."

With all of this as preamble, we turn to the remaining controversy between the parties.

Doe has filed a motion requesting us to vacate the circuit court's judgment and to remand the case to it with instructions that it enter a declaratory judgment that "[Doe's] 2010 Minnesota conviction does not require him to register in the State of Maryland as a sex offender." In their response, appellees voice no objection to our vacating the circuit court's judgment but urge us to instruct that court to dismiss the case as moot. The basis of appellees' mootness contention is that the Department notified Doe in writing on August 26, 2014 that:

> Following the issuance of the opinion[s] of the Court of Appeals in [*Doe I*] and [*Doe II*], this office conducted a review of your case. In light of the Court's opinion[s] in those cases, this office has determined that your 2010 conviction in Minnesota does not require you to register in the State of Maryland as a sex offender.

Noting that "it is undisputed that [Doe] was not placed on the Maryland Sex Offender Registry, is not on the Registry, and that the Department has informed [Doe] that he is not obligated to register as a sex offender in Maryland," appellees assert that there is "no justiciable issue before the Court." We do not agree.

The test for mootness is "whether, when it is before the court, a case presents a controversy between the parties for which, by way of resolution, the court can fashion an effective remedy." *Hamot v. Telos Corp.*, 185 Md. App. 352, 360 (2009) (quoting *Adkins v. State*, 324 Md. 641, 646 (1991). There is nothing permanent or irrevocable about the Department's current position that Doe is not required to register as a sex offender. That the Department has recently rescinded its position that Doe must register under the Act does not fully extinguish Doe's interest in obtaining a *judicial* declaration of the Act's application to him. Certainly, the Department's written assurance does not render the case moot. In rejecting a similar contention in *Carroll County Ethics Comm'n v. Lennon*, 119 Md. App. 49 (1998), we explained:

> Finally, we cannot accept Lennon's argument that his voluntary cessation of the challenged conduct serves to moot the case. If that were so, appellate review could consistently be foreclosed in cases like this as long as the putative violator resigns from his position or even simply promises to refrain from the challenged conduct. Indeed, the Supreme Court has consistently held that "voluntary cessation of a challenged practice does not deprive a [court] of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632(1953).

Id. at 61 (footnote omitted). Moreover, there is currently a judgment requiring Doe to register as a sex offender—a judgment that, in light of *Doe I* and *Doe II*, is wrong. Doe has a legitimate interest in seeing that judgment corrected.

For these reasons, we conclude that this case is not moot. We reverse the judgment of the circuit court and remand this case to it with instructions to enter a declaratory judgment that Doe's 2010 Minnesota conviction does not require him to register in the State of Maryland as a sex offender.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS REVERSED AND THE CASE REMANDED TO IT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEES TO PAY COSTS.