Portion of Sex Offender Premises Restriction Held Unconstitutional

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Categories : Crimes and Elements, Uncategorized

Tagged as : 300 foot rule, daniels, place where minors gather, premises, sex offenders, softball

Date : January 14, 2013

Happy New Year! I feel like I spent most of 2012 talking about Justice Reinvestment. Let's start 2013 with a more agreeable subject—like sex offenders.

In one of its final rulings of 2012, the court of appeals held in *State v. Daniels* that a portion of the law limiting where some registered sex offenders may go is unconstitutionally vague. In *Daniels*, the defendant was charged with two counts of violating G.S. 14-208.18(a)(3), which makes it a Class H felony for certain sex offenders to knowingly be "at any place where minors gather for regularly scheduled educational, recreational, or social programs." The charges stemmed from two visits by the defendant to county parks. In the first, the defendant came to the park to meet his daughter, who was watching a tee ball game at one of the park's youth baseball fields. In the second, the defendant was playing softball on an adult ball field at a park that also had a youth field.

In his defense, the defendant filed a motion to declare G.S. 14-208.18 unconstitutional on a mix of First Amendment and due process grounds. The trial court granted the motion, declaring that G.S. 14-208.18(a)(3) is unconstitutionally overbroad because it infringes on the defendant's freedoms of association and religion, and unconstitutionally vague in that it fails to put people of ordinary intelligence on notice of the precise conduct the law prohibits. The trial court further declared G.S. 14-208.18(a)(2), the 300-foot rule described here, unconstitutional, as the facts of the case could have implicated that provision as well. Having deemed the statute unconstitutional, the judge dismissed the charges against the defendant.

The State made three arguments on appeal.

- First, that the trial court lacked authority to rule on G.S. 14-208.18(a)(2), the 300-foot rule, because the defendant had only been charged with a violation of subdivision (a)(3);
- Second, that the defendant lacked standing to challenge the constitutionality of the law on its face; and
- Third, that in any event the premises restrictions in question are neither unconstitutionally overbroad nor vague.

As to the first argument, the court of appeals agreed with the State. The defendant was charged only under G.S. 14-208.18(a)(3), and the trial court thus lacked jurisdiction to rule on the constitutionality of subdivision (a)(2). The court noted that the legislation enacting G.S. 14-208.18 included a severability clause, indicating the General Assembly's intent to create three separate and independent offenses. So, *Daniels* did not resolve any of the constitutional or interpretive questions surrounding the 300-foot rule.

Having limited the scope of its review to G.S. 14-208.18(a)(3), the court went on to consider whether the defendant had standing to mount a facial challenge to that part of the law. The court concluded that he did not, as a person bringing a facial challenge must "establish that no set of circumstances exists under which the act would be valid." Slip op. at 19 (citing State v. Thompson, 349 N.C. 483, 491 (1998)). Because there are particular activities which are unambiguously prohibited by G.S. 14-208.18(a)(3)—such as a covered sex offender actually going onto a baseball field where children have regularly scheduled games, which the court said would clearly be covered—the defendant could at best challenge the law as applied to the facts of his case.

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And so the court reviewed those facts. To recap, in one count the defendant was accused of being “out kind of close to the parking lot area” at a county park that had a youth ball field, and in the other he was accused of playing softball on an adult softball field adjacent to a youth tee ball field. In both instances, the court concluded that it would not be clear to a reasonable person whether these areas “near” or “adjacent” to youth fields were “places where minors gather” within the language of G.S. 14-208.18(a)(3), and thus held that the law was unconstitutionally vague as applied to both incidents.

After *Daniels*, it appears that vagueness challenges to G.S. 14-208.18(a)(3) can best be avoided by taking a narrow reading of the word “place” in that subdivision. The prohibited “place” is not the entire county park, but rather the particular portion of it where regularly scheduled activities for children actually occur. The same rationale would logically to extend to other locales. For example, the relevant prohibited “place” at a community college that has educational programs for minors would likely be the particular buildings or perhaps even particular classrooms where those programs occur, not the entire campus. Every place and situation is different, of course, so it is hard to offer crystal clear guidance based on *Daniels* alone.

Daniels did not answer the frequently asked question of whether minors must actually be gathered at the place in question while the sex offender is there in order for the subdivision (a)(3) crime to occur. The court noted that minors were present during both of the defendant’s park visits, but that fact did not appear to play a critical role in the court’s analysis.

Finally, although the trial court struck the law under both the First Amendment and as a matter of due process, the court of appeals deemed the law unconstitutional on the latter grounds alone. Thus, *Daniels* does not resolve any of the freedom of religion or freedom of association issues raised by sex offender premises restrictions, which I know continue to percolate through the trial division, and which appear in the newspaper from time to time.

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