Sex Offender Premises Restrictions Revised in Response to Doe v. Cooper

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The General Assembly amended G.S. 14-208.18, the law that makes it a Class H felony for certain registered sex offenders to go certain places. The changes are a response to *Doe v. Cooper*, a federal case in which the trial judge enjoined every district attorney in the state from enforcing the parts of the law he found to be unconstitutional. Today's post takes a look at the revised law.

As a reminder, the prior version of G.S. 14-208.18 set out three types of places that certain registered sex offenders may not go. Those types of places were described in three statutory subdivisions, (a)(1), (a)(2), and (a)(3), which said that covered offenders could not knowingly be:

(a)(1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.

(a)(2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

(a)(3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.

The law applied to two categories of sex offenders:

Article 7B offenders: Those convicted of any offense in Article 7B of Chapter 14 (rapes, sexual offenses, sexual activity by a substitute parent or custodian or with a student, and sexual battery) or a substantially similar offense federal offense or offense from another state, and

Minor-victim offenders. Those who committed an offense where the victim was under the age of 16 at the time of the offense.

I discussed the trial court orders in *Doe* in two previous posts. The first post, here, covers the order issued in December 2015, 148 F. Supp. 3d 477 (M.D.N.C. 2015), in which the court found that subdivision (a)(3) is unconstitutionally vague as a matter of constitutional due process. The second post, here, covers the order issued in April 2016, in which the court found that subdivision (a)(2) (the "300 foot rule") is unconstitutionally overbroad under the First Amendment. The judge permanently enjoined the enforcement of both of those subdivisions. Subdivision (a)(1) was upheld and remains enforceable.

The legislature enacted Session Law 2016-102 to address the constitutional infirmities found in the *Doe* case. What does the revised law say? And do the revisions effectively address the constitutional issues? Let's go subdivision by subdivision.

Applicability based on victim age. For all of the crimes set out in G.S. 14-208.18, the *minor-victim offender* eligibility category is broadened so that the law applies to any registered sex offender whose victim was under the age of 18 at the time of the offense. Under prior law the relevant age was 16. The *Article 7B offender* category is unchanged, except for a new requirement applicable only to subdivision (a)(2), discussed below.

Subdivision (a)(1). The revised law makes no changes to subdivision (a)(1) itself. That provision was never deemed unconstitutional, and thus presumably remains enforceable as it was under prior law.

Subdivision (a)(2). The language of the 300 foot rule itself is unchanged. What has changed under the revised law is the subcategory of registered sex offenders to whom subdivision (a)(2) applies. Under the revised law, subdivision (a)(2) only applies to Article 7B offenders when "a finding has been made in any criminal or civil proceeding that the person presents, or may present, a danger to minors under the age of 18." G.S. 14-208.18(c)(2)a.

The reason a federal judge found the prior 300 foot rule to be unconstitutionally overbroad was that it was poorly tailored to further the state's interest in protecting children: it applied to some offenders who never committed a crime against a child. To the extent that the law swept too far, it wound up punishing a substantial amount of protected free speech, judged in relation to its plainly legitimate sweep.

The new eligibility criteria probably remedy that overbreadth by limiting crime to minor-victim offenders and offenders specifically found to pose a danger to minors. It strikes me, though, that the revisions come with a cost to simplicity and administrability. For example, a person on the registry for a rape or sexual offense committed against a 20-year-old victim will be subject to the 300 foot rule only if a judicial official has, at some point, made a finding in a prior criminal or civil proceeding that the person is or could be a danger to minors. A law enforcement officer or prosecutor considering charging a 300 foot rule violation by such an offender would need to verify that, at some point, such a finding was made.

Subdivision (a)(3). The federal court found subdivision (a)(3) to be unconstitutionally vague because it did not define a criminal offense with sufficient definiteness that ordinary people could understand what conduct is prohibited. The court was especially troubled by the "regularly scheduled . . . program" language, as it gave no guidance on how often such a program would need to occur to render a place off limits. It also gave no examples of the type of places the legislature had in mind.

Revised subdivision (a)(3) addresses both concerns. It replaces the "regularly scheduled" language with a prohibition on being at any place where minors "frequently congregate." Is "frequently" less vague than "regularly scheduled"? Probably. "Regularly scheduled" could include rare but nonetheless *regularly scheduled* gatherings, like a once-a-year Easter egg hunt, that could render an otherwise non-kid-focused place off limits at all times. A requirement for "frequent" gatherings of minors seems at least a little more focused. Moreover, the revised statute provides a list of examples (libraries, arcades, amusement parks, recreation parks, and swimming pools), and clarifies that those types of places are restricted *only when the minors are actually present*. Similar language from other jurisdictions—cited in the *Doe* case itself—has survived constitutional challenge. *See, e.g.*, United States v. Taylor, 338 F.3d 1280 (11th Cir. 2003) (upholding a Florida probation condition that referenced areas "where children frequently congregate").

One additional thing that occurs to me about subdivision (a)(3) is that because the federal court found it to be vague, it did not go on to consider the plaintiffs' First Amendment overbreadth challenge to that part of the law. Even if the revised version is now clear enough to not be vague, I wonder if it will now be challenged as overbroad—especially when it continues to apply to adult-victim Article 7B offenders for whom no dangerousness finding has been made.

Subdivision (a)(4). New subdivision (a)(4) bars Article 7B offenders and minor-victim offenders from being on the State Fairgrounds during the State Fair, on the Western North Carolina Agricultural Center during the Mountain State Fair, and on any other fairgrounds when an agricultural fair is being conducted.

Effective date. The revised law comes into effect on September 1, 2016, and applies to offenses committed on or after that date. As of now, prosecutors are still enjoined from prosecuting earlier offenses under subdivisions (a)(2) and (a)(3). If, however, either injunction is stayed or overturned by a higher court on appeal, the changes in the new law relevant to that subdivision are repealed, and the appropriate portion of the prior law is effective once again. S.L. 2016-102, sec. 2. The State has indeed appealed the April trial court order from the Middle District, but to my knowledge the Fourth Circuit has not issued any stay of the injunction.

The effective date clause does not limit that conditional repeal of the new law to the pendency of a stay, leading me to wonder what happens if one were issued but then lifted. At that point would the new version of the law kick in once again? I guess we'll cross that bridge when and if we get there. For now, suffice it to say that officers, prosecutors, judicial officials, and defendants dealing with G.S. 14-208.18 after September 1 will want to keep a careful eye on the *Doe* case as it moves forward, to be sure they are applying the proper version of the law.