18-P-509 Appeals Court

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 36870 vs. SEX OFFENDER REGISTRY BOARD.

No. 18-P-509.

Suffolk. June 12, 2019. - October 15, 2019.

Present: Blake, Kinder, & Desmond, JJ.

Indecent Assault and Battery. Minor. Consent. Sex Offender Registration and Community Notification Act. Jurisdiction, Sex Offender. Practice, Civil, Judgment on the pleadings. Words, "Like violation."

Civil action commenced in the Superior Court Department on February 13, 2017.

A motion for judgment on the pleadings was heard by Joseph F. Leighton, Jr., J.

Ilse Nehring for the plaintiff.
David L. Chenail for the defendant.

BLAKE, J. At issue in this appeal is the question whether D.C. Code Ann. § 22-3501(a), defining the crime of taking indecent liberties with a minor child, is a "like violation" of G. L. c. 265, § 13B, indecent assault and battery on a child

under the age of fourteen, thus requiring the plaintiff, John Doe, to register as a sex offender pursuant to G. L. c. 6, §§ 178C-178P.

Doe appeals from a Superior Court judgment denying his motion for judgment on the pleadings and affirming the Sex Offender Registry Board's (board) classification of Doe as a level two sex offender. Doe argues that the board did not have jurisdiction to require him to register as a sex offender because the board failed to establish that Doe's index out-of-State crime was a "like violation" of a Massachusetts sex offense requiring registration. We affirm.

Background. In 1985, Doe visited family in Washington, D.C. An eight or nine year old[1] girl reported to police that,

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[1] The police report listed four names as "complainants" or "witnesses" and their dates of birth. The first and third names had birthdays that indicated they were children under the age of sixteen at the time of the incident: the first person's date of birth was 1976, making the child eight or nine years old in 1985; and the third person's date of birth was 1978, making the child six or seven years old in 1985. The hearing examiner "infer[red] that the complainant [was] the first name listed (and redacted) on the 'COMPLAINANTS/WITNESSES' list on the police report. Her year of birth was listed as 1976 (month and day redacted), making her eight or nine years old on the date of the offense." Doe argues that the hearing examiner failed to explain what substantial evidence indicated the victim's age and that the hearing examiner "random[ly] select[ed]" the younger of the two listed minors on the police report. To the contrary, the hearing examiner selected the older of the two listed minors on the police report. The hearing examiner acted within her discretion to infer that the first name on the list was the victim, particularly where only two of the witnesses listed could have been children, and the hearing examiner gave Doe the

during his stay, Doe entered her bedroom, "[took her] into the living room, placed [her] on the couch[,] . . . pulled her panty's [sic] down and then pulled his pants down to his knees. He then turned her over onto her stomach and placed his penis (wing-wing) into her butt (rectum)." Doe was charged in the Superior Court of the District of Columbia with sodomy of a child under the age of sixteen, in violation of D.C. Code Ann. § 22-3502, and subsequently pleaded guilty to taking indecent liberties with a minor child, in violation of D.C. Code Ann. § 22-3501(a) (District of Columbia offense).[2]

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more generous inference. Moreover, as discussed more fully infra, the difference in age between the two minors was inconsequential, as both were minors incapable of consenting under the statutes governing both the District of Columbia offense and the Massachusetts offense at issue in this case.

[2] At the time of Doe's conviction, D.C. Code Ann. § 22-3501 provided:

> "(a) Any person who shall take, or attempt to take any immoral, improper, or indecent liberties with any child of either sex, under the age of [sixteen] years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or who shall commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child shall be imprisoned in a penitentiary, not more than [ten] years.
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> "(b) Any such person who shall, in the District of Columbia, take any such child or shall entice, allure, or persuade any such child, to any place whatever for the

In 2005, the board moved to classify Doe as a level two sex offender. At that time, the board had before it only Doe's interstate criminal history record, which showed that Doe had pleaded guilty to "rectal sodomy." The board finally classified Doe as a level two sex offender, designating rape, in violation of G. L. c. 265, § 22, as the Massachusetts "like violation"

> purpose either of taking any such immoral, improper, or indecent liberties with such child, with said intent or of committing any such lewd, or lascivious act upon or with the body, or any part or member thereof, of such child with said intent, shall be imprisoned in the penitentiary not more than [five] years.
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> "(c) Consent by a child to any act or conduct prescribed by subsection (a) or (b) of this section shall not be a defense, nor shall lack of knowledge of the child's age be a defense.
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> "(d) The provisions of this section shall not apply to the offenses covered by § 22-2801 [rape]."

In 1987, the District of Columbia Court of Appeals noted that subsection (d) "as enacted differs in [an] important respect [from] the statute as codified," referring to the fact that the statute as enacted included within subsection (d)'s exclusions the crime of sodomy, § 22-3502, in addition to rape, § 22-2801 -- but that the codified version did not include sodomy. Watson v. United States, 524 A.2d 736, 742 n.7 (D.C. 1987). The court noted that subsection (d) was intended to withdraw certain offenses from § 22-3501 that were "covered in other sections of the code, and which provide for more severe penalties than those provided in this section" (quotation omitted). Id. at 743. Accordingly, the 1988 Cumulative Supplement to the annotated code corrected the error, and set out the text of subsection (d) as follows:

> "(d) The provisions of this section shall not apply to the offenses covered by § 22-3502 [sodomy] or by § 22-2801 [rape]."

requiring that Doe register as a sex offender, which Doe did not challenge. Soon after, the board notified Doe that it intended to reclassify him as a level three sex offender pursuant to 803 Code Mass. Regs. § 1.37C (2004).[3] Doe challenged the reclassification, and after a de novo hearing in 2011, the board again classified him as a level two sex offender. The board was still under the assumption that Doe had been convicted of "rectal sodomy," and Doe did not challenge this conclusion.

In 2014, the board again notified Doe that it intended to reclassify him as a level three sex offender pursuant to 803 Code Mass. Regs. § 1.37C (2013). Doe requested a hearing to challenge the board's proposed reclassification. A de novo reclassification hearing was held in 2015, where the hearing examiner ordered the board "to attempt again to get" archived records of Doe's index offense.

Before the hearing examiner issued her decision, the Supreme Judicial Court changed the standard of proof in reclassification proceedings to proof by clear and convincing evidence. See Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 298 (2015) (Doe No. 380316). In light of this, the hearing examiner conducted another de novo hearing in 2016 in accordance with Doe No.

[3] See now 803 Code Mass. Regs. § 1.32 (2016).

380316, supra. By the date of the hearing, new information as to Doe's index offense had been "unearth[ed]" showing that Doe pleaded guilty in 1985 to taking indecent liberties with a minor child, and not to rectal sodomy.[4] At the hearing, Doe filed a request for relief from registration, asserting that the board did not have jurisdiction to require him to register as a sex offender. He argued that the board could not demonstrate which

[4] Doe argues that court documents from his conviction are inconsistent and uncorroborated by one another, and that they do not necessarily concern the same facts and circumstances. He further argues that the documents do not evidence a conviction and thus the board cannot assert jurisdiction over him to require him to register. The criminal complaint stated that Doe "did commit a certain unnatural and perverted sexual practice with one [name blacked out] (then and there being a child under the age of sixteen)" in violation of D.C. Code Ann. § 22-3502 (sodomy). The accompanying warrant listed the charge as "Sodomy (child under [sixteen years])." The warrant was signed and returned but without a docket number. An interstate criminal history record showed that Doe pleaded guilty to "Rectal Sodomy" and that he was sentenced to three to nine years. No docket number or statute was listed. A judgment and "commitment/probation" order indicated that Doe pleaded guilty to "Taking Indecent Liberties with a Minor Child" and that he was sentenced to thirty months to eight years. A "case [number]" was given but no statute was listed. While it is possible that additional documents could have provided more clarity at the initial and subsequent classification hearings, examiners may permissibly rely on evidence that "reasonable persons are accustomed to rely on in the conduct of serious affairs." 803 Code Mass. Regs. § 1.18(1) (2016). Given the age of the case and the fact that the board had, in 2015, "unearth[ed]" additional documents which the hearing examiner considered at the time, it was proper for this hearing examiner to rely on the records she had to determine that Doe was convicted of taking indecent liberties with a minor child, a violation of D.C. Code Ann. § 22-3501(a).

District of Columbia offense he had been convicted of and therefore could not examine the elements of a District of Columbia offense to determine whether there was a "like violation" to any Massachusetts crime requiring registration.[5]

The hearing examiner issued a written decision in 2017 denying Doe's request for relief from registration, concluding that Doe's District of Columbia offense[6] was a "like violation" of the Massachusetts crime of indecent assault and battery on a child under fourteen (Massachusetts offense), and classifying

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[5] Doe was not present at the hearing but was represented by counsel.

[6] Doe contends that it is unclear whether he was sentenced under subsection (a) or (b) of D.C. Code Ann. § 22-3501, and thus, in considering the underlying conduct, it was error for the hearing examiner to "random[ly]" choose one subsection over the other in her "like violation" analysis. We note that Doe was sentenced to three to nine years. The maximum sentence under subsection (b) (enticement) is five years, while the maximum sentence under subsection (a) (indecent liberties) is ten years. It thus appears that Doe must have been sentenced under subsection (a). Moreover, the language of the statute itself indicates that subsection (a) concerns "tak[ing] . . . indecent liberties with [a] child," while subsection (b) concerns "entic[ing] . . . [a] child." See McIlwain v. United States, 568 A.2d 470, 470-471 & n.1 (D.C. 1989); Watson, 524 A.2d at 737 (referring to subsection [a] as "taking indecent liberties with a minor child," and to subsection [b] as "enticing a minor child" [emphases added]). Here, the judgment and "commitment/probation" order stated that Doe was convicted of taking indecent liberties with a minor child. We are satisfied that, for the purposes of a "like violation" analysis, the hearing examiner correctly discerned that Doe was convicted of violating subsection (a), and we constrain our analysis accordingly.

him as a level two sex offender.[7] Doe sought judicial review pursuant to G. L. c. 30A, § 14, and G. L. c. 6, § 178M, and filed a motion for judgment on the pleadings in the Superior Court, which the judge denied.[8] The judge affirmed the board's classification, and this appeal followed.

Standard of review. "An offender may seek judicial review . . . of the board's . . . reclassification and registration requirements." G. L. c. 6, § 178M. We "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14 (7). "We reverse the board's decision if it was (a) [i]n violation of constitutional provisions; (b) [i]n excess of the statutory authority or jurisdiction of the board; (c) [b]ased upon an error of law; (d) [m]ade upon unlawful procedure; (e) [u]nsupported by

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[7] The hearing examiner referred to taking indecent liberties with a minor child as a "lesser included offense" of sodomy. Doe asserts, and we agree, that this designation was inaccurate. See Roberts v. United States, 752 A.2d 583, 585 n.6 (D.C. 2000) ("The government acknowledges that the indecent liberties charge is not a lesser included offense of sodomy"). See generally the discussion at note 2, supra. However, this erroneous designation is of no material significance and did not prejudice Doe in any discernible manner.

[8] In his written decision, the judge stated that Doe did not challenge the hearing examiner's determination that Doe's District of Columbia offense was a "like violation" of the Massachusetts offense. The parties agree that Doe did in fact raise and preserve this issue in his motion for judgment on the pleadings in the Superior Court.

substantial evidence; (f) [u]nwarranted by facts found by the court . . . where the court is constitutionally required to make independent findings of fact; or (g) [a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law" (quotations and emphases omitted). Doe, Sex Offender Registry Bd. No. 151564 v. Sex Offender Registry Bd., 456 Mass. 612, 614-615 (2010) (Doe No. 151564), citing G. L. c. 30A, § 14 (7).

The board's jurisdiction. General Laws c. 6, § 178C, states that a sex offense requiring registration includes "a like violation of the laws of another state."

> "A 'like violation' is a conviction in another jurisdiction of an offense of which the elements are the same or nearly the same as an offense requiring registration in Massachusetts. The elements of the offense in another jurisdiction need not be precisely the same as the elements of a Massachusetts sex offense in order for it to constitute a 'like violation.' In drafting the statute, the Legislature chose the word 'like' rather than the word 'identical' to describe the required relationship between an offense from another jurisdiction and a Massachusetts sex offense."

Doe No. 151564, 456 Mass. at 615-616. Where "the essence of the two crimes [is] the same" and the crimes "prohibit essentially the same conduct," the crimes may properly be deemed "like violation[s]." Id. at 615, 617. The "like violation" assessment must be conducted "in terms of offenses and not conduct" by comparing the elements alone, without consideration of the underlying acts. Id. at 619. This does not prohibit the board from considering an offender's conduct when evaluating his

or her level of dangerousness, see G. L. c. 6, § 178K (1) (b) (iii), but ensures "notice and clarity" to criminal defendants convicted of offenses in other jurisdictions about whether registration will be required in Massachusetts. Id. at 618. Because criminal penalties are authorized for failing to register as a sex offender, "we apply the 'rule of lenity' and resolve any ambiguities in the 'like violation' provision against the board." Id., citing Commonwealth v. Wotan, 422 Mass. 740, 742-743 (1996). See id. at 742 ("When a statute is found plausibly to be ambiguous, the defendant is given the benefit of the ambiguity").

Doe argues that the board failed to establish that he was convicted of an offense that is a "like violation" of a Massachusetts sex offense requiring registration because the age and consent elements differ between the two offenses, and because the board did not establish that the offenses prohibited essentially the same conduct. Consequently, Doe asserts, the board lacked jurisdiction to require him to register as a sex offender.

a. Age. i. Doe contends that the hearing examiner's use of the police report to determine the age of the victim in Doe's case constituted a consideration of the conduct and facts in the underlying case, and not merely the elements of the offense which, he says, violates the Supreme Judicial Court's holding in

Doe No. 151564. While we agree with Doe that Doe No. 151564 prohibits the board from considering the underlying conduct and acts, we conclude that the age of a victim (or of an offender) is neither conduct nor an act. Rather, age is an element, and one which varies considerably among criminal statutes with the same or similar purposes from jurisdiction to jurisdiction. To properly evaluate an offender's registration duties, or lack thereof, the board must be permitted to make a factual determination as to the victim's age (and, at times, the offender's age -- see, e.g., G. L. c. 265, § 23A), where the age difference between the defendant and the victim may serve as an aggravating factor.

In addition, Doe No. 151564 cautioned against considering conduct and acts out of concern that doing so "could expand the registration requirement to include crimes beyond those that explicitly encompass sexual conduct"[9] and could also deprive a

[9] Doe No. 151564 also cautioned against considering the facts (and not simply the acts) supporting a conviction in another jurisdiction, but only in reference to the facts pertaining to sexual conduct, not mere biographical data points such as age. See Doe No. 151564, 456 Mass. at 619 ("Permitting an inquiry into the facts supporting a conviction in another jurisdiction could expand the registration requirement to include crimes beyond those that explicitly encompass sexual conduct" [emphasis added]). Doe No. 151564's focus on conduct is further evidenced by the fact that the court's ruling that the board cannot consider the facts underlying a conviction in conducting the "like violation" analysis is within the subsection entitled "[c]onsideration of the underlying conduct" (emphasis added). Id. at 618.

criminal defendant of proper notice that he or she could be required to register as a sex offender in Massachusetts even where the underlying conviction did not require proof of sexual conduct. Doe No. 151564, 456 Mass. at 619. However, the board's ability to consider the age of a victim (or of an offender) in determining a "like violation" does not, on its own, expand the registration requirement to include crimes beyond those involving sexual conduct. Thus, our determination that the board may permissibly consider the victim's age is in accordance with Doe No. 151564, as it does not deprive defendants of proper notice of the requirement to register in Massachusetts associated with convictions involving sexual conduct elsewhere.

ii. Doe further contends that, because the crimes at issue define differently the age whereby a child is unable to consent -- under sixteen years of age in the District of Columbia offense and under fourteen years of age in the Massachusetts offense -- the elements of the two offenses are not "the same or nearly the same" and therefore the District of Columbia offense is not a "like violation" of a Massachusetts offense requiring registration. He asserts that the proof necessary to convict under the District of Columbia statute would not necessarily also warrant a conviction of the Massachusetts offense. If the child were fourteen or fifteen years of age, for instance, a

conviction of the District of Columbia offense would be warranted, but in Massachusetts the Commonwealth would have to prove an additional element of lack of consent to warrant a conviction of indecent assault and battery on a person age fourteen or older, pursuant to G. L. c. 265, § 13H.

We conclude that such a technical comparison of crimes which are, in all other respects, "essen[tially] . . . the same," is not what the Legislature intended when it passed the Sex Offender Registry Law. Doe No. 151564, 456 Mass. at 615. See St. 1996, c. 239, § 1. See also Doe, Sex Offender Registry Bd. No. 346132 v. Sex Offender Registry Bd., 85 Mass. App. Ct. 482, 487 (2014) (in Doe No. 151564, board properly found "like violation" where crimes in question "differ[ed] only in statutory formulation" and were otherwise essentially the same). Rather, the Legislature intended "to treat sex offenses in the same manner regardless of where the offenses were committed." Doe No. 151564, supra at 619. If the small age difference in the two statutes prohibited the board from finding a "like violation," the result would be that some offenders from other jurisdictions with convictions involving sexual conduct would not be required to register in Massachusetts merely because that jurisdiction's statutory age framework was not precisely the same as that in Massachusetts. "Where we are to focus on the essence of the crime at issue rather than require a 'like

violation' to have identical elements, it would make little sense to then insist that the Commonwealth establish that in every respect the proof required for each element of the offense in each jurisdiction must be identical." Commonwealth v. Bell, 83 Mass. App. Ct. 82, 87 (2013).[10]

b. Sexual conduct. Doe argues that the board failed to establish that the two offenses at issue "prohibit[ed] essentially the same conduct" and that the test in making the determination is not whether the purpose of the two statutes is the same or similar, but rather whether the elements of the offenses are the same or similar. In support of his argument, Doe asserts that the District of Columbia offense did not define several of its terms, that the board cannot apply Massachusetts definitions to discern the meaning of terms undefined in the District of Columbia offense, and that the District of Columbia offense has an additional sexualized intent element that is not present in the Massachusetts offense.

First, we understand Doe No. 151564 to stand for the proposition that the purpose of the two statutes is relevant to the board's analysis, as a guide to the board in analyzing the

[10] The question how the board could properly handle a matter where the age of either the victim or the offender was not inconsequential, or where age would make a material difference in a "like violation" analysis, is beyond the scope of this opinion. We do not comment or speculate as to how the board would conduct its "like violation" analysis in such a case.

offenses at issue to determine whether "the essence" of the two crimes is the same, and whether the statutes "prohibit essentially the same conduct." Doe No. 151564, 456 Mass. at 615-617. Case law from both jurisdictions helps us distill the purpose of the statutes at issue here.

The District of Columbia Court of Appeals noted that the District of Columbia statute is "intended to protect [children] below the age of sixteen, regardless of the use of force or consent, from any sexual relationship" (citation omitted). Matter of C.D., 437 A.2d 171, 174 (D.C. 1981). Later, that court recognized that the "rape/carnal knowledge, sodomy, and indecent acts with a minor [statutes] are designed to punish the sexual assault and exploitation of children." Watson v. United States, 524 A.2d 736, 743 (D.C. 1987). The statute states that consent is not a defense. D.C. Code Ann. § 22-3501(c).

In Massachusetts, this court has similarly held that "the purpose of G. L. c. 265, § 13B, is to protect minors from sexual exploitation." Commonwealth v. Davidson, 68 Mass. App. Ct. 72, 76 (2007), quoting Commonwealth v. Conefrey, 37 Mass. App. Ct. 290, 300 (1994), S.C., 420 Mass. 508 (1995). The Massachusetts statute states that a child under the age of fourteen is deemed incapable of consenting to the conduct at issue. G. L. c. 265, § 13B. Both statutes therefore have similar goals of protecting from sexual exploitation and abuse children who cannot per se

consent. The statutes "prohibit essentially the same conduct," and "the essence" of the crimes is similar enough to warrant the hearing examiner's determination that the two were "like violation[s]," thus requiring that Doe register as a sex offender in Massachusetts.

Moreover, the elements of both offenses are similar, albeit not identical. Other than age,[11] both offenses have a conduct element and an intent element. The conduct element in the Massachusetts offense requires that the defendant committed an indecent assault and battery (touching) of the child. Commonwealth v. Colon, 93 Mass. App. Ct. 560, 562 (2018). An indecent touching in Massachusetts is one which, "when . . . judged by the normative standard of societal mores, . . . is violative of social and behavioral expectations, in a manner which [is] fundamentally offensive to contemporary moral values . . . [and] which the common sense of society would regard as immodest, immoral and improper" (quotations omitted). Commonwealth v. Rosa, 62 Mass. App. Ct. 622, 625 (2004), quoting Commonwealth v. Lavigne, 42 Mass. App. Ct. 313, 314-315 (1997). This closely tracks the language of the District of Columbia offense, where the conduct element requires that the defendant

[11] In light of our holding as to the element of age, supra, we do not discuss age again in our analysis of the remaining elements.

either did, or attempted to take, "immoral, improper, or indecent liberties" with a child. Although these terms are undefined in the District of Columbia offense, the fact that each of the undefined terms is found in the Massachusetts offense supports the conclusion that the conduct elements of both offenses "prohibit essentially the same conduct" and are therefore similar for the purposes of a "like violation" analysis. Doe No. 151564, 456 Mass. at 617.

The intent element of the Massachusetts offense requires that the touching be "intentional[] . . . [and] without legal justification or excuse." Colon, 93 Mass. App. Ct. at 562, quoting Commonwealth v. Cruz, 93 Mass. App. Ct. 136, 138 (2018). It is a general intent crime and it does not require that the defendant's specific intent be proved. See Conefrey, 37 Mass. App. Ct. at 299-300 ("The defendant's proposed jury instruction is an erroneous statement of law because it suggests that indecent assault and battery on a child is a specific intent crime. The judge correctly instructed the jury that the touching that is alleged to be indecent should be intentional and deliberate. . . . Placed in the same category as statutory rape, indecent assault and battery on a child is a strict liability crime" [quotations and citation omitted]). The District of Columbia offense, on the other hand, is a crime of specific intent because it requires that the defendant had the

"intent of arousing, appealing to, or gratifying the lust or passions or sexual desires" of either himself or the child. D.C. Code Ann. § 22-3501(a). While this is different from the required proof in Massachusetts, "we consider the 'like violation' requirement satisfied where it is shown that the proof necessary for the out-of-State conviction would also warrant a conviction of a Massachusetts offense for which registration is required." Doe No. 151564, 456 Mass. at 616. The specific intent element of the District of Columbia offense requires more -- not less -- proof than the general intent element of the Massachusetts offense. We are satisfied that the proof necessary to convict Doe in the District of Columbia of a violation of D.C. Code Ann. § 22-3501(a) would suffice to convict Doe in Massachusetts of a violation of G. L. c. 265, § 13B.

Judgment affirmed.