STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 18, 2016
v	No. 325449 Gratiot Circuit Court
DAVID ALLEN SNYDER, Defendant-Appellant.	LC No. 14-007061-FH

Before: HOEKSTRA, P.J., and METER and M. J. KELLY, JJ.

PER CURIAM.

Defendant, David Allen Snyder, appeals by right his jury conviction of failing to register as a sex offender. MCL 28.729. The trial court sentenced him as a fourth habitual offender, MCL 769.12, to serve 2 to 15 years in prison, consecutive to a term he was already serving. On appeal he maintains that the trial court should have declared that, under various theories, he is not subject to registration under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.* Snyder also argues, in relevant part, that the trial court deprived him of his constitutional right to represent himself. We conclude that the trial court did not err when it determined that Snyder was not entitled to declaratory relief and was properly subject to SORA. We further conclude that any deficiency in the trial court's handling of Snyder's request to represent himself does not warrant relief. Accordingly, we affirm.

In August 1995, Snyder pleaded no contest to having committed fourth-degree criminal sexual conduct, see MCL 750.520e, and, because he was incarcerated for a listed offense at the time SORA became effective, he had to register as a sex offender. See MCL 28.723(1)(b). He had an obligation to keep his address, employment, and vehicles updated in the registry. The undisputed evidence showed that, in March 2014, Snyder began working for Chippewa Cab and did not properly report his employment.

Snyder argues that there was no legal basis to compel him to register as a sex offender under various theories. This Court reviews de novo questions of law, such as the proper interpretation of a statute and the proper application of constitutional law. *People v Rose*, 289 Mich App 499, 505; 808 NW2d 301 (2010).

Snyder first argues that the trial court in his underlying case was required to inform him of the registration requirements in order for his plea deal to be valid. In *Padilla v Kentucky*, 559 US 356, 369; 130 S Ct 1473; 176 L Ed 2d 284 (2010), the United States Supreme Court

indicated that when the consequences of a guilty plea (in that case, deportation) are clear, there is a duty to give correct advice. In *People v Fonville*, 291 Mich App 363, 394-395; 804 NW2d 878 (2011), this Court extended *Padilla* to failures of counsel to warn a defendant when registration under SORA is a consequence of conviction. Here, SORA was not in effect at the time of Snyder's plea, but the legislation had been passed. Nevertheless, in *People v Gomez*, 295 Mich App 411, 418; 820 NW2d 217 (2012), the Court held that "both the federal analysis and the Michigan analysis require that the new rule of criminal procedure announced in *Padilla* be applied prospectively only." Because Snyder's plea was long before the decisions in *Padilla* and *Fonville*, neither the court nor his trial lawyer had any obligation to ensure that he understood that he would be required to register as a sex offender before accepting his plea. For the same reasons, the failure to advise him does not insulate him from SORA's requirements.

Snyder also cites *People v Lee*, 489 Mich 289, 293; 803 NW2d 165 (2011), where the original trial court declined to require registration at sentencing, concluding that the subject act—flicking a three-year-old's penis when he was uncooperative during a diapering, which resulted in a child abuse conviction that was not a listed offense—was more akin to abuse than a sex act and therefore did not come under the SORA catchall provision. At a subsequent hearing before a different judge where no evidence was presented to show that the act had a sexual component, the defendant was ordered to register. *Id.* at 293-294. Because the trial court failed to comply with the enacted requirements of SORA, the subsequent decision to require registration was erroneous. *Id.* at 299-301. Here, Snyder does not allege that the trial court failed to comply with SORA procedures.

Snyder also contends that he had a vested property right in his original judgment of sentence, which did not include a requirement that he register. He relies on the decision in *McCullough v Virginia*, 172 US 102, 123; 19 S Ct 134; 43 L Ed 382 (1898), where the Supreme Court stated that "[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment." However, *McCullough* was a civil case where a judgment was errantly vacated by subsequent legislation. *Id*. at 123-124. Snyder also argues that "the law does not permit a criminal defendant to bargain away his constitutional rights without receiving in return either the benefit of his bargain or . . . reinstatement of the rights surrendered." *Bercheny v Johnson*, 633 F 2d 473, 476 (CA 6, 1980). In *Bercheny*, the defendant "gave up his right to a trial in order to secure a plea agreement" and have a psychiatric evaluation, which did not occur, before sentencing. *Id*. Because the defendant did not receive the benefit of his bargain, the Sixth Circuit ordered that the state be directed to provide him with the evaluation and be resentenced. *Id.* at 476-477. Neither of these cases is on point. The fact that the Legislature enacted a general statute—SORA—that imposes duties on a class of convicted felons does not alter the original judgment of sentence. And, as will be discussed, Snyder got the full benefit of his plea bargain, which did not include immunity from registration.

SORA is a "purely regulatory or remedial" statute that allows "easier public access to compiled information that is otherwise available to the public only through arduous research in criminal court files." *People v Pennington*, 240 Mich App 188, 195; 610 NW2d 608 (2000) (quotation marks and citation omitted). The purpose of SORA is to provide information to "the public so that they might modify their behavior in appropriate and lawful ways to protect themselves and prevent crime" with a registry of "persons residing in their communities who have engaged in sexually predatory conduct and who, by virtue of relatively high recidivism

rates among such offenders, are recognized to be resistant to reformation and deemed to pose potential danger of repeat misconduct." *Id*. (quotation marks and citation omitted). "[T]he Legislature intended SORA as a civil remedy to protect the health and welfare of the public," rather than as a punishment for a crime. *People v Temelkoski*, 307 Mich App 241, 262; 859 NW2d 743 (2014), lv granted ___ Mich ___ (2015).

Here, Snyder's August 1995 sentence was not disturbed by subsequent legislation protecting the public by requiring those who had been convicted of listed offenses to register. In 1995, Snyder surrendered his right to a jury trial on the charges against him in exchange for a guilty plea to one charge. The enactment of SORA did not alter his sentence and did not deprive him of the benefit of his plea deal.

Snyder similarly maintains that the trial court lacked jurisdiction because there was no legal basis to charge him with failure to register as a sex offender because his compliance with SORA was not a part of his previous guilty plea to a listed offense, and he did not freely consent to application of SORA. The authority to charge Snyder with failure to comply with SORA did not arise from the terms of his prior sentence; rather, the Legislature provided that it was a crime to willfully fail to register as a separate criminal offense. See MCL 28.729.

Snyder also argues that requiring him to register under SORA violated his due process rights because he was deprived of his plea deal. Both the Michigan Constitution and the United States Constitution preclude the government from depriving a person of life, liberty, or property without due process of law. US Const, Am V; Const 1963, art 1, § 17. Here, however, Snyder has failed to identify a tangible property right of which he was deprived by having to register as a sex offender. See *Akella v Michigan Dep't of State Police*, 67 F Supp 2d 716, 727 (ED Mich, 1999) (stating that a claim that registration under SORA violates due process requires the allegation of "the existence of a constitutionally protected property or liberty interest"); *Lanni v Engler*, 994 F Supp 849, 855 (ED Mich, 1998) (noting that SORA "merely compiles truthful, public information and makes it more readily available," and "any detrimental effects that may flow from the Act would flow most directly from plaintiff's own misconduct and private citizen's reaction thereto, and only tangentially from state action"). Snyder also mentions that registering as a sex offender would constitute being punished twice for the same crime. However, this Court has squarely rejected the notion that the requirements of SORA amount to punishment. *Temelkoski*, 307 Mich App at 270-271.

Snyder also faults his trial lawyer for failing to raise the defense that there was no legal basis to compel him to register as a sex offender. Snyder's lawyer explained in a letter to him that he would not raise the defense because he believed it lacked merit. Further, Snyder himself raised these issues without success in the trial court. As we have already determined, these claims have no merit; and Snyder's trial lawyer cannot be faulted for failing to raise a meritless challenge. *Knowles v Mirzayance*, 556 US 111, 123; 129 S Ct 1411; 173 L Ed 2d 251 (2009).

Next, Snyder states that the provisions of SORA constitute an impermissible ex post facto law. As this Court explained in *Temelkoski*, 307 Mich App at 260-262, the Legislature properly enacted SORA under its police power to protect the public from persons who were likely to reoffend and, in particular, who posed a danger to children. The Court further stated that because "the Legislature was acting pursuant to its police powers to protect the citizenry against

individuals it deemed pose a danger of recidivism," the statute contained evidence of an intent to exercise regulatory power, "and not a purpose to add to the punishment." *Id.* at 260-261 (quotation marks and citations omitted). For that reason, the court explained, SORA was not "so punitive either in purpose or effect that it negates the Legislature's intent to deem it civil." *Id.* at 270. Thus, SORA, as amended in 2011, does not constitute ex post facto punishment.

Next, Snyder claims that he was subjected to malicious prosecution; specifically, because he did not consent to the registration requirement, the prosecutor had no basis to prosecute him for failing to register. As already stated, Snyder did not have to consent to the registration requirement in order to be culpable for failing to comply with SORA's requirements. In any event, malicious prosecution is a civil claim, not a defense to a criminal charge. See *People v Hill*, 282 Mich App 538, 545; 766 NW2d 17 (2009), vacated in part on other grounds 485 Mich 912 (2009). And Snyder cannot show that his prosecution ended in his favor. See *Walsh v Taylor*, 263 Mich App 618, 632-633; 689 NW2d 506 (2004).

Next, Snyder argues that he was denied a proper procedure to determine whether there was a legal basis to compel him to register as a sex offender. He notes that SORA provides a procedure for an offender's removal from the registry for those convicted of particular listed offenses in certain circumstances. See MCL 28.728c. Snyder does not argue for removal under MCL 28.728c, but states that review of his requirement should have been by a motion for declaratory judgment. Here, the trial court denied his motion for a declaratory order that there was no legal basis to compel him to register as a sex offender because he did not provide informed consent and his no contest plea did not include an agreement to register. Thus, Snyder was able to pursue his claim that he could not be compelled to register.

Finally, Snyder argues that the trial court erred in summarily denying his motion for self-representation. The Sixth Amendment right to counsel also implies the right of self-representation, US Const, Am VI, and in Michigan, the right of self-representation is explicitly recognized by our constitution and by statute. Const 1963, art 1, § 13; MCL 763.1; *People v Russell*, 471 Mich 182, 187-188; 684 NW2d 745 (2004). When a defendant requests to proceed as his own counsel, before it may grant the request, the trial court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. *Russell*, 471 Mich at 190, citing *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). Additionally, MCR 6.005(D)(1) provides procedures concerning a defendant's waiver of the right to a lawyer. MCR 6.005(D)(1) prohibits a court from granting a defendant's waiver request without first advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation. *People v Williams*, 470 Mich 634, 642-643; 683 NW2d 597 (2004). A defendant may only enter into self-representation fully aware of the dangers of acting as his own counsel, or "with his eyes open." *Faretta v California*, 422 US 806, 835; 95 S Ct 2525; 45 L Ed 2d 562 (1975) (quotation marks and citation omitted).

Trial courts must substantially comply with the substantive requirements set forth in both *Anderson* and MCR 6.005(D). Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures. *People v Adkins (After Remand)*, 452 Mich 702, 726-727; 551 NW2d 108 (1996), overruled not in relevant part *People v Williams*, 470 Mich 634, 641 n 7; 683 NW2d 597 (2004). Where the trial court fails to substantially comply with the requirements in *Anderson* and the court rule, then the defendant has not effectively waived his Sixth Amendment right to the assistance of counsel. *Russell*, 471 Mich at 191-192.

Here, after the prosecutor's opening statement, Snyder told the trial court, "I'd like to represent myself, please." The trial court responded, "No, sir," and Snyder reasserted, "I want to represent myself, he ain't going to tell them the whole truth." The trial court asked Snyder to be quiet and pay attention, and stated that he could be asked to leave if it was necessary. The trial court clearly failed to engage Snyder in a colloquy regarding his desire to waive representation. A trial court "should consider requests to exercise the right to self-representation by criminal defendants in accordance with the procedure described in" *Adkins* and in compliance with MCR 6.005. *People v Ramsdell*, 230 Mich App 386, 406; 585 NW2d 1 (1998). Nevertheless, the trial court's denial without further exploring Snyder's request does not warrant relief.

It is evident from the record that Snyder's request would have disrupted, unduly inconvenienced, and burdened the trial. The right to self-representation is constitutionally protected, but not absolute. See *Adkins*, 452 Mich at 721 n 16. Whether a waiver of the right to counsel was knowing and intelligent depends on the particular facts and circumstances of the case, "including the background, experience and conduct of the accused." *Anderson*, 398 Mich at 370. In a case where the defendant attempted to "dismiss his attorney and represent himself after the trial was well underway," the defendant's right to represent himself is a qualified right where the trial judge should exercise discretion. *Id.* at 367.

Here, Snyder requested to represent himself after his trial began. From the time the jury was sworn until it delivered its verdict, the trial only lasted about four and a half hours and involved two witnesses. The timeliness of a request to self-represent is a factor for the trial court to consider in deciding a motion to waive the right to counsel, and courts will balance the timeliness of the request "against considerations of judicial delay." *Faretta*, 422 US at 817-818. The potential for delay and inconvenience to the court is possibly greater when the request for self-representation is made during trial. *Anderson*, 398 Mich at 368. Additionally, Snyder did not dispute that he failed to comply with SORA when he did not report his employment. Thus, the brief trial consisted of a presentation of facts that were not in dispute. Snyder's defense, as argued in numerous pretrial motions, was that there was no legal basis for requiring him to register as a sex offender. The trial court had considered these legal arguments and determined that they were without merit. A trial court may deny a motion for self-representation when "a defendant behaves in a disruptive manner and makes a motion to proceed pro se for surreptitious reasons." *Ramsdell*, 230 Mich App at 405-406. Synder's attempt to rehash his spurious legal arguments before the jury would have been disruptive and futile. Moreover, it is not a violation of a defendant's constitutional right for a trial court to deny an untimely motion for self-representation without first conducting a colloquy to determine whether the defendant has effectively waived his right to counsel. See *Hill v Curtin*, 792 F3d 670, 677-679 (CA 6, 2015).

This case is similar to *Ramsdell*, 230 Mich App at 405-406, where the trial court properly denied the defendant's request for self-representation where the "defendant desired to represent himself in order to elicit testimony to support claims" that had previously been found by the trial court to be inapplicable. Because the time of the request and the desire by Snyder to assert inapplicable legal argument in a simple case would have disrupted, unduly inconvenienced, and burdened the trial court, the trial court properly denied Snyder's request to represent himself.

There were no errors warranting relief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Michael J. Kelly