

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 2003

FERMAN CARLOS ESPINDOLA,

**

Appellant,

**

vs.

**

CASE NO. 3D02-1839

THE STATE OF FLORIDA,

**

LOWER

TRIBUNAL NO. 01-38819

Appellee.

**

An appeal from the Circuit Court for Miami-Dade County,
Manuel A. Crespo, Judge.

Bennett H. Brummer, Public Defender and John Eddy Morrison,
Assistant Public Defender, for appellant.

Charlie Crist, Attorney General and Fredericka Sands,
Assistant Attorney General, for appellee.

Before JORGENSEN, COPE, and GREEN, JJ.

PER CURIAM.

This is an appeal from a final order declaring the defendant

a "sexual predator," in accordance with section 775.21, Florida Statutes (2001), the Florida Sexual Predator Act ("FSPA"). Defendant, an individual who pled guilty to an offense which, pursuant to the FSPA requires that he be designated a "sexual predator," claims that the statute is violative of procedural due process and therefore unconstitutional. As further explained below, we find FSPA to be unconstitutional because it fails to provide minimal procedural due process. Accordingly, we reverse.

I. Facts

The facts of this case are undisputed. The defendant was at a club on South Beach with the co-defendant (who is not a party to this appeal) and the victim. The co-defendant brought the victim a cocktail, of which she drank a little and the defendant finished. A couple of minutes after drinking the cocktail the defendant fell down unconscious. Soon after, the victim also became dizzy and disoriented. All three left the club, and the co-defendant took them to an unknown hotel and checked into a room. The victim then also lost consciousness. When she regained consciousness, the defendant and co-defendant were allegedly having sexual intercourse with her.

The state charged both men with sexual battery of a physically incapacitated victim by multiple perpetrators. The

defendant pled guilty in exchange for a withhold of adjudication and one year community control followed by four years of probation. He has also agreed to assist in the prosecution's case against the co-defendant, which is still pending trial.

Although she remains afraid of the co-defendant, the victim has testified that she does not fear the defendant, and even considers him a friend. Based on this testimony, the state did not seek the standard "stay-away" order in this case.

Since pleading guilty to multiple perpetrator sexual battery would automatically result in the defendant being declared a "sexual predator" under the Act, the defendant filed a motion to declare the Act unconstitutional as violative of procedural due process. The trial court denied the motion before completing the plea and later entered an order finding the defendant to be a sexual predator "subject to community and public notification." The trial court denied a motion to quash that order on the same constitutional grounds, and this appeal ensued.

II. Structure of the Act

Like every other state in the nation, Florida has enacted its version of "Megan's Law,"¹ entitled The Florida Sexual

¹ The "Megan's Law" was named in memory of Megan Kanka, a seven year old New Jersey girl who was sexually assaulted and murdered by a neighbor twice previously convicted of sexual

Predator's Act, which was enacted to address the problems of "sexual predators" by:

1. Requiring sexual predators supervised in the community to have special conditions of supervision and to be supervised by probation officers with low caseloads;
2. Requiring sexual predators to register with the Florida Department of Law Enforcement, . . . ; and
3. Requiring community and public notification of the presence of a sexual predator,

§ 775.21(3)(e), Fla. Stat. Under FSPA, the sole determination to be made by the trial court before designating a person a "sexual predator" is whether that person had the prerequisite criminal conviction. See § 775.21(5)(a), Fla. Stat.² See also

offenses. See Doe v. Pataki, 120 F.3d 1263, 1265 n.1 (2d Cir. 1997). It was enacted to "identify potential recidivists and alert the public when necessary for the public safety." See Doe v. Dep't of Pub. Safety, 271 F.3d 38, 42 n.4 (2d Cir. 2001), quoting Paul P. v. Farmer, 227 F.3d 98, 99 (3d Cir. 2000).

² This section provides that:

(5) Sexual predator designation.--An offender is designated as a sexual predator as follows:

(a)1. An offender who meets the sexual predator criteria described in paragraph (4)(a) who is before the court for sentencing for a current offense committed on or after October 1, 1993, is a sexual predator, and the sentencing court must make a written finding at the time of sentencing that the offender is a sexual predator, and the clerk of the court shall transmit a copy of the order containing the written finding to the department within 48 hours after the entry of the order[.]

State v. Curtin, 764 So. 2d 645, 647 (Fla. 1st DCA 2000) (trial court required to enter finding of sexual predator status where defendant was convicted of crime enumerated in statute). The act of delineating an offender as a sexual predator is mandatory, and the trial court has no discretion. See Kelly v. State, 795 So. 2d 135, 137 (Fla. 5th DCA 2001) (stating that: "based on the unambiguous language of [FSPA] and the clearly stated legislative intent, . . . the Act is mandatory and affords no discretion to the trial judge to designate an individual a sexual predator if the statutory criteria are established").³ Indeed, the granting of the state's motion to have a defendant declared a sexual predator has been deemed merely "perfunctory" by the courts. See e.g., Thomas v. State, 716 So. 2d 789, 790 (Fla. 4th DCA 1998).

Once an offender has been designated a "sexual predator," the registration and public notification requirements of FSPA are automatically triggered. See § 775.21, Fla. Stat. An offender must, within forty-eight (48) hours, register with the Department of Law Enforcement ("FDLE") or, alternatively, the

³ A defendant does not even have to be present for the trial court to impose the "sexual predator" designation. See Burkett v. State, 731 So. 2d 695, 698 (Fla. 2^d DCA 1998) (sexual predator designation is a "collateral consequence" of defendant's crime, and defendant need not be present at hearing where designation is imposed).

sheriff's office, and with the Department of Highway Safety and Motor Vehicles ("DMV").⁴ See § 775.21(6)(a), (e), & (f), Fla.

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⁴ The offender must personally go to the offices of these departments to register.

⁵ This section provides in pertinent part:

(6) Registration.--

(a) A sexual predator must register with the department by providing the following information to the department:

1. Name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, photograph, address of legal residence and address of any current temporary residence, within the state or out of state, including a rural route address and a post office box, date and place of any employment, date and place of each conviction, fingerprints, and a brief description of the crime or crimes committed by the offender. . . .

2. Any other information determined necessary by the department, including criminal and corrections records; nonprivileged personnel and treatment records; and evidentiary genetic markers when available.

* * * *

(e) If the sexual predator is not in the custody or control of, or under the supervision of, the Department of Corrections, or is not in the custody of a private correctional facility, and establishes or maintains a residence in the state, the sexual predator shall register in person at an office of the department, or at the sheriff's office in the county in which the predator establishes or maintains a residence, within 48 hours after establishing permanent or temporary residence in this state. If a

Upon registration an offender must provide their name, age, race, sex, date of birth, height, weight, hair and eye color, a photograph, address of legal residence, address of any current temporary residence, "a brief description of the crime or crimes committed by the offender," and genetic material.

FSPA authorizes the DMV to give the offender's photograph to FDLE for purposes of public notification,⁶ and also requires

sexual predator registers with the sheriff's office, the sheriff shall take a photograph and a set of fingerprints of the predator and forward the photographs and fingerprints to the department, along with the information that the predator is required to provide pursuant to this section.

(f) Within 48 hours after the registration required under paragraph (a) or paragraph (e), a sexual predator who is not incarcerated and who resides in the community, including a sexual predator under the supervision of the Department of Corrections, shall register in person at a driver's license office of the Department of Highway Safety and Motor Vehicles and shall present proof of registration. . . .

⁶ FSPA specifically provides in pertinent part that:

(g) Each time a sexual predator's driver's license or identification card is subject to renewal, and within 48 hours after any change of the predator's residence or change in the predator's name by reason of marriage or other legal process, the predator shall report in person to a driver's license office, and shall be subject to the requirements specified in paragraph (f). The Department of Highway Safety and Motor Vehicles shall forward to the department and to the Department of Corrections all photographs and information provided by sexual predators.

FDLE to take the offender's registration information and photograph and place it on the internet for worldwide distribution. See § 775.21(7)(c), Fla. Stat. County law enforcement also has a statutory duty to provide this same information to the public through other means. See § 775.32(7)(a), Fla. Stat. (2001).⁷ Broad immunity is afforded

Notwithstanding the restrictions set forth in s. 322.142, the Department of Highway Safety and Motor Vehicles is authorized to release a reproduction of a color-photograph or digital-image license to the Department of Law Enforcement for purposes of public notification of sexual predators as provided in this section.

