FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-659

THEOPHOLIS BRINSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Leon County.
Martin A. Fitzpatrick, Judge.

February 19, 2020

M.K. THOMAS, J.

Theopholis Brinson appeals the denial of his motions to dismiss his conviction and revocation of probation for failure to comply with the sexual offender registration requirement of section 943.0435, Florida Statutes (2017). He argues error because the trial court never designated him a sexual offender and failed to make a factual finding that there was a sexual component to his underlying false imprisonment conviction.[1] We disagree and affirm.

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[1] Brinson also argues that because he entered a plea agreement, the trial court erred in relying on the probable cause affidavit as opposed to strictly the Information to establish a factual predicate of a sexual component to his underlying false

Facts

In 2002, Brinson was charged with lewd or lascivious battery, aggravated battery, and false imprisonment. The Information set forth the following factual basis for the charges:

> Brinson did unlawfully engage in sexual activity with S.T., a person 12 years of age or older but less than 16 years of age, by vaginal penetration; did unlawfully commit a battery upon S.T. and by slamming her into a parked vehicle and choking her did intentionally or knowingly cause great bodily harm; did unlawfully forcibly, by threat, or secretly confine, abduct, imprison, or restrain another person, S.T. without lawful authority and against her will.

Brinson pleaded no contest to aggravated battery and false imprisonment. As part of the plea agreement, the State entered a nolle prosequi regarding the lewd or lascivious battery charge.

At the sentencing hearing, the trial court requested a factual basis for the plea and the State responded as follows:

> Mr. Brinson and the victim, S.T. were apparently friendly, had been friendly in the past. But on this date, Mr. Brinson -- on this date Mr. Brinson, by threat of doing physical harm to S.T. would not allow her to leave the residence, Mr. Brinson and his family's residence, scaring her by threats, and eventually by holding pieces of S.T. 's clothing against her will in order that she not leave the residence. Eventually S.T. escaped the residence. And after she escaped, an altercation between Mr. Brinson and S.T. occurred in the street, which caused S.T. to be slammed against a car doing some fairly severe injuries to her shoulder. Also, Your Honor, just for the record, count 1 of case 02-2811 is to be nol-prossed by the State at this time.

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imprisonment offense. This argument was not preserved for appellate review. *Carr v. State*, 156 So. 3d 1052, 1062 (Fla. 2015).

Brinson raised no objection to the State's factual predicate. The trial court accepted the plea and entered sentence.

After completing his sentence and while on release, Brinson violated probation and returned to prison for an additional sixty months. About six years after Brinson completed his prison sentence, the State charged Brinson with failure to report as a sexual offender. In response to the charge, Brinson filed two motions to dismiss, asserting the charge for failure to register was improper because: 1) he had never been designated a sexual offender by a court; 2) allowing the Florida Department of Law Enforcement (FDLE) to designate sexual offender status is unconstitutional; 3) automatic designation of sex offender status without a hearing violates due process; and 4) his underlying false imprisonment offense does not necessarily encompass a sexual component, and a hearing is required before designation of sexual offender status is appropriate.

In response, the State argued that the probable cause affidavit provided a factual basis for the plea and clearly established a sexual component to the underlying false imprisonment offense. Furthermore, even review of just the facts supporting the charges to which Brinson pleaded nolo contendere reveals that a sexual component was established—his withholding the victim's clothes to keep her from escaping his residence. At the hearing on the motions to dismiss, the trial court and the parties relied on the probable cause affidavit to set forth the facts of the underlying convictions and sentencing. Brinson raised no objection.

The probable cause affidavit detailed that Brinson forced the minor child into his residence,

> . . . . where inside he took condoms out of a brown bag that was in the kitchen and continued to carry the victim into his bedroom. In the bedroom, he threw the victim on the bed and forcibly removed her clothes except her bra. [Brinson] put a condom on and had (penis to vaginal) sexual intercourse with the victim. The victim stated [Brinson] refused to allow her to leave and forced her to have penis to vaginal intercourse with him a second time.

Eventually, the victim escaped the residence and fled into the street wearing only a bra.

The trial court denied Brinson's motions to dismiss, finding that a sexual component to the underlying false imprisonment conviction was established. After denial of the motions, Brinson pleaded no contest to failure to register as a sex offender and reserved the right of appeal as to the denial.

Legal Analysis

Our review of the trial court's denial of a motion to dismiss is de novo. *Parks v. State*, 96 So. 3d 474, 476 (Fla. 1st DCA 2012).

In 1997, Florida enacted the sexual offender registration statute. Ch. 97-299, § 8, Laws of Fla., eff. Oct. 1, 1997. Conviction of one of the statute's enumerated offenses automatically imposes upon a defendant both the status of sex offender and the registration requirements. *See* § 943.0435(1)(h)1.a.(I), Fla. Stat.; *Ames v. State*, 870 So. 2d 203, 204 (Fla. 1st DCA 2004). In 1998, the list of enumerated offenses was expanded to include kidnapping and false imprisonment, where the victim is a minor and the defendant is not the victim's parent. *See* §§ 787.01, 787.02, 943.0435(1)(h)1.a.(I), Fla. Stat. The offenses of kidnapping and false imprisonment do not necessarily contain a sexual component. *See* §§ 787.01, 787.02, Fla. Stat.

Brinson argues that to pass constitutional muster, the State must prove a sexual component to his underlying false imprisonment offense before he qualifies for sexual offender status and is subjected to the registration requirements. *See Raines v. State*, 805 So. 2d 999, 1003 (Fla. 4th DCA 2001). It is his contention that this required factual finding was never made.

Brinson relies on *State v. Robinson*, 873 So. 2d 1205 (Fla. 2004), for the proposition that a conviction for false imprisonment alone is insufficient to activate sexual offender status. Brinson argues that the State must also prove a sexual component to the underlying offense. We disagree. The facts of *Robinson* are readily distinguishable, and the holding does not stretch so broadly.

In *Robinson*, the Florida Supreme Court addressed a constitutional challenge to a different statute, section 775.21, Florida Statutes (The Florida Sexual Predators Act). *Id.* at 1207. Robinson was convicted of kidnapping a minor who was not his child. *Id.* at 1208. Although the State conceded that there was no sexual component to the offense, the trial court nonetheless designated him a "sexual predator" under the Act. *Id.* Robinson argued this automatic sexual predator designation, considering the State's concession of no sexual component to the kidnapping offense, was unconstitutional. *Id.* The Florida Supreme Court agreed and reversed the designation but carefully restricted its decision as follows:

> *We hold only that under the facts of this case, where the State concedes that that the crime contained no sexual element and the circumstances of the crime conclusively belie any sexual motive*, the designation of the defendant as a sexual predator—which then invokes the attendant statutory requirements and prohibitions-based solely on his conviction for kidnapping a minor not his child violates the defendant's right to due process of law.

Id. at 1217 (emphasis added).

Contrary to Brinson's argument, *Robinson* does not impose a burden on the State to prove a sexual component to any enumerated offense that by definition does not necessarily encompass a sexual element, before a defendant qualifies for "sexual offender" status under section 943.0435. Initially, *Robinson* addressed "designation" under the Florida Sexual Predators Act, not sex offender status and registration under section 943.0435. Although both statutes address public safety through imposition of specific requirements upon those defendants convicted of qualifying offenses, the two are separate and distinct.[2]

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[2] Statutory sexual offender notification and registration requirements are not intended to be punitive. They are designed to be remedial in nature by protecting the public from sexual offenders and protecting children from sexual activity. The information collected and disseminated as a result of sexual

To be declared a "sexual predator," the Act specifically requires designation by the trial court with written findings. *See* § 775.21(5), Fla. Stat. No such requirements are contained in section 943.0435, where "sex offender" status automatically attaches if the defendant is convicted of one of the enumerated offenses. *See* § 943.0435(1)(h)1, Fla. Stat. Brinson's argument improperly intertwines the automatic sexual offender status under section 943.0435 with the requirement of trial court designation and written findings mandated by the Act for sexual predator status.

The holding in *Robinson* is limited—a sexual predator designation is "unconstitutionally applied to a defendant who is convicted of a qualifying offense that does not contain a sexual element, such as false imprisonment or kidnapping, where it is *undisputed by the State* that the facts of the particular qualifying offense do not contain a sexual component." *See Munroe v. State*, 69 So. 3d 1044, 1045 (Fla. 2d DCA 2011) (emphasis in original) (citing *Robinson*, 873 So. 2d at 1217). Thusly, where the defendant objects to a sexual predator designation due to the absence of a sexual element and the *State disputes* such a contention—the designation is not unconstitutional unless the defendant proves the absence of a sexual component.

But Brinson is not appealing a designation under the Florida Sexual Predators Act. Instead, Brinson appeals sexual offender registration status under section 943.0435. And there is no concession by the State that the facts of his underlying offense lack a sexual component. Under section 943.0435, sexual offender registration status is automatic upon conviction of false imprisonment. There is no requirement for a trial court designation or written findings to activate the sexual offender status. To deactivate the automatically assigned sexual offender status, a defendant must challenge the assignment by asserting a lack of sexual predicate. If the State does not concede the absence of a sexual component, the defendant must carry the burden of proof for that deactivation. Here, Brinson failed to do so.

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offender status is information that, by law, the public is entitled to access. § 943.0435, Fla. Stat.

The record demonstrates that Brinson's false imprisonment charge contained multiple sexual elements. The factual predicate provided to the trial court in support of the plea agreement indisputably involved a sexual component. Brinson pleaded nolo contendere to the false imprisonment and aggravated battery charges. At the sentencing hearing, Brinson raised no objection to the State's recitation of the factual basis for the plea agreement. Thus, he may not now challenge the facts as disputed. "Questions of fact cannot be reserved on appeal upon a plea of nolo contendere." *Falco v. Sate*, 407 So. 2d 203, 207 (Fla. 1981) (citing *Martinez v. State*, 368 So. 2d 338 (Fla. 1978)). Only questions of law dispositive of the cause may be reserved. *See Brown v. State*, 376 So. 2d 382, 384 (Fla. 1979).

Brinson's argument that he was never designated a sex offender by a court and that the statute unconstitutionally delegates such a decision to the executive branch—in this instance FDLE—also fails. As this court has previously clarified, qualification as a "sexual offender" under section 943.0435 turns on "a single issue—whether one has been 'convicted of committing, or attempting, soliciting, or conspiring to commit' any of a number of specified offenses." *Ames*, 870 So. 2d at 204. Brinson's false imprisonment conviction is one of the enumerated offenses. Section 943.0345(1)(a)1. provides that if a defendant meets the definition of "sexual offender," certain registration requirements are automatically imposed. FDLE does not determine sexual offender status by its enforcement of the registration requirements.

Finally, we have previously rejected Brinson's argument that by not providing a hearing before "sexual offender" status attaches, section 943.0435 violates a defendant's right to procedural due process under article I, section 9, of the Florida Constitution. *See Ames*, 870 So. 2d at 204; *Smith v. State*, 871 So. 2d 296, 297 (Fla. 1st DCA 2004). The only consideration for determining whether Brinson qualified as a "sexual offender" was whether he had been convicted of one of the offenses enumerated in section 943.0435(1)(a)1. Brinson's satisfaction of this requirement *was* determined when he pleaded nolo contendere to false imprisonment. However, he argues that he was entitled to a

hearing on "whether [he] should suffer the stigma of being classified as a sex offender and be subjected to the threat of criminal penalties for failure to strictly comply with all the notification and registration requirements of the statute" and "whether he is a danger to society and likely to reoffend." But the Legislature did not recognize either stigma or societal danger as relevant for purposes of "sexual offender" status under section 943.0435. *See Johnson v. State,* 795 So. 2d 82, 89 (Fla. 5th DCA 2000).

Because Brinson is unable to demonstrate that he is entitled to relief, we AFFIRM.

ROWE and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Andy Thomas, Public Defender, and Justin F. Karpf, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Frank X. Moehrle, Jr., Assistant Attorney General, Tallahassee, for Appellee.