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State high court upholds parks ban for sex offenders

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To bolster claims that the risk posed by sex offenders is overblown, a defendant cited a handful of studies.

The rate of recidivism for such offenders is not upwards of 80 percent, as the U.S. Supreme Court stated in a 2002 decision. The Human Rights Watch estimated it was more like 25 percent, and it may even be more like 5 percent, according to the federal Bureau of Justice Statistics, he argued.

The defendant, Marc Pepitone, who was convicted under a state law forbidding sex offenders who committed their crimes against children from knowingly entering public parks, also argued another study found relatively few sex assaults actually occurred in parks.

But this morning the state's top court wrote the numbers weren't the problem for Pepitone's due process challenge. The problem for him is that lawmakers have a legitimate interest in protecting children from sex offenders, and the law was a reasonable method of doing so, "regardless of how convincing that social science might be."

In rejecting Pepitone's facial challenge to the constitutionality of Section 11-9.4-1(b) of the Criminal Code today, the Illinois Supreme Court also wrote that the law didn't really criminalize innocent conduct, as the defendant argued.

It didn't make it a crime to simply walk a dog in Bolingbrook, as Pepitone had done, or visit museums in Chicago or go to a game at Soldier Field or go to the Lincoln Park Zoo — all examples of things Pepitone cited as crimes for him under the law.

It punishes such conduct specifically for sex offenders.

"Like the statute outlawing possession of any firearm or any firearm ammunition by a convicted felon, the statute here makes the status of the defendant an element of the offense," Justice Mary Jane Theis wrote in the unanimous decision. "Consequently, conduct that is innocent for most people is not innocent for those who have been convicted of certain offenses."

The case began when a police officer noticed Pepitone's van near a municipal park in Bolingbrook in 2013. Pepitone had been away from the vehicle walking a dog. When he returned, he acknowledged to the officer that he was a sex offender, convicted in 1998 of predatory child sexual assault and sentenced to six years in prison, but added that his registration expired in 2010.

The officer told him that, as a legally defined child sex offender, he was still forbidden from being in a park, and even though he said he wasn't aware of the ban, he was arrested for violating the law banning such offenders from "knowingly" being present "in any public park building or on real property comprising any public park."

Twelfth Judicial Circuit Judge Carmen J. Goodman rejected Pepitone's claim that the law violates substantive due process, but a split 3rd District Appellate Court last year reversed, with Justice Mary W. McDade writing that it violates the Constitution for "arbitrarily stripping a wide swath of innocent conduct and rights" away from people like Pepitone.

Justice Robert L. Carter dissented from that decision, which was filed in February 2017, writing that he believed the law satisfied the rational-basis test, a threshold for laws that don't necessarily implicate "fundamental" constitutional rights.

At the high court, Pepitone acknowledged that being present in a park is not a fundamental right, but he urged the court to use a three-part rational-basis test, asking whether there's a legitimate state interest, a reasonable connection between the interest and the law at stake and whether the means adopted to achieve the interest are "reasonable" in accomplishing the desired objective.

Theis wrote in the 14-page opinion that both that version and another version, technically a two-step inquiry asking if "there is a legitimate state interest behind the legislation, and if so, whether there is a reasonable relationship between that interest and the means the legislature has chosen to pursue it "are essentially the same."

"If a statute is reasonably related to a legitimate state interest, the means or method that the legislature has chosen to serve that interest will also be reasonable," the court wrote, adding that while the test is not "toothless," it affords the law a high deference.

Pepitone also conceded there is a legitimate state interest in protecting minors from sex offenders. And the state argued there is a rational relationship between that interest and a parks ban, citing court cases in which judges held children are especially vulnerable in parks, offering four specific Illinois cases in which sexual assaults happened to children in parks and eight such cases against adults.

It also offered up comments made by Sen. Pam Althoff, a McHenry Republican who sponsored the measure in the General Assembly, in which she said parks provide "many obscured views and other distractions" that make it easier for predators to get potential victims.

The state also argued sex offenders frequently commit new crimes, citing the 2002 U.S. Supreme Court decision in *McKune v. Lile* in which Justice Anthony M. Kennedy wrote the rate was "as high as 80 percent" and a 2003 case called *Smith v. Doe*, which cited the *McKune* statistic and characterized the risk as "frightening and high."

But Pepitone countered those arguments have been debunked, citing among other things a 2015 law journal article detailing how the number derived from a 1986 piece in a general-audience magazine, Psychology Today, that was unsubstantiated.

The authors of the journal article wrote the federal high court's "casual approach to the facts of sex offender reoffense rates is far more frightening than the rates themselves."

But Theis, citing previous rulings by the state's top justices in which they gave the benefit of the doubt to lawmakers' policy powers, wrote that Pepitone's studies didn't hold weight in the case.

"The problem for the defendant is that, regardless of how convincing that social science may be, the legislature is in a better position than the judiciary to gather and evaluate data bearing on complex problems,'" she wrote. "Simply put, we are not a superlegislature."

Pepitone next argued the law was overly broad, citing all the activities he was barred from that he characterized as innocent conduct. But again, the court wrote that it's not innocent conduct, based on his previous conviction. It added that the law doesn't have to be the best means of protecting the interest — it just needs to be reasonable, and that threshold was met.

"We conclude that there is a rational relation between protecting the public, particularly children, from sex offenders and prohibiting sex offenders who have been convicted of crimes against minors from being present in public parks across the state," the justices concluded.

Despite upholding the conviction, for which the trial court sentenced him to two years' conditional discharge with community service and a $400 fine, there may be a silver lining for Pepitone.

The court rejected his facial challenge, but agreed to remand the case to the appellate court to decide on his as-applied challenge to the law.

The state was represented by the attorney general's office. A spokeswoman said the office is "pleased" with the ruling.

Pepitone was represented by Katherine Strohl, a sole practitioner in Ottawa who also worked on the case while she was in the 3rd District Appellate Defender's Office.

In an e-mail this afternoon, Strohl said she is "very disheartened" by the court's decision to uphold a law with "immeasurable cultural, political, recreational, educational and familial ramifications" for offenders.

She said sex offenders are not all the same, but they are uniformly rejected by society.

"But as despised as they may be, it is important to remember that they have already paid their debt to society and are now entitled to the same constitutional rights as every other taxpayer and citizen," Strohl said. "Instead, they are the target of unrelenting legislation that is based on neither fact nor reason, and which courts across the country continue to give legislatures free license to enact."

The case is *People v. Pepitone*, No. 122034.

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