STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RODNEY T. MCLAURIN,

Defendant-Appellee.

UNPUBLISHED
December 15, 2005

No. 255744
Genesee Circuit Court
LC No. 03-012281-FH

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

I. Introduction

The prosecution appeals by leave granted the order of the Genesee Circuit Court granting defendant's motion to withdraw his guilty plea, dismissing the charge against defendant for violating MCL 28.729(1)(a), and ordering the Michigan Department of Corrections (MDOC) to remove defendant's name from the sex offender registry (SOR). For the reasons detailed below, we affirm the trial court's order allowing defendant to withdraw his guilty plea and dismissing the charge against him, but reverse that part of the order requiring the MDOC to remove defendant's name from the SOR.

II. Facts and Procedural History

On July 23, 1985, defendant was convicted, after entering a nolo contendere plea, to a charge of attempted first-degree criminal sexual conduct (CSC I), MCL 750.520b, and was sentenced to a term of imprisonment of 2½ to 5 years, with credit for 117 days served. While incarcerated for the attempted CSC I conviction, defendant assaulted a prison guard. On May 4, 1987, defendant was sentenced to a consecutive term of two to four years for the ensuing assault conviction pursuant to MCL 768.7a(1) (the term of imprisonment imposed for a crime committed by an incarcerated individual "begin[s] to run at the expiration of the term or terms of imprisonment which the person is serving . . . .").

Defendant was paroled on October 17, 1989. While on parole, defendant was convicted of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v). He was sentenced on January 10, 1991, to a term of 2½ to 4 years imprisonment with that term to run "at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense." MCL 768.7a(2). Defendant was paroled for a second time on February 28, 1994, but

again violated his parole and was returned to prison on January 31, 1995. Defendant was discharged from the MDOC on September 25, 1996.

A concise timetable of defendant's convictions and paroles is as follows:

- July 23, 1985: Defendant was convicted of attempted CSC 1, and sentenced to two years, 6 months to five years;
- May 4, 1987: Defendant was convicted of felonious assault on a prison guard and sentenced to 2 to 4 years, consecutive to CSC I term;
- October 17, 1989: Defendant was paroled on CSC I conviction;
- January 17, 1991: Defendant was convicted of possession of less than 25 grams of cocaine, sentenced to 2½ years to 5 years, consecutive to felonious assault term;
- February 28, 1991: Defendant was paroled;
- January 31, 1995: Defendant was returned to prison on parole violation;
- September 25, 1996: Defendant was discharged from MDOC.

Because defendant was incarcerated on October 1, 1995, and had been convicted of attempted CSC I, a listed offense under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., the MDOC placed him on the SOR. After he was discharged from the MDOC in 1996, defendant's pattern of criminal behavior continued. While he was on probation for another offense in 2003, it was discovered by a University of Michigan-Flint Police Department Detective that defendant had left his last residence and had not registered a new address within ten days as required by the SORA, MCL 28.725(1)(a). On November 12, 2003, defendant reached an agreement with the prosecution to plead guilty to attempted failure to register as a sex offender. The trial court accepted defendant's plea. However, prior to sentencing, defendant moved to withdraw his plea asserting that there was no legal basis to support it.

At the hearing on his motion, defendant argued that, pursuant to MCL 28.723(1)(b), he would only be required to register as a sex offender if, on October 1, 1995, he had still been incarcerated for the CSC I conviction. Defendant argued that on that date he was incarcerated for subsequent offenses for which he was serving consecutive terms. The trial court, without articulating its rationale, permitted defendant to withdraw his plea and scheduled a trial in the case. The trial court further authorized defendant to "pursue the validity" of his inclusion on the SOR.

On February 20, 2004, the trial court heard further arguments on the issue. At this hearing, the prosecution asserted that under MCL 791.234(3), defendant could only have been discharged from his attempted CSC I conviction after the maximum terms of all of his consecutive sentences were served. Therefore, the prosecution asserted, defendant's attempted

CSC I conviction was not discharged until September 25, 1996, and defendant was properly registered as a sex offender because he was incarcerated for attempted CSC I on October 1, 1995. The trial court disagreed with the prosecution's position and ruled that MCL 791.234(3)

> was written to give the parole board jurisdiction over the prisoner for purposes of parole. It was not written to deal with this registry issue, and this Court will take the position that if the legislature only wanted to include those defendants who were still incarcerated for sex crimes, that if they wanted to include all CSC convicts who were in prison for unrelated offenses, they would have said so in 28.723(1)(B)[sic], they would have said so.

Accordingly, the trial court determined that because defendant was not required to be registered as a sex offender on October 1, 1995, the charge for failure to register had to be dismissed. The trial court also directed the MDOC to remove defendant's name from the SOR.

III. Analysis

A. Guilty Plea

The first issue requiring our resolution is whether we should reverse the trial court's order allowing defendant to withdraw his guilty plea. Generally, a decision to allow a defendant to withdraw a guilty plea is reviewed for an abuse of discretion. *People v Davidovich*, 463 Mich 446, 451; 618 NW2d 579 (2000). An abuse of discretion exists when an unprejudiced person, considering the facts acted upon by the trial court, would conclude that there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Additionally, we review de novo the trial court's decision as to the meaning of a statute. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

We have previously held that "[t]here is no absolute right to withdraw a guilty plea once the trial court has accepted it." *People v Patmore*, 264 Mich App 139, 149; 693 NW2d 385 (2004). However, pursuant to MCR 6.310(B), a trial court may permit a defendant to withdraw an accepted guilty plea before sentencing if doing so is "in the interest of justice . . . ." Making this determination involves a two-step process. First, defendant must establish a '"fair and just reason for withdrawal of the plea.'" *People v Wilhite*, 240 Mich App 587, 597; 618 NW2d 386 (2000), quoting *People v Jackson*, 203 Mich App 607, 611; 513 NW2d 206 (1994). "If [the] defendant meets that burden, then the prosecution has the burden of showing that substantial prejudice would result from allowing withdrawal of the plea." *Patmore, supra* at 150.

i. Fair and Just Reason

In his motion, defendant argued that a fair and just reason for allowing him to withdraw his plea was that there was no legal basis to support his plea, since MCL 28.723(1)(b) did not apply to him as a matter of law. At the initial hearing, the trial court granted the motion without explanation, but at a later continued hearing on defendant's motion, the trial court held that the MDOC should remove defendant's name from the SOR on the basis that defendant's name should never have been listed:

> The statute at MCL 28.723(B) [sic] makes a cutoff, a date, October 1, 1995. In Mr. McLaurin's case he was convicted of a sex charge in 1985, ten years previously. He was sentenced to a five-year maximum and technically finished his five years on that charge. His imprisonment was extended because of other criminal activity, and as a result of the extension, he was put on the registry list.
>
> The prosecutor relies on MCL 791.234(3) for the proposition that he was still incarcerated for the sex charge even though his maximum date was well past. This court does not agree with the prosecutor's interpretation. That statute was written to give the Department of Corrections, it was written to give the parole board jurisdiction over the prisoner for purposes of parole. It was not written to deal with this registry issue, and this court will take the position that if the legislature only wanted to include those defendants who were still incarcerated for their sex crimes, that if they wanted to include all CSC convicts who were in prison for unrelated offenses, they would have said so in 28.723(1)(B) [sic], they would have said so. They would have talked about extensions.
>
> And I understand the prosecutor wants the court to read that statute in conjunction with the parole statute, but I don't need to do that because I'm taking the position that the sex registry statute had that choice [sic] and did not make that choice [sic], and therefore, [defense counsel's] motion is correct and I will grant it.

Although the trial court did not articulate at the first hearing a reason for granting defendant's motion to withdraw his plea, the court's conclusion at the second hearing–that defendant was never supposed to be on the list–was the same reason proffered by defendant for withdrawing his plea. We therefore take it to be the trial court's rationale as well.

Obviously not any reason offered by a defendant will be sufficient to allow withdrawal of a guilty plea based on the interests of justice. Nonetheless, we have previously held that when a defendant can establish a valid defense to the charge, the interests of justice may be satisfied. See, e.g., *People v Thew*, 201 Mich App 78, 96; 506 NW2d 547 (1993), and *Jackson*, *supra* at 613. The question is whether this case falls within the confines of these cases, i.e., whether defendant has shown the existence of a valid defense to the crime charged.

In *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263; 696 NW2d 646, amended 473 Mich 205 (2005), our Supreme Court recently reiterated the fundamental canons of statutory interpretation that we will apply here:

> Fundamental canons of statutory interpretation require us to discern and give effect to the Legislature's intent as expressed by the language of its statutes. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). If such language is unambiguous, as most such language is, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459; 663 NW2d 447 (2003), "we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto*, *supra* at 402. [*Id.* at 281.]

MCL 28.723(1)(b) states that the following individuals are required to register as sex offenders:

> An individual convicted of a listed offense on or before October 1, 1995 if on October 1, 1995 he or she is on probation or parole, committed to jail, committed to the jurisdiction of the department of corrections, or under the jurisdiction of the juvenile division of the probate court or the department of social services *for that offense* or is placed on probation or parole, committed to jail, committed to the jurisdiction of the department of corrections, placed under the jurisdiction of the juvenile division of the probate court or family division of the circuit court, or committed to the department of social services or family independence agency after October 1, 1995 *for that offense*. [MCL 28.723(1)(b) (emphasis added).]

Under the plain language set forth above, a person convicted of a listed offense on or before October 1, 1995, must register if he is, *inter alia*, committed to the MDOC "for that offense" on October 1, 1995. There is no dispute that defendant had been convicted of a listed offense[1] before October 1, 1995, and that on October 1, 1995, he was committed to the jurisdiction of the MDOC. There is likewise no dispute that defendant's maximum release date for the "listed offense" was in 1990, five years before October 1, 1995. Thus, because defendant was not committed to the MDOC on October 1, 1995, for the listed offense, he was not required to be registered as a sex offender. The plain language of the statute compels this conclusion.[2]

The prosecutor does not contest this reading of the plain language of MCL 28.723(1)(b). Instead, he argues that MCL 28.723(1)(b) must be read together with the provisions of MCL 791.234(3), and if read that way, on October 1, 1995, defendant was committed to the jurisdiction of the MDOC for the listed offense. MCL 791.234(3) states:

> If a prisoner other than a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, *the parole board has jurisdiction* over the prisoner *for purposes of parole* when the prisoner has served the total time of the added minimum terms, less the good time and disciplinary credits allowed by statute. The maximum terms of the sentences shall be added to compute the new maximum term *under this subsection*, and *discharge* shall be issued only after the total of the maximum sentences has been served less good time and disciplinary credits, unless the prisoner is paroled and discharged upon satisfactory completion of the parole. [Emphasis added.]

We agree with the trial court that these two statutory provisions do not relate to the same subject matter, nor do they share a common purpose. *People v Webb*, 458 Mich 265, 274; 580 NW2d

[1] MCL 28.722(e)(ix) includes MCL 750.520b as a listed offense.

[2] Contrary to the dissent's assertion, we do not rely upon the second clause of MCL 28.723(1)(b), but instead the first clause, since defendant was undisputedly convicted of a listed offense prior to October 1, 1995, and was incarcerated on that date.

884 (1998) (when two statutes "arguably relate to the same subject or share a common purpose, the statutes are in pari materia and must be read together as one law . . . .").

Generally speaking, the SORA is "intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose" a danger to society because of their criminal sexual acts. MCL 28.721a. More specifically, MCL 28.723 relates to individuals convicted of certain sex crimes and the determination of which of those individuals are required to register under the SORA. To the contrary, MCL 791.234(3) relates to the jurisdiction of the parole board to determine when prisoners subject to consecutive sentences may be discharged. While the parole guidelines themselves may relate to public safety, MCL 791.233e(1), just as the SORA does, MCL 28.721a, the statute setting forth the jurisdiction of the parole board is not concerned with public safety itself but with clarifying when the parole board has the right to determine a prisoner's potential threat to public safety. Furthermore, the SORA deals with a specific class of individuals–those previously convicted of certain sex offenses–while MCL 791.234(3) addresses the jurisdiction for the parole board to determine when a prisoner serving consecutive sentences for any offenses can be discharged from prison. Thus, we conclude that the statutes do not relate to the same class of persons or share a common purpose. Therefore, they are not in pari materia. *Webb*, *supra* at 274.