§ 775.21(6)(g), Fla. Stat. (2001).

⁷ Specifically, this section provides that:

(7) Community and public notification.--

(a) Law enforcement agencies must inform members of the community and the public of a sexual predator's presence. Upon notification of the presence of a sexual predator, the sheriff of the county or the chief of police of the municipality where the sexual predator establishes or maintains a permanent or temporary residence shall notify members of the community and the public of the presence of the sexual predator in a manner deemed appropriate by the sheriff or the chief of police. Within 48 hours after receiving notification of the presence of a sexual predator, the sheriff of the county or the chief of police of the municipality where the sexual predator temporarily or permanently resides shall notify each licensed day care center, elementary school, middle school, and high school within a 1-mile radius of the temporary or permanent residence of the sexual predator of the presence of the sexual predator. Information provided to members of the community and

anyone acting in good faith in the implementation of FSPA's notification requirements. See § 775.21(9), Fla. Stat. (2001).⁸

the public regarding a sexual predator must include:

1. The name of the sexual predator;
2. A description of the sexual predator, including a photograph;
3. The sexual predator's current address, including the name of the county or municipality if known;
4. The circumstances of the sexual predator's offense or offenses; and
5. Whether the victim of the sexual predator's offense or offenses was, at the time of the offense, a minor or an adult.

⁸ This section specifically provides that:

(9) Immunity.--The department, the Department of Highway Safety and Motor Vehicles, the Department of Corrections, any law enforcement agency in this state, and the personnel of those departments; an elected or appointed official, public employee, or school administrator; or an employee, agency, or any individual or entity acting at the request or upon the direction of any law enforcement agency is immune from civil liability for damages for good faith compliance with the requirements of this section or for the release of information under this section, and shall be presumed to have acted in good faith in compiling, recording, reporting, or releasing the information. The presumption of good faith is not overcome if a technical or clerical error is made by the department, the Department of Highway Safety and Motor Vehicles, the Department of Corrections, the personnel of those departments, or any individual or entity acting at the request or upon the direction of any of those departments in compiling or providing information, or if information is incomplete or incorrect because a

An offender must appear in person at a DMV office to notify it of any change of residence, which is forwarded to FDLE and posted on its website. See § 775.21(6)(g), Fla. Stat. If an offender plans to move out-of-state, he or she must inform DMV at least forty-eight (48) hours before leaving. See § 775.21(6)(i), Fla. Stat. All of this registration information must be updated by the offender for the "duration of his or her life."⁹ See § 775.21(6)(l), Fla. Stat. Failure to comply with these registration requirements is a third-degree felony. See § 775.21(10)(a), Fla. Stat.

Finally, FSPA also automatically prohibits specific offenders, from working "at any business, school, day care center, park, playground, or other place where children regularly congregate." § 775.21(10)(b), Fla. Stat.¹⁰

sexual predator fails to report or falsely reports his or her current place of permanent or temporary residence.

⁹ A person can, however, petition the court for relief if after twenty (20) years he or she has never been arrested for any subsequent felony or misdemeanor.

¹⁰ This section provides:

(b) A sexual predator who has been convicted of or found to have committed, or has pled nolo contendere or guilty to, regardless of adjudication, any violation, or attempted violation, of s. 787.01, s. 787.02, or s. 787.025, where the victim is a minor and the defendant is not the victim's parent; s. 794.011(2), (3), (4), (5), or (8); s. 794.05; s.

III. Procedural Due Process

The defendant argues that the automatic registration and notification requirements of FSPA are violative of his protected right to procedural due process, guaranteed to him by the Fourteenth Amendment to the United States Constitution.¹¹

Procedural due process questions are examined in two steps:

the first asks whether there exists a liberty or property interest which has been interfered with by the State, . . . the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.

Ky. Dep't of Corrs. v. Thompson, 490 U.S. 454, 460 (1989) (citations omitted).

