

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KENT ALLEN LEE,

Defendant-Appellee.

FOR PUBLICATION

June 17, 2010

9:05 a.m.

No. 283778

Allegan Circuit Court

LC No. 05-14491-FH

Before: OWENS, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

In this Third Degree Child Abuse (MCL 750.136b) case, defendant Kent Allen Lee appeals by leave granted¹ from the circuit court's grant of the prosecutor's motion to require defendant to register as a sex offender under Michigan's Sex Offenders Registration Act (SORA), MCL 28.721, *et seq.* We affirm.

I. FACTS

Defendant entered a plea of no contest to third degree child abuse (a two-year misdemeanor) as a second habitual offender. The circuit court accepted the no contest plea. Defendant was sentenced to 5 years' probation, with the first ten weekends to be served in jail. At sentencing, the prosecutor argued that she had received information from the victim's family suggesting that the offense should result in defendant registering as a sex offender. The circuit court judge left "open to the prosecutor to set this matter for a hearing at which time if they wish we'll listen to testimony concerning what the nature of this particular act was so the Court can have a better basis to make a decision as to whether or not this should be a sex registry offense."

¹ Defendant originally filed an application for delayed leave to appeal with this Court on February 19, 2008. This Court denied the motion on April 18, 2008 for "lack of merit on the grounds presented." On October 21, 2009, our Supreme Court, in lieu of granting leave to appeal, remanded to this Court for consideration as on leave granted.

Over a year after defendant's original sentencing, the prosecutor filed a motion to order that defendant be required to register as a sex offender. After hearing testimony on this motion, the circuit court ordered that defendant register as a sex offender under SORA.

II. ANALYSIS

Defendant argues that the circuit court erred by reserving the ability to require defendant to register as a sex offender. We disagree.

The construction and application of SORA presents a question of law that the Court reviews de novo on appeal. *People v Golba*, 273 Mich App 603, 605, 729 NW2d 916 (2007).

Michigan's SORA requires an individual who is convicted of a listed offense after October 1, 1995, to be registered under its provisions. MCL 28.723(1)(a); *People v Haynes*, 281 Mich App 27, 30; 760 NW2d 283 (2009). The term "listed offense" is defined by MCL 28.722(e) to not only include violations of specific statutes, but also two "catchall" provisions that require registration:

Any other violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than 18 years of age. [MCL 28.722(3)(xi)]

and

An offense substantially similar to an offense described in subparagraphs (i) to (xiii) under a law of the United States, any state, or any country or under tribal or military law. [MCL 28.722(3)(xiv)]

Plaintiff urges this Court to view SORA registration not as a punishment or a part of the sentence, but as "a remedial regulatory scheme furthering a legitimate state interest of protecting the public, *Golba*, 273 Mich App at 620. Indeed, circuit courts have been given a great deal of leeway in the application of SORA. The sentencing court "may consider facts concerning uncharged offenses, pending charges, and even acquittals, provided that the defendant is afforded the opportunity to challenge the information and, if challenged, it is substantiated by a preponderance of the evidence." *Id.* at 614.

In *In re Ayres*, 239 Mich App 8; 608 NW2d 132 (1999), this Court had to determine whether requiring juveniles who had been convicted of certain specified sex offenses to register as sex offenders violated Michigan's prohibition against cruel or unusual punishment. This Court found instructive "two recent federal court decisions that have held that the registration and notification requirements of Michigan's Sex Offenders Registration Act, as applied to adult offenders, do not impose 'punishment' under the Eighth Amendment of the United States Constitution." *Id.* at 14. This Court quoted *Doe v Kelley*, 961 F Supp 1105, 1109 (WD Mich, 1997):

"On its face, the notification scheme is purely regulatory or remedial. It imposes no requirement on the registered offender, inflicts no suffering, disability or restraint. It does nothing more than create a mechanism for easier public access to

compiled information that is otherwise available to the public only through arduous research in criminal court files.” [Ayres, *supra* at 15.]

This Court also quoted the following language from *Lanni v Engler*, 994 F Supp 849, 854 (ED Mich, 1998):

“Dissemination of information about a person's criminal involvement has always held the potential for negative repercussions for those involved. However, public notification in and of itself has never been regarded as punishment when done in furtherance of a legitimate government interest . . . The registration and notification requirements can be more closely analogized to quarantine notices when public health is endangered by individuals with infectious diseases . . . Whenever notification is directed to a risk posed by individuals in the community, those individuals can expect to experience some embarrassment and isolation. Nonetheless, it is generally recognized that the state is well within its rights to issue such warnings and the negative effects are not regarded as punishment.” [citation omitted].

Therefore, case law clearly supports the circuit court’s imposition of SORA registration in a case such as defendant’s, and even allows for presentation of additional proofs if the evidence of record is insufficient to reach a determination on the matter. *People v Althoff (On Remand)*, 280 Mich App 524; 760 NW2d 764 (2008) (*Althoff II*). Judicial fact-finding outside of the avenues of trial or admissions does not violate due process because SORA is a remedial regulatory scheme that furthers a legitimate state interest of public safety, and compliance with the statute is not a punishment. *Id.* at 540. Therefore, SORA registration is not a part of defendant’s sentence, nor is it a condition of probation; rather it is ministerial function designed to protect the public from sex offenders.

The issue then becomes procedural: when must the circuit court make its decision requiring SORA registration? Current case law and statutes are silent on this issue. However, we conclude that as long as the circuit court has jurisdiction over defendant’s case, it may order registration under SORA.

While case law clearly states that SORA registration is not a condition of probation, there is ample case law that stands for the proposition that once a defendant has been discharged from probation, a trial court no longer has jurisdiction over that defendant. See *People v Hodges*, 231 Mich 656, 660-661; 204 NW 801 (1925); *People v Ritter*, 186 Mich App 701, 704; 464 NW2d 919 (1991); *People v Valentin*, 220 Mich App 401, 407-408; 559 NW2d 396 (1996). Even though SORA registration is regulatory and not a punishment, there must be an outside limit to its application. The most logical limit is at the end of the trial court’s jurisdiction over the case. This way defendants are not left wondering whether they may be subject to sex offender registration at any time, even years after the commission of their crimes.

Because defendant in the present case remains on probation, the trial court did not commit procedural error when it ordered SORA registration over a year after imposing its sentence.

Next, defendant argues that the trial court's factual findings were insufficient to establish that defendant committed a "violation of a law ... that by its nature constitutes a sexual offense against a minor" for purposes of MCL 28.722(e)(xi). We disagree.

In *Golba*, 273 Mich App at 611, this Court concluded, "that the underlying factual basis for a conviction governs whether the offense by its nature constitutes a sexual offense against an individual who is less than 18 years of age. In other words, the particular facts of a violation, and not just the elements of the violation, are to be considered. *Althoff II*, 280 Mich App at 534. This determination can relate to uncharged conduct if supported by a preponderance of the evidence. *Golba*, 273 Mich App at 613-614.

Defendant was charged originally with Criminal Sexual Conduct Second Degree (CSC) and pled no contest to Child Abuse Third Degree. MCL 750.520a(q) defines sexual contact as:

(q) "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

(i) Revenge.

(ii) To inflict humiliation.

(iii) Out of anger.

Plaintiff argues that defendant's own testimony supports a finding that defendant intentionally touched the victim's penis in order to inflict humiliation or out of anger. At the evidentiary hearing the judge found that there indeed had been sufficient facts of record to support a requirement of SORA registration.

At sentencing, the judge stated that defendant's crime was "a rather abusive assault on a young man's self-dignity and self value." Random House Webster's College Dictionary, Second Edition, defines "humiliate" as, "to cause (a person) a painful loss of pride, self-respect, or dignity." Therefore, the original trial court already, in essence, found that defendant had inflicted humiliation upon the victim. Defendant himself acknowledged that he flicked the victim's penis as a form of "bullying" and that the child cried as a result. Defendant also acknowledged that he was frustrated that the child would not put his pajamas on, and that, as a result, defendant flicked his penis in order to get him to cooperate. We conclude that these facts demonstrate an intentional touching the victim's intimate parts in a sexual manner for the purpose of inflicting humiliation. Therefore, we affirm the circuit court's order requiring defendant to register under SORA.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Michael J. Talbot