Nevertheless, even if we were to construe the statutes together, the prosecution's assertion that defendant was committed to the jurisdiction of the MDOC for his attempted CSC I conviction on October 1, 1995, fails. This Court addressed a related issue of statutory construction in *Lickfeldt v Dep't of Corrections*, 247 Mich App 299; 636 NW2d 272 (2001). In *Lickfeldt*, the plaintiff was originally sentenced to two concurrent terms of 3½ to 14 years for uttering and publishing, MCL 750.249. *Id*. at 301. While incarcerated for this conviction, she was sentenced to a mandatory consecutive sentence for prison escape, MCL 750.193. *Id*. She was subsequently sentenced to additional consecutive sentences for crimes committed while she was on parole. *Id*. After serving the maximum fourteen-year period on her original sentences, the plaintiff sought a writ of mandamus ordering termination of those sentences, so that her security level could be reduced. *Id*.

The *Lickfeldt* Court held that because MCL 750.193 specifically states that the mandatory consecutive sentence for a prison escape "shall be served after the termination, pursuant to law, of the sentence or sentences then being served," the MDOC was required to terminate the plaintiff's sentences for her original crimes before she served her sentence for prison escape. *Lickfeldt*, *supra* at 302-303 (emphasis omitted). The Court rejected the defendant's argument that MCL 791.234 required them to maintain the plaintiff's sentence string in its entirety. *Id*. In doing so, the Court noted the distinction between the term "discharge" as used in MCL 791.234 and the use of the term "termination" in MCL 750.193. *Id*. at 304. The Court concluded that "prisoners are 'discharged,' and sentences are 'terminated.'" *Id*. However, the Court went on to note that MCL 768.7a, "which mandates consecutive sentences for crimes committed by a person who has escaped from prison or who is on parole," refers to the "expiration" of sentences rather than their "termination." *Id*. at 305-306. The Court concluded that "all of [the] plaintiff's sentences, except for the original sentences she was serving when she was convicted of prison escape, merely 'expire' as they are completed, effectively moving the string along from sentence to sentence." *Id*. at 306. The Court further distinguished between sentences that expire as they

are completed, but may be terminated early once the minimum terms have been served pursuant to MCL 791.234(5), and the plaintiff's original sentences which the MDOC was required to terminate pursuant to the prison escape statute, MCL 750.193(1), once the plaintiff served the maximum on her original sentences. *Id*.

Under *Lickfeldt*, on October 1, 1995, defendant had not been discharged from the jurisdiction of the MDOC, but his sentence for attempted CSC I had expired because he had served his maximum sentence for that conviction prior to that time, "moving the string along" to his remaining consecutive sentences. The MDOC was not required to "terminate" defendant's original sentence because his subsequent sentences were not imposed for a violation of the prison escape statute, MCL 750.193(1), or other similar statute. *Lickfeldt*, *supra* at 306. However, the "expiration" of the sentence for attempted CSC I indicates that defendant was no longer under the jurisdiction of the MDOC "for that offense," but instead was under the jurisdiction of the MDOC for service of his consecutive sentences for assault and possession of cocaine. Accordingly, defendant was not required to be registered as a sex offender, MCL 28.723(1)(b), and the trial court did not abuse its discretion in permitting defendant to withdraw his guilty plea for attempted failure to register as a sex offender. MCR 6.103(B). The trial court then correctly dismissed the charge against defendant, because as he was not "an individual required to be registered under" the SORA, there was no basis in law for the charge to be brought against him. MCL 28.729(1).

ii. Substantial Prejudice

As noted earlier, the trial court initially offered no explanation in support of its decision to allow defendant to withdraw his guilty plea, but did provide guidance on its decision at the subsequent hearing. However, none of its reasons went to a lack of substantial prejudice to the prosecution. Normally this would be grounds for at least a remand to allow the trial court to decide the issue. See *Patmore*, *supra* at 150. Unlike the situation in *Patmore*, however, the prosecution in this case never argued to the trial court that the people would be prejudiced by a withdrawal. And, no argument to that effect is made to this Court, so it is waived.[3] *Oneida Twp v Eaton Co Drain Comm'r*, 198 Mich App 523, 526 n 3; 499 NW2d 390 (1993).

B. Removal From List

The prosecution also argues that the trial court erred in requiring the MDOC to remove defendant's name from the SOR. This issue presents a question of law that is reviewed de novo on appeal. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). See also *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995) (noting that jurisdictional questions are reviewed de novo). We conclude that the trial court erred by ordering the MDOC to remove defendant's name from the SOR because the proper method for removing one's name from the SOR is to request removal from the

[3] We note that there were no delays in seeking to withdraw the plea, and the basis for withdrawal has no relation to the consequences emanating from the plea. *People v Osaghae*, 460 Mich 529, 533; 596 NW2d 911 (1999).

Michigan Department of State Police (hereinafter MSP), and if that fails, to then file a complaint for mandamus against the MSP.

The specific argument put forth by the prosecution is that the trial court erred by ordering the MDOC to remove defendant's name from the SOR because only the Court of Claims may assert jurisdiction over actions against state officials for actions performed in their official capacities. MCL 600.6419; *Hamilton v Reynolds*, 129 Mich App 375, 378; 341 NW2d 152 (1983). Defendant, however, correctly asserts that the aforementioned rule does not apply to actions for mandamus, MCL 600.4401; MCR 3.305; *People v Young* (*On Remand*), 220 Mich App 420, 433; 559 NW2d 670 (1996). Defendant therefore requests that this case be remanded so that such an action may be pursued.

The SORA does not set forth a method by which a person wrongly placed on the SOR may seek to have his name removed. Michigan courts have also failed to describe the method by which a person wrongfully placed on the SOR should seek relief.[4]

We conclude that the trial court erred in issuing an order instructing the MDOC to remove defendant's name from the SOR, because the proper method for removing one's name from the SOR is to request removal from the MSP, and if such action fails, to then file a complaint for mandamus against the MSP. An action for mandamus

> is proper where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial and involves no exercise of discretion or judgment, and (4) no other remedy exists, legal or equitable, that might achieve the same result. [*Lickfeldt*, *supra* at 302.]

In this case, defendant had a clear legal right to have his name removed from the SOR. Further, although it was the MDOC that incorrectly listed defendant on the SOR pursuant to MCL 28.724(2)(c), the MSP is responsible for maintenance of the SOR, including "deletions from registrations . . . ." MCL 28.728(1)-(6). Accordingly, the MSP has a clear legal duty to remove defendant's name from the SOR for the offense for which he was convicted prior to October 1, 1995. The removal of defendant's name from the registry for that conviction is also a ministerial act. However, defendant has not yet shown that no other remedy exists.

Accordingly, defendant has not yet shown that he is entitled to a writ of mandamus, but if in the future he can show that the MSP refuses to remove his name from the SOR for the listed offense which he committed before October 1, 1995, he will be able to establish that "no other remedy exists, legal or equitable, that might achieve the same result," and a writ of mandamus will be appropriate. *Lickfeldt*, *supra* at 302.

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[4] The State of Michigan's website indicates that persons who believe the online version of the SOR contains an error "should contact the law enforcement agency where the offender's listed address is located" to notify them of the error.

IV. Conclusion

We affirm the trial court's decision allowing defendant to withdraw his guilty plea and dismissing the case, but reverse the trial court's order requiring the MDOC to remove defendant's name from the SOR. We remand this case for further proceedings consistent with this opinion and we do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Christopher M. Murray