The defendant claims that FSPA infringes on his liberty interest in reputation. See Wis. v. Constantineau, 400 U.S. 433, 437 (1971) (stating that: "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be

796.03; s. 800.04; s. 827.071; s. 847.0133; or s. 847.0145, or a violation of a similar law of another jurisdiction, when the victim of the offense was a minor, and who works, whether for compensation or as a volunteer, at any business, school, day care center, park, playground, or other place where children regularly congregate, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

¹¹ The Fourteenth Amendment provides that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1.

heard are essential."). However, the law is clear that to trigger procedural due process rights, the defendant must suffer a change in legal status in addition to the "stigma" that would result from the public notification and release of registry regulation. See Paul v. Davis, 424 U.S. 693, 701 (1976) (stating that: "reputation alone, apart from some more tangible interests such as employment, is [not] either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause"). See also Cutshall v. Sundquist, 193 F.3d 466, 479 (6th Cir. 1999) (holding that: "[o]nly where the stigma of damage to a reputation is coupled with another interest, such as employment, is procedural due process triggered."). This has come to be commonly known as the "stigma-plus test." Id.

A. Stigma Plus

The act of being publicly labeled, pursuant to FSPA, a "sexual predator" clearly results in a stigma.¹² See, e.g., Doe v. Williams, 167 F. Supp. 2d 45, 51 (D.C. Cir. 2001) (stating that: "[i]t is beyond dispute that public notification pursuant to the [District of Columbia's Sexual Offender and Registration

¹² "A 'stigma' is a mark or token of infamy, disgrace, or reproach." Doe v. Dep't of Pub. Safety, 271 F.3d at 47, quoting The American Heritage Dictionary of the English Language 1702 (4th ed. 2000).

Act] results in stigma."); Doe v. Lee, 132 F. Supp. 2d 57, 63 (D. Conn. 2001) (holding that: "[t]he stigma question [is] whether, assuming [an offender] is not dangerous, public dissemination of the sex offender registry conveys the erroneous message that he is. The answer to this question must be yes."); Doe v. Pataki, 3 F. Supp. 2d 456, 467-68 (S.D.N.Y. 1998) (stating that: "First, [the offenders] have convincingly demonstrated that, when implemented, the community notification provisions of the Act will likely result in their being branded as convicted sex offenders who may strike again and who therefore pose a danger to the community. . . . [S]uch widespread dissemination of the above information is likely to carry with it shame, humiliation, ostracism, loss of employment and decreased opportunities for employment, perhaps even physical violence, and a multitude of other adverse consequences. Thus, there is no genuine dispute that the dissemination of the information contemplated by the Act to the community at large is potentially harmful to [offenders'] personal reputations.").

The defendant claims that there are also several "plus factors" implicated by FSPA. He asserts, inter alia, that the

lifelong registration requirements,¹³ employment prohibitions,¹⁴ and the inability to pursue tort remedies¹⁵ pursuant to the act satisfy the "plus" requirements of the stigma-plus test. We agree, noting that the Supreme Court specifically mentioned employment as a "plus" factor in Paul v. Davis, 424 U.S. at 701. See also Collie v. State, 710 So. 2d 1000, 1012 (Fla. 2d DCA 1998) (employment restrictions infringe on a constitutionally-protected liberty interest).

With facts and statutes similar to those in this case, other courts have also found additional plus factors that satisfy the stigma-plus test. See Hawaii v. Bani, 36 P.3d 1255 (Haw. 2001)¹⁶; Doe v. Attorney Gen., 686 N.E.2d 1007 (Mass. 1997)¹⁷;

¹³ See § 775.21(6), Fla. Stat.

¹⁴ See § 775.21(10)(b), Fla. Stat.

¹⁵ See § 775.21(9), Fla. Stat.

¹⁶ The court provided as additional "plus" factors that:

Potential employers and landlords will foreseeably be reluctant to employ or rent to [the defendant] once they learn of his status as a "sex offender." . . . Indeed, the public disclosure provisions of [the act] can adversely affect an offender's personal and professional life, employability, associations with neighbors, and choice of housing. . . . In addition, public disclosure may encourage vigilantism and may expose the offender to physical violence.

Bani, 36 P.3d at 1265. (citations omitted).

¹⁷ The court in Doe found that:

Noble v. Bd. of Parole, 964 P.2d 990 (Or. 1998).¹⁸

B. Due Process

Since we have determined that the FSPA's registration and public notification provisions implicate the defendant's liberty interests, we must now decide whether the defendant was afforded the requisite procedural safeguards of due process. See Mathews v. Eldridge, 424 U.S. 319 (1976) (procedural due process requires that government act in a fair manner when there is a deprivation of a constitutionally protective property interest).

The combination of the following circumstances persuades us that the plaintiff has a liberty and privacy interest protected by the Constitution . . . that entitles him to procedural due process: (1) the requirement that he register with local police; (2) the disclosure of accumulated personal information on request; (3) the possible harm to his earning capacity; (4) the harm to his reputation; and, most important, (5) the statutory branding of him as a public danger, a sex offender.

686 N.E.2d at 1013.

¹⁸ Describing the liberty interest that is lost by a label of "predatory sex offender," the court wrote:

Finally, and perhaps most importantly, it is an interest in avoiding the social ostracism, loss of employment opportunities, and significant likelihood of verbal and perhaps, even physical harassment likely to follow from designation. In our view, that interest, when combined with the obvious reputational interest that is at stake, qualifies as a "liberty" interest within the meaning of the Due Process Clause.

Noble, 964 P.2d at 995-96.

"The Supreme Court has explained that the central meaning of procedural due process is that '[p]arties whose rights are to be affected are entitled to be heard; and in order to enjoy that right they must first be notified. It is equally fundamental [that these rights] must be granted at a meaningful time and in a meaningful manner.'"

Fullmer v. Mich. Dep't of State Police, 207 F. Supp. 2d 650, 661 (E.D. Mich. 2002), quoting Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (alterations in original).

It is undisputed that the defendant here was provided no process as FSPA requires an automatic determination of "sexual predator" if one of the enumerated crimes has been committed.¹⁹ See § 775.21(5)(a), Fla. Stat. Thus, as several courts of other jurisdictions have done before us, we find that this total failure to provide for a judicial hearing on the risk of the defendant's committing future offenses, makes it violative of procedural due process, and therefore unconstitutional. See Doe v. Dep't of Pub. Safety, 271 F.3d 38 (2d Cir. 2001), aff'g, Doe

¹⁹ The defendant was charged with, and pled guilty to sexual battery on a physically incapacitated victim by multiple perpetrators. A single conviction for a multiple perpetrator sexual battery of a physically incapacitated victim automatically "classified" the defendant as a sexual predator. See § 775.21(4)(a), Fla. Stat. (a single capital, life, or first-degree felony violation of chapter 794 automatically qualifies person as "sexual predator"); § 794.011(4)(a), Fla. Stat. (sexual battery on physically incapacitated victim is a first-degree felony); § 794.023(2)(b), Fla. Stat. (reclassifying all first degree sexual batteries as life felonies if committed by multiple perpetrators).

v. Lee, 132 F. Supp. 2d 57 (D. Conn. 2001), cert. granted, 122 S. Ct. 1959 (2002); Fullmer v. Mich. Dep't of State Police, 207 F. Supp. 2d 650 (E.D. Mich. 2002); Doe No. 1 v. Williams, 167 F. Supp. 2d 45 (D.C. Cir. 2001); Doe v. Pryor, 61 F. Supp. 2d 1224 (M.D. Ala. 1999); Doe v. Pataki, 3 F. Supp. 2d 456 (S.D.N.Y. 1998); Hawaii v. Bani, 36 P.3d 1255 (Haw. 2001); Doe v. Attorney Gen., 686 N.E.2d 1007 (Mass. 1997).²⁰

IV. Conclusion

For the foregoing reasons, we find that in the absence of a provision allowing for a hearing to determine whether the defendant presents a danger to the public sufficient to require registration and public notification, the Florida Sexual Predators Act violates procedural due process. Accordingly, the order on appeal is reversed.

²⁰ New Jersey's original "Megan's Law" did not provide for a judicial hearing on the risk of future offenses, but the state's Supreme Court read such a requirement into the statute. See Doe v. Portitz, 662 A.2d 367, 381-85 (N.J. 1995). Without this judicial amendment to the statute it would have been unconstitutional. Id. at 421-22.

We however, cannot judicially amend section 775.21, as that province in Florida is left solely to the legislature. See State v. Keaton, 371 So. 2d 86, 89 (Fla. 1979) (courts may not vary the intent of the legislature with respect to the meaning of a statute, in order to render it constitutional).