STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 6, 2008
v	No. 280563 Calhoun Circuit Court
MICHAEL BART MILESKI, Defendant-Appellant.	LC No. 2002-003738-FC

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was acquitted of two counts of criminal sexual conduct in the first degree (CSC I) (vaginal and oral penetration), and was convicted of one count of CSC I (anal penetration), MCL 750.520b. This Court reversed defendant's conviction and remanded for a new trial. *People v Mileski*, unpublished opinion per curiam of the Court of Appeals, issued January 5, 2007 (Docket No 248038). On remand, defendant entered a plea of no contest to a charge of assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced as a second habitual offender, MCL 769.10, to six to 15 years in prison. This Court granted defendant's application for leave to appeal. We affirm, but remand for correction of the presentence investigation report. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that since assault with intent to do great bodily harm less than murder is not a "listed offense" under the Michigan Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., the trial court erred in requiring him to register as a sex offender under the Act. We disagree.

A "listed offense" is defined at MCL 28.722(e) to include various offenses, as well as the following:

> 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(e)(xi)].

Defendant maintains that this provision does not apply because assault with intent to do great bodily harm less than murder, "by its nature", does not constitute a sexual offense. However, in *People v Golba*, 273 Mich App 603, 611; 729 NW2d 916 (2007), this Court concluded that for

purposes of assessing whether an offense, "by its nature," constitutes a "sexual offense," *the underlying factual basis* for the conviction should be examined. In that case, although the defendant was convicted of unauthorized access to computers, the record established that the unauthorized access involved viewing pornography with a 16 year old to whom the defendant had sent sexually explicit emails and with whom he had solicited sex. Accordingly, the *Golba* Court upheld the order requiring the defendant to register under the SORA. Similarly, in *People v Althoff* (*On Remand*), ___ Mich App___; ___ NW2d ___ (2008), this Court found *Golba* controlling and also concluded that it was appropriate to look at the facts, as opposed to the pure legal elements of assault GBH, in determining whether the defendant was required to register under the SORA.

Defendant also argues, however, that the factual basis for his plea established only the offense of assault with intent to do great bodily harm less than murder. He suggests that only the summary of the factual basis given at his plea hearing may be used in the determination. However, the parties stipulated that the factual basis for the plea included "the facts contained in Emmett Township Police Department Complaint No. 02-5190 and/or any hearings, trials, preliminary examinations or other matters that were prepared in connection with the case." The trial testimony alone established that the assault was sexual and involved a minor. Accordingly, this factor was established by the stipulated factual basis.

Next, defendant argues that his presentence investigation report should be corrected so that an accurate version and/or one devoid of contested material is on record with the Department of Corrections. We agree.

In *People v Spanke*, 254 Mich App 642, 648-649; 658 NW2d 504 (2003) (citations omitted), this Court held:

> The sentencing court must respond to challenges to the accuracy of information in a presentence report; however, the court has wide latitude in responding to these challenges. . . . The court may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information. . . . Should the court choose the last option, it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence. . . . If the court finds the challenged information inaccurate or irrelevant, it must strike that information from the PSIR before sending the report to the Department of Corrections. . . .

Similarly, MCL 771.14(6) requires that inaccurate or irrelevant information be stricken from a presentence report, whereas MCR 6.425(E)(2) requires correction or striking if a challenge is found to be meritorious.

Defendant points to the first page of the report (CFJ-145), which indicates that he was currently serving two sentences, one being the CSC I conviction that was overturned on appeal. Also, the first page of the basic information report (CFJ-101) indicates that defendant's criminal history includes one sex offense conviction even though, again, the CSC I conviction was overturned. We conclude that these two items must be struck from the presentence report because they are inaccurate.

We find no basis for striking any other information from the report. Defendant challenges the inclusion of references to charges that were dismissed or resulted in acquittals. However, this information was accurate, and defendant has not shown that the trial court erred in concluding that, even if the information was not relevant to sentencing, it was relevant for purposes of the Department of Corrections and parole and probation decisions. Defendant also challenges summaries of complainant's description of the crime, claiming that the overturned conviction belied any conclusion that her statements were established facts. However, the trial court corrected one challenged statement by ordering that the sexual assault be characterized as "alleged." The trial court properly determined that the context of the second challenged statement, which was in a section of the report that included defendant's contrary version of what transpired, implicitly indicated that complainant's version was "alleged." Finally, defendant challenges inclusion of a recommendation that he undergo sex offender treatment in prison, stating that he would not be eligible for such treatment given his conviction of assault with intent to do great bodily harm less than murder, and suggesting that the recommendation was therefore irrelevant. The trial court properly determined that it would be within the purview of the Department of Corrections to determine whether to follow this recommendation.

We remand for correction of the presentence investigation report consistent with this opinion. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis