STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	FOR PUBLICATION August 5, 2014 9:05 a.m.
v	No. 313178 Delta Circuit Court
FRANCIS STEVEN MINEAU, Defendant-Appellee.	LC No. 12-008604-FH

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

BOONSTRA, J.

The prosecution appeals by leave granted[1] the trial court's order denying its request to order defendant, Francis Steven Mineau, to vacate his residence within the "student safety zone" as a term of probation as a registered sex offender in accordance with MCL 28.735(1) under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.* We reverse and remand for resentencing.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

At all relevant times, defendant's residence was located approximately 191 feet from an elementary school. Pursuant to SORA, because he lived within 1,000 feet of the school, he lived within a "student safety zone." MCL 28.733(f). In 1999, he was apparently[2] convicted of indecent exposure involving two young girls who were walking to school. See MCL 750.335a(2)(b). Consequently, he was required to register as a sex offender, but at the time, SORA did not require him to vacate his residence. In 2005, the Legislature amended SORA by enacting MCL 28.735, which, inter alia, provides that individuals who are required to be registered under SORA "shall not reside within a student safety zone." MCL 28.735(1), as enacted by 2005 PA 121 (effective January 1, 2006). However, notwithstanding his 1999

[1] *People v Francis Steven Mineau*, unpublished order of the Court of Appeals, entered June 21, 2013 (Docket No. 313178).

[2] The exact nature of defendant's prior conviction was not specified in the record before us, and we have not been provided with a copy of defendant's presentence investigation report. Nevertheless, defendant has not disputed the prosecutor's description of the 1999 incident.

conviction, defendant was not required to vacate his residence when the statute became effective, because he "was residing within that student safety zone on January 1, 2006." MCL 28.735(3)(c). In 2011, defendant was removed from the sex offender registry.

On May 15, 2012, defendant exposed himself to minor elementary school children who were passing his house in a school bus. Defendant was charged with, and pleaded guilty to, aggravated indecent exposure, MCL 750.335a(2)(b). As a consequence, defendant was required to again register as a sex offender. Defendant was sentenced, in relevant part, to probation subject to a number of conditions, including placing an opaque fence around his property. Relevant to the instant appeal, the prosecutor argued that pursuant to MCL 28.735(1), defendant was required to vacate his residence within the student safety zone, and to relocate to more than 1,000 feet from school property. The trial court concluded that because defendant resided within the student safety zone on January 1, 2006, the exception set forth in MCL 28.735(3)(c) applied to him. The trial court accordingly declined to order defendant to vacate his residence as a term of probation. This appeal followed.

II. STANDARD OF REVIEW

"We review for an abuse of discretion a trial court's decision to set terms of probation." *People v Malinowski*, 301 Mich App 182, 185; 835 NW2d 468 (2013). An abuse of discretion occurs when the trial court's decision falls outside the principled range of outcomes. *Id*. Additionally, an error of law may lead a trial court to abuse its discretion. See *Donkers v Kovach*, 277 Mich App 366, 369; 745 NW2d 154 (2007). We review de novo as a question of law an issue of statutory interpretation. *People v Anderson*, 298 Mich App 178, 181; 825 NW2d 678 (2012).

III. ANALYSIS

MCL 28.735(1) states that "[e]xcept as otherwise provided . . . an individual required to be registered . . . shall not reside within a student safety zone." Here, it is not disputed that unless an exception applies, MCL 28.735(1) would require defendant, as a registered sex offender living in a student safety zone, to vacate his residence. However, the statute provides exceptions to the requirement found in MCL 28.735(1) in certain instances. In pertinent part, MCL 28.735(3) provides that:

> (3) This section does not apply to any of the following:
>
> * * *
>
> (c) An individual who was residing within that student safety zone on January 1, 2006. However, this exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone.

As noted, defendant was residing in his current residence on January 1, 2006. Consequently, pursuant to the *first* sentence of MCL 28.735(3)(c), defendant would not be required to vacate his residence. However, the applicability of the *second* sentence is at issue here. It is equally undisputed that "contact" need not be direct and physical. The trial court properly, if implicitly, concluded that defendant's conduct in the instant offense had constituted a kind of "contact."

The relevant inquiry is whether the "exception to the exception" set forth in the second sentence of MCL 28.735(3)(c) can be satisfied by the very conduct that causes an individual to have to register as a sex offender, or whether it can only be satisfied by subsequent conduct. In other words, does the Legislature's use of the phrase "initiates or maintains contact" include a temporal component that cannot be satisfied by the conduct that comprised the current offense, but that can only be satisfied by subsequent conduct?

We do not find such a temporal component in the language used by the Legislature in MCL 28.735(3)(c). What the Legislature was addressing was its heightened concern regarding that sub-set of sex offenders whose conduct is directed at minors and, in particular, minors within a student safety zone. Consequently, in recognition of the fact that the first sentence of MCL 28.735(3)(c) provides a general exception for sex offenders (of any type) who were residing within a student safety zone on January 1, 2006, the Legislature added the second sentence of MCL 28.735(3)(c) to render that exception wholly inapplicable to "an individual who initiates or maintains contact with a minor within that student safety zone."

The language used by the Legislature does not, as defendant suggests, limit the "exception to the exception" to conduct that occurs *after* an individual is required to register as a sex offender. To the contrary, the Legislature provided that the exception set forth in the first sentence of MCL 28.735(3)(c) simply has no application in the case of an individual who has contact with a minor in a student safety zone. The suggested temporal component would, in essence, grant defendant a "free pass," but it is one that we find the Legislature did not intend by the plain language of the statute.[3]

Accordingly, we hold that the statutory language does not limit the "exception to the exception" to conduct that occurs *after* an individual is required to register as a sex offender. To the contrary, the Legislature provided that the exception set forth in the first sentence of MCL 28.735(3)(c) simply has no application in the case of an individual who has contact with a minor in a student safety zone.

This Court's decision in *People v Zujko*, 282 Mich App 520; 765 NW2d 897 (2008), is not to the contrary. In *Zujko*, this Court held that "MCL 28.735(1) and MCL 28.735(3)(c), taken together, mean that a registered sex offender shall not reside in a student safety zone unless the offender resided in that zone as of January 1, 2006." *Id*. at 523. In discussing the word "individual" in the context of MCL 28.735(3)(c), this Court stated that "if such an individual engages in any contact with a minor, the individual loses the benefit of the [exception] and must move his or her residence within 90 days pursuant to [MCL 28.735(4)]." *Id*. at 524. *Zujko* thus merely held that the exception set forth in the first sentence of MCL 28.735(3)(c) applied to *any*

[3] We similarly find no temporal component in the Legislature's use of the word "required" in MCL 28.735(1). The Legislature could have prohibited only those individuals who were required to register before committing a current offense from residing in a student safety zone. It did not do so, however. Rather, by the plain language of the statute, defendant is, by virtue of his current offense, "an individual required to be registered" under SORA. He is therefore prohibited under that section from residing in the student safety zone.

individual who resided in the student safety zone as of January 1, 2006, thereby rejecting the prosecution's position that MCL 28.735(3)(c) also required that the individual have been a registered sex offender as of that date. The Court's holding did not require interpretation of the second sentence of MCL 28.735(3)(c), because the defendant in that case was not charged with, or required to register as a sex offender because of, any "contact with a minor within th[e] student safety zone." MCL 28.735(3)(c).

Nor does the interplay between MCL 28.735(3)(c) and MCL 28.735(4) require a different result. MCL 28.735(4) states:

> (4) An individual who resides within a student safety zone and who is subsequently required to register under article II shall change his or her residence to a location outside the student safety zone not more than 90 days after he or she is sentenced for the conviction that gives rise to the obligation to register under article II. However, this exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone during the 90-day period described in this subsection.

While MCL 28.735(4) was not directly at issue in *Zujko*, the Court addressed its interplay with MCL 28.735(3)(c) in dicta,[4] as follows:

> Subsection 4 gives an individual who resides in a student safety zone and who becomes a registered sex offender 90 days to relocate outside the zone. A reading of MCL 28.735(4) and MCL 28.735(3)(c) indicates that an individual who falls under the 3(c) exemption would not be compelled to comply with the requirement of subsection 4. However, an individual who did not meet the 3(c) requirement, i.e., he or she did not reside in a school safety zone before January 1, 2006, would be required to move his or her residence within 90 days pursuant to subsection 4. [*Zujko*, 282 Mich App at 523-524.]

Subsection 4 thus generally affords to an individual who is required to move from a student safety zone pursuant to MCL 28.735(1) a period of up to 90 days in which to do so. As the Court in *Zujko* noted, an individual who falls under the 3(c) exemption is not required to move from the student safety zone, and therefore subsection 4 does not apply to that individual. But "an individual who did not meet the 3(c) requirement, i.e., he or she did not reside in a school safety zone before January 1, 2006, would be required to move his or her residence within 90 days pursuant to subsection 4." *Id*. at 523-524. What the Court in *Zujko* did not address, even in dicta, was the effect, if any, of subsection 4 where the second sentence of MCL 28.735(3)(c) applied. That again is because the defendant in *Zujko* had not engaged in any "contact with a minor within th[e] student safety zone." MCL 28.735(3)(c).

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4 In arguing that an individual did not fall within the MCL 28.735(3)(c) exception unless he or she was a registered sex offender as of January 1, 2006, the prosecution contended that the trial court's contrary interpretation would render MCL 28.735(4) nugatory. This Court rejected that position.

We conclude, consistent with *Zujko*, that like an individual to whom MCL 28.735(3)(c) does not apply (because the individual did not reside within the student safety zone as of January 1, 2006), an individual who generally does meet that MCL 28.735(3)(c) requirement, but to whom MCL 28.735(3)(c) is wholly inapplicable by virtue of the "exception to the exception" set forth in the second sentence of MCL 28.735(3)(c), is subject to MCL 28.735(4). He or she must therefore "change his or her residence to a location outside the student safety zone not more than 90 days after he or she is sentenced for the conviction that gives rise to the obligation to register under article II." MCL 28.735(4). However, as it did in MCL 28.735(3)(c), the Legislature has provided an exception where the individual "initiates or maintains contact with a minor within that student safety zone during the 90-day period." MCL 28.735(4). In that event, such an individual is not entitled to the benefit of the 90-day allowance that subsection 4 otherwise affords.

In other words, where, as here, the current offense required registration under SORA, see MCL 28.723(1)(a); MCL 28.722(k), MCL 28.722(s), and MCL 750.335a(2)(b), and the individual offender was not subject to an exception or, as here, the applicable exception was inapplicable, the individual generally would have a 90-day time period within which to change his or her residence. That is true even if, as here, the offense involved "contact with a minor within th[e] student safety zone." MCL 28.735(3)(c). However, if the individual "initiates or maintains contact with a minor within that student safety zone during the 90-day period," MCL 28.735(4), he or she loses the benefit of the 90-day period otherwise allowed to effect the change of residence.

Consequently, because defendant's current offense involved "contact with a minor within th[e] student safety zone," MCL 28.735(3)(c), the exception set forth in the first sentence of that subsection is inapplicable, and defendant must therefore vacate his residence within the student safety zone pursuant to MCL 28.735(1). Pursuant to MCL 28.735(4), he must do so within 90 days of his sentence. If he were to initiate or maintain contact with a minor within that student safety zone during that 90-day period, he would lose the benefit of that 90-day allowance.

We therefore find that the "exception to the exception" set forth in the second sentence of MCL 28.735(3)(c) is satisfied by the conduct of the instant offense that caused defendant to have to register as a sex offender, reverse the trial court's order denying plaintiff's request to order defendant to vacate his residence as a term of probation, and remand for resentencing with that added term of probation.

Reversed and remanded. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause