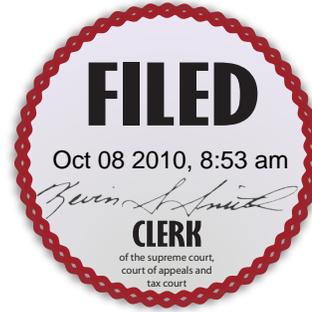


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

GREGORY F. ZOELLER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

APPELLEE PRO SE:

MARTIN DE LA TORRE
New Castle, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

INDIANA PAROLE BOARD,)

Appellant,)

vs.)

MARTIN DE LA TORRE,)

Appellee.)

No. 72A01-1005-CR-254

APPEAL FROM THE SCOTT CIRCUIT COURT
The Honorable Richard Striegel, Special Judge
Cause No. 72C01-8707-CF-12

October 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

The Indiana Parole Board (“the Parole Board”) appeals the trial court’s denial of its motion to correct error, which the Parole Board filed after the court granted Martin De La Torre’s¹ motion to be removed from Indiana’s sex offender registry. The Parole Board raises two issues for our review, one of which is dispositive: whether De La Torre’s motion was not yet ripe for the trial court’s consideration, depriving the court of subject matter jurisdiction. We hold that De La Torre’s motion was not ripe and, therefore, we reverse the trial court’s judgment denying the Parole Board’s motion to correct error.

FACTS AND PROCEDURAL HISTORY

In July of 1987, De La Torre committed rape, as a Class A felony. See Delatorre v. State, 544 N.E.2d 1379, 1380-81 (Ind. 1989). He received a fifty-year executed sentence, which he is currently serving at the New Castle Correctional Facility. Pursuant to Indiana Code Section 35-50-6-1(a) (1985), in July of 2011 the Parole Board “shall” release De La Torre on parole. The length of De La Torre’s term of parole cannot exceed one year. Ind. Code Ann. § 35-50-6-1(b) (LexisNexis 1985).

In anticipation of his parole date, on September 3, 2009, De La Torre filed his motion to be removed from the Indiana sex offender registry. In filing that motion, De La Torre assumed that the Parole Board would require, as a condition of his parole, his compliance with the Indiana Sex Offender Registration Act (“the Act”). See I.C. §§ 11-8-8-1 to 11-8-8-22 (2010); see also I.C. § 11-13-3-4(g)(2) (2010) (requiring, among other

¹ In his brief, De La Torre alternatively spells his name “De La Torre” and “Delatorre.” Appellee’s Br. at 1, 5. We opt for the first spelling based on his signature on his certificate of service.

things, “a parolee who is a sex or violent offender . . . to register with a local law enforcement authority under IC 11-8-8”). The Act did not exist at the time De La Torre committed his crime. The trial court agreed with De La Torre’s assumption and, on October 29, 2009, granted his request.

On November 30, the Parole Board filed a motion to intervene and a motion to correct error. The court granted the motion to intervene and held a hearing on the motion to correct error in December. On April 1, 2010, the court denied the Parole Board’s motion to correct error and reaffirmed its October 29 order. This appeal ensued.

DISCUSSION AND DECISION

On appeal, the Parole Board contends that De La Torre’s motion to be removed from the Indiana sex offender registry is not yet ripe for consideration. The resolution of that issue is controlled by a recent decision of this court:

Provisions of the Indiana Sex Offender Registration Act have been declared in violation of the ex post facto clause contained in the Indiana Constitution, as applied to persons who had committed their crimes prior to the imposition of any registration requirement. See Wallace v. State, 905 N.E.2d 371, 384 (Ind. 2009) (defendant’s conviction for failing to register as a sex offender reversed because the registration statute, as applied to him, added punishment beyond that which could have been imposed when he committed his crime), reh’g denied. See also State v. Pollard, 908 N.E.2d 1145, 1154 (Ind. 2009) (trial court properly dismissed charge that Pollard violated the residency restriction provision of the Sex Offender Registration Act when he had served his sentence before the Act was enacted and application to him would add punishment beyond that possible when his crime was committed). However, the registration statute did not violate the Indiana constitutional ban on ex post facto laws as applied to the appellant in Jensen v. State, 905 N.E.2d 384, 394 (Ind. 2009) (appellant who had pled guilty to child molesting while the registration statute included a ten-year reporting requirement, and was subsequently adjudicated a sexually violent predator and ordered to register for life, did not demonstrate a violation of ex post facto prohibition).

Here, however, unlike the litigants in Wallace, Pollard, and Jensen, Gardner presents no claim that is ripe for adjudication. See Ind. Dep't of Env'tl. Mgmt. v. Chem. Waste Mgmt., Inc., 643 N.E.2d 331, 336 (Ind. 1994) (Ripeness, as an aspect of subject matter jurisdiction “relates to the degree to which the defined issues in a case are based on actual facts rather than on abstract possibilities, and are capable of being adjudicated on an adequately developed record.”). There is no evidence that Gardner has been court-ordered to register as a violent offender, or that he has been notified by any correctional authority or registry coordinator that he will be required to register.

Gardner v. State, 923 N.E.2d 959, 960 (Ind. Ct. App. 2009) (footnote omitted), trans. denied.

Here, as in Gardner, there is no evidence that De La Torre has been court-ordered to register as a sex offender, or that he has been notified by the Parole Board or a registry coordinator that he will be required to register. Further, the Parole Board has acknowledged in this appeal that no provisions of the Act were in existence at the time De La Torre committed his crime, and that, “in general, ‘the law in effect at the time that the crime was committed is controlling.’” Appellant’s Br. at 8 (quoting Holsclaw v. State, 270 Ind. 256, 261, 384 N.E.2d 1026, 1030 (1979)). Thus, it is entirely possible that the Parole Board will impose no conditions on De La Torre regarding registration with the sex offender registry.

At the time of De La Torre’s crime the Parole Board did have the authority to impose any “additional conditions . . . reasonably related to the parolee’s successful reintegration into the community and not unduly restrictive of a fundamental right.” See Ind. Code Ann. § 11-13-3-4(b) (LexisNexis 1988). In addressing the merits of De La Torre’s claim, the Parole Board suggests that it could incorporate, through that statute, some or all of the Act and/or the current statutory provisions for parole. And De La

Torre contends that his motion is ripe for adjudication and that he should not be required to wait until the Parole Board requires him to comply with the Act and, thus, subject himself to a violation of his parole, arrest, or prosecution.

But there is no evidence of what, if anything, the Parole Board will actually do with respect to De La Torre. An ex post facto analysis cannot begin without knowledge of what law is actually being applied retroactively. And a determination cannot be made based on abstract possibilities and an inadequately developed record. See Gardner, 923 N.E.2d at 960.

Thus, De La Torre's motion to be removed from Indiana's sex offender registry is not ripe, and the trial court lacked subject matter jurisdiction over De La Torre's motion. See id. (quoting Ind. Dep't of Env'tl. Mgmt., 643 N.E.2d at 336). We reverse the court's order denying the Parole Board's motion to correct error.

Reversed.

BAKER, C.J., and MATHIAS, J., concur.