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DISTRICT IV

February 1, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2014AP2182-CR State of Wisconsin v. Timothy D. Lawver (L.C. # 2011CF2332)

Before Kloppenburg, P.J., Higginbotham, and Blanchard, JJ.

Timothy Lawver appeals a judgment of conviction for failing to provide information required under the sexual offender registration requirements of WIS. STAT. § 301.45(2)(g) (2013-14).¹ On appeal, Lawver challenges the constitutionality of that statute, as applied to him. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Lawver was convicted of first-degree sexual assault of a child in 1992. He was released from prison in 1995 and was released from supervision in 1997. While Lawver was serving his sentence, the legislature enacted a sex-offender registry law requiring persons convicted of particular crimes, including first-degree sexual assault of a child, to register as sex offenders and provide certain identifying information such as name and address. *See* WIS. STAT. § 175.45 (1993-94), *revised and renumbered as* WIS. STAT. § 301.45 by 1995 WI Act 440. Registrants are required to provide the Department of Corrections with information on an annual basis, *see* § 301.45(3), and to respond to Department requests to verify and update their information on file. *See* § 301.45(2)(g).

After his release from supervision, Lawver generally complied with the registration requirements. In 2011, however, Lawver failed to respond to Department inquiries, and this prosecution was started. *See* WIS. STAT. § 301.45(6) (knowing failure to comply with the statutory registration requirements is a Class H felony). A jury trial was held, and Lawver was found guilty of non-compliance with the registry requirements.

Lawver was represented by an attorney at trial. At various points in the pre-trial proceedings, however, Lawver represented himself. At several pre-trial hearings, Lawver expressed his belief that the registration requirements were improperly “retroactive” because they did not exist when he was convicted. Lawver indicated that he wanted the judge who sentenced him in 1992 to testify that no registration requirements were imposed at the time.

The State filed a pretrial motion seeking to exclude any evidence that WIS. STAT. § 301.45 is unconstitutional. Lawver did not have an attorney when the court addressed the State’s motion. The court granted the State’s motion, informing Lawver that he could raise a

constitutional argument, but only to the judge, not the jury. At the last hearing where Lawver represented himself, he again argued that the statute was unconstitutional and the court acknowledged that he “can make a record” on that challenge.

Ultimately, an attorney was appointed to represent Lawver. At the final pretrial conference on the Friday before the scheduled Monday jury trial, counsel informed the court that Lawver wanted to challenge the constitutionality of the statute, and stated it was his “obligation” to raise such an issue before trial. The court replied that Lawver could do so, and again pointed out that any constitutional issue was a court issue, not a determination for the jury. At this point, the matter had been pending for over two-and-one-half years, and the court expressed the desire to try the factual matters. When the State suggested that the constitutional issue be addressed before the jury was sworn in, the court replied that it could not decide a constitutional question over a weekend. The court decided that the factual issues would be decided by the jury, as scheduled, and then if Lawver “want[ed] to raise these constitutional issues afterward, ... feel free to do so before ... sentenc[ing] ... [and] both sides [will be given] an opportunity to raise any constitutional issues.”

The jury trial was held and Lawver was found guilty. At the conclusion of the trial, a sentencing date was selected. Lawver did not renew his constitutional argument or request any briefing schedule from the court. Likewise, Lawver did not raise the issue at any time during the sentencing hearing. Lawver did not file a postconviction motion.

We conclude that Lawver has forfeited his constitutional challenge.² Although Lawver's constitutional issue was discussed on numerous occasions, it was never formally briefed by the parties. More importantly, the circuit court never decided the question. In his reply brief, Lawver concedes that trial counsel did not raise the issue after the jury trial was completed. Lawver asks this court, however, to address the constitutional issue nonetheless.

“Forfeiture is a rule of judicial administration, and whether we apply the rule is a matter addressed to our discretion.” *State v. Kaczmariski*, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702. We generally do not make an exception to the forfeiture rule unless the issue presented is one of law and involves no questions of fact. *See State v. Bodoh*, 226 Wis. 2d 718, 737, 595 N.W.2d 330 (1999). Such is not the case here.

Lawver complied with the statutory registration requirements for over a decade. In his brief, Lawver suggests that the 2009 amendment of the statute to require registrants to provide e-mail account and Internet usage information led to his decision to no longer comply with the law. *See* 2009 Wis. Act 131, § 1 *creating* WIS. STAT. § 301.45(2)(a)6m. On appeal, Lawver contends that the 2009 amendment takes the current law outside the reach of previous judicial decisions upholding the constitutionality of sexual offender registries; *see Smith v. Doe*, 538 U.S. 84 (2003), and declaring Wisconsin's sex offender registry to be non-punitive. *See State v. Bollig*, 2000 WI 6, ¶¶21-27, 232 Wis. 2d 561, 605 N.W.2d 199.

² We note that Lawver is raising an “as-applied” challenge to the constitutionality of WIS. STAT. § 301.45 rather than a facial challenge to the statute. That distinction is critical because a facial challenge is a matter of subject matter jurisdiction and cannot be waived, unlike an “as-applied” challenge which is subject to rules of waiver and forfeiture. *See State v. Bush*, 2005 WI 103, ¶17, 283 Wis. 2d 90, 699 N.W.2d 80.

WISCONSIN STAT. § 301.45(2)(a)(6m) requires the disclosure of every electronic mail account used by the registrant, the Internet address of every web site created or maintained by the registrant, every Internet user name used by the registrant, and the name and Internet address of every public or private Internet profile created, used, or maintained by the registrant. In this case, the circuit court did not address the argument that the amendment was unconstitutional as applied to Lawver. The record is devoid of any factual development regarding the effect of the amendment on Lawver. There is no evidence of how much information Lawver would be required to disclose under the law. An “as-applied” challenge should not be decided when the record is silent as to the impact of the statute on the challenger. *See State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63 (the facts of the particular case, not hypothetical facts, must be considered in an “as-applied” challenge to the constitutionality of a statute). Therefore, we decline to look beyond Lawver’s forfeiture.

Moreover, Lawver concedes that pre-amendment WIS. STAT. § 301.45 is constitutional. If § 301.45(2)(a)6m were found to be unconstitutional as an ex post facto law, it could be severed from the rest of the statute. *See State ex rel. Singh v. Kemper*, 2014 WI App 43, ¶9, 353 Wis. 2d 520, 846 N.W.2d 820, *review granted*, 2016 WI 2, 365 Wis. 2d 741, 872 N.W.2d 668 (Wis. Nov. 4, 2015) (No. 2013AP1724). Lawver was charged with non-compliance with § 301.45(2)(g). At trial, Lawver admitted that he ignored the Department’s 2011 request to verify his information within ten days of receipt of the Department’s request. The State charged and proved a violation of § 301.45(2)(g), a part of the statute that Lawver concedes is constitutional. Lawver was not charged with violating the section of the statute that Lawver contends is unconstitutional as applied. Thus, even if § 301.45(2)(a)6m were unconstitutional, Lawver’s conviction would still stand.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS.
STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals