STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 1, 2010
v	No. 290902 Clinton Circuit Court
TYLER JAMES HATTEN, Defendant-Appellant.	LC No. 2007-008231-FH

Before: K. F. Kelly, P. J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

Defendant was charged with first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c) (commission of a felony) and delivery of a controlled substance (psilocybin) to a minor, MCL 333.7410(1); MCL 333.7401(2)(b). Pursuant to a plea agreement, defendant pleaded guilty to delivery of a controlled substance and the CSC I charge was dismissed. He was sentenced to a term of 12 months in jail with five years' probation, and was required to register as a sex offender under the Sex Offender Registry Act, (SORA), MCL 28.721 *et. seq*. Defendant appeals by leave granted challenging the requirement that he register as a sex offender. We vacate that portion of the judgment of sentence. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. BASIC FACTS AND PROCEDURAL BACKGROUND

The events leading to the charges being lodged against defendant occurred on June 17, 2007. Defendant and the victim were present at a party in Maple Rapids and defendant gave the victim psilocybin mushrooms. According to the information, the CSC I charge was based upon the allegation that defendant sexually penetrated the victim "under circumstances involving the commission of another felony, to-wit: Delivery of a Controlled Substance to a Minor."

At defendant's plea hearing, he admitted that he gave psilocybin mushrooms to the victim when he was 20 years old and she was 16 years old[1]. No information was solicited or offered regarding the CSC I charge. Pursuant to the plea agreement, the CSC I charge was dismissed.

According to the defendant's description of the offense in the presentence investigation report (PSIR):

> I had 3½ grams of mushroom at a party in Maple Rapids and I gave half to my [defendant's friend]. He ate half the shrooms I handed him and said I'll take the rest in about 15 mins. When he came back he saw the mushrooms were gone and started some commotion. Come 2 find out a girl by the name of [the victim] ate them. I later was contacted by Sargent [sic] Sipple and asked to give a report about what happened that night, and a month later I received a warrant in the mail . . .

The PSIR also indicates that defendant "adamantly denies having sexual intercourse of any kind" with the victim.

According to agent DeSander's description of the offense, after the victim took the mushrooms,

> [t]he smoke was overwhelming in the house and she decided to go for a walk, in which the defendant walked out with her. They exited the building and sat down on the grass near the apartment. According to the victim, the defendant then asked her to perform oral sex on him. [The victim] declined stating, "I don't do that." The defendant ultimately pulled her head down on his exposed penis and forced her to perform oral sex.
>
> After [defendant] ejaculated in her mouth, he pulled off her pants and forced his penis into her vagina, all while making comments about her only being 16. After "copulating with her," they put their clothes on and walked back to the apartment without saying a word.

The agent also reported that while defendant had been given an independent polygraph examination that stated defendant was truthful about his denial of any sexual relations with the victim, he had refused to take a polygraph examination at the Sheriff's Department. The victim's impact statement does not describe any of the events occurring at the party, but does describe the emotional effects it had on her.

At sentencing, defense counsel indicated that for purposes of assessing the applicability of the SORA, defendant was not contesting the agent's account of the incident. Counsel argued, however, that the controlled substance crime was completed before any alleged sexual activity occurred, and that there was nothing uniquely sexual about the controlled substance offense that would support requiring defendant to register.

[1] At the time of the offense, the victim was actually fifteen years old.

The trial court found that the offense in this case qualified as a "listed offense" based on the two "catch all" provisions of the SORA, MCL 28.722(e)(xi) and (x)(iv). The trial court first concluded that there were two instances of sexual contact following the delivery of the drug. It determined that the delivery was therefore a "violation of a law . . . that by its nature constitutes a sexual offense against" a minor. MCL 28.722(e)(xi). Next, the trial court noted that one of the specific penal code violations delineated as a "listed offense" was kidnapping, MCL 750.349 (victim less than 18 years of age) and considered whether the current offense was "substantially similar." MCL 28.722(e)(xiv). While the trial court acknowledged that there was no kidnapping in this case, it found substantial similarity, stating:

> Kidnapping is a knowing restraint of another person with the intent to do one or more of the following. Well, if you look at the restraint language of the kidnapping statute, it talks about restricting a person's movements, confining a person as to interfere with that person's liberty, without that person's consent or lawful authority. And, the Court would find that the delivery of the psychotropic drug, a mushroom, to a minor would have the result of a restriction of one person's movements or an interference of that person's liberty without their consent or legal authority regardless of whether there was an actual physical sexual assault following.

Accordingly, the trial court ordered that defendant register as a sexual offender.

II. STANDARDS OF REVIEW

The construction and application of SORA presents a question of law subject to de novo review. *People v Anderson*, 284 Mich App 11, 13; ___ NW2d ___ (2009). Additionally, we review the trial court's factual findings at sentencing for clear error. *Id*. "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich. 289, 303; 505 N.W.2d 528 (1993).

III. ANALYSIS

Defendant argues that the trial court erred ordering that he register as a sex offender pursuant to the SORA. We agree.

The 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 includes two "catchall" provisions that requires 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)]

The trial court relied on both provisions to require defendant to register. We address each in turn.

A. MCL 28.722(e)(xi)

Defendant argues that the trial court erred in concluding the two instances of sexual contact following the delivery of the drug was a "violation of a law . . . that by its nature constitutes a sexual offense against" a minor. Under the circumstances presented in this case, we agree.

> MCL 28.722(e)(xi) requires the simultaneous existence of three conditions: First, the defendant must have been convicted of a state law violation or a municipal ordinance violation. Second, the state law or municipal ordinance violation must, "by its nature," constitute a "sexual offense." Third, the victim of the state law or municipal ordinance violation must be under eighteen years of age. [*People v Althoff*, 280 Mich App 524, 531; 760 NW2d 764 (2008), quoting *People v Meyers*, 250 Mich App 637, 647; 649 NW2d 123 (2002).]

Here, it is undisputed that the violation at issue was delivery of a controlled substance to a minor who was under age 18. Thus, the question is whether the delivery was, "by its nature," a "sexual offense". This requires consideration of whether only the statutory violation itself may be considered, or whether the facts of the underlying offense are examined in any given case. It also requires a determination of what constitutes the underlying offense, i.e., whether anything that occurred after delivery of the psilocybin mushrooms can be considered.

In *People v Golba*, 273 Mich App 603, 611; 729 NW2d 916 (2007), 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.'" See also *Meyers*, *supra* at 648-649. In other words, the particular facts of a violation, and not just the elements of the violation, are to be considered. *Althoff*, *supra* at 534. This determination can relate to uncharged conduct if supported by a preponderance of the evidence. *Golba*, *supra* at 613-614.

In *Meyers*, the defendant was convicted of using the Internet to communicate with a person for the purpose of attempting to accost, entice, or solicit a child for immoral purposes but was actually communicating with a detective. The *Meyers* Court looked at the underlying Internet discussion, concluding that it was "'by its nature,' sexual in that it specifically involved graphic discussions of oral sex, which Meyers hoped to obtain from the person with whom he was conversing over the Internet." *Meyers*, *supra* at 649.

In *Golba*, the defendant was convicted of unauthorized access to computers. It was deemed, by its nature, to be a sexual offense where the unauthorized access involved downloading pornography onto a school computer, viewing it with a female student, sending the student sexually explicit e-mails, and soliciting sex from her.

In *Althoff*, the violation was intent to disseminate obscene material, MCL 752.365. The obscene material was computer discs containing photographs of young, nude females.

In *Anderson*, the defendant pleaded guilty to aggravated assault. The assault itself involved a seven-year-old girl who had claimed that the defendant repeatedly touched her underneath her underwear.

In the above cases, the underlying facts regarding *the violation being examined* showed that *the violation itself* involved activity that, by its nature, constituted a sexual offense. Here, nothing sexual occurred during the delivery of psilocybin mushrooms. We conclude that the absence of sexual intent at the time of the delivery would preclude a finding that the violation was, by its nature, a sexual offense. With no sexual intent, the underlying violation would have been complete at the point of delivery and divorced from the subsequent acts. Conversely, if defendant gave the victim the drug with the intent that he would subsequently take advantage of her reduced resistance to accomplish a sexual act, the violation, by its nature, would be a sexual offense. This presents a question of fact. Factual findings are reviewed for clear error. *Anderson, supra* at 13.

Here, there were two instances of sexual contact following the delivery of the drug. With regard to MCL 28.722(e)(xiv), the trial court noted that the drug might have the result of reduced resistance. However, there was no determination that the drug was given to the victim for the purpose of facilitating the subsequent acts. We conclude that no such connection could be established on remand. The current record indicates that no additional relevant evidence would be forthcoming. Other than the alleged predatory act itself, there is nothing in the record that gives rise to an inference that defendant gave the victim the drug for the purpose of sexually assaulting her. It is possible that defendant intended to take advantage of her reduced resistance when he gave her the drug, but any conclusion to this effect would be pure speculation. Thus, there is no basis for a determination that, under the facts of this case, the violation of delivering the substance was, by its nature, a sexual offense.

B. MCL 28.722(e)(xiv)

The trial court analogized the restraint in this case to the kidnapping of a minor, a "listed offense" (MCL 750.349) under SORA; and found them to be substantially similar. However, in *Haynes*, 281 Mich App 33, this Court held that MCL 28.722(e)(xiv)

> applies to offenses proscribed by federal law, the laws of other states, and laws of other countries that are similar to the listed Michigan offenses. *It does not apply to offenses proscribed by the state of Michigan*. Michigan offenses are already expressly enumerated as listed offenses or included by operation of the other catchall provisions. [Emphasis added].

Because kidnapping of a minor is specifically identified as a listed offense, the trial court erred in relying on MCL 28.722(e)(xiv) to find that defendant was required to register as a sex offender.

The judgment of sentence is vacated to the extent that it requires defendant to register as a sex offender under SORA.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck