

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DMARKO CURAN JEFFERSON,

Defendant-Appellant.

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UNPUBLISHED  
December 9, 2021

No. 353488  
Macomb Circuit Court  
LC No. 2019-000139-FH

Before: BORRELLO, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of failing to register a change of address under the Sex Offenders Registration Act, MCL 28.729(1)(a). At trial, defendant was acquitted of one count of larceny from the person, MCL 750.357. Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 23 months to 15 years' imprisonment. We vacate defendant's conviction, and remand for further proceedings.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

This case arises out of an investigation into an alleged larceny in Clinton Township, which led to defendant being charged for failing to register his address as required by the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.* Defendant had been convicted of fourth-degree criminal sexual conduct, MCL 750.520e, in the year 2000. Darrel Terry testified that, on the night of the alleged larceny, he had been playing poker, won money, and was carrying about \$700 after he finished playing. On his way home, he stopped at a 7-Eleven around midnight, where he first encountered defendant. Defendant told Terry that his car had broken down, and Terry agreed to give defendant a ride. Terry alleged that, as he dropped off defendant, he pulled his poker winnings out of his pocket to give defendant \$20 because he felt bad for him. Defendant then grabbed all the money out of Terry's hand, got out of the car, and ran away. Defendant, however, testified at trial that he had met Terry at the 7-Eleven to sell him prescription narcotic pills. Defendant testified that he sold Terry 20 Vicodin pills and 10 other pills, which were supposedly Vicodin, but were actually fake. Defendant speculated that Terry discovered the fake pills, invented the theft story, and reported it to police as retaliation.

Police identified defendant from surveillance footage from the 7-Eleven. They secured a search warrant for defendant's known address, which was his mother's house. Upon executing the search warrant, defendant's mother told police that he did not live with her, but she allowed him to have mail sent to her house. Police corroborated this information when they did not find clothes or any of defendant's belongings in his mother's house. At trial, defendant's mother testified that defendant did live with her, but she told police he did not because she was scared. She and defendant both testified at trial that defendant lived with his mother, but he regularly spent from three days up to a week living with his girlfriend.

At some point during the investigation, police learned that defendant was required to register his address as a sex offender based on his conviction from 2000, and he was registered as living with his mother. However, based on the information they found, defendant was not actually living there. Defendant was charged with larceny from the person and failure to register under the SORA. A jury acquitted him of larceny from the person and convicted him of the SORA violation.

Following trial, defendant filed three posttrial motions. In one motion, defendant argued that the trial court judge should be disqualified from further proceedings in this case because she displayed bias by saying that she believed that defendant committed larceny from the person in a posttrial hearing. In his next motion, defendant argued that his trial counsel was ineffective by not contesting his SORA violation charge. In his final motion, defendant argued that he was entitled to resentencing because the full risk of COVID-19 was unknown at the time of his sentencing, and the risk of the virus amounts to a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. The trial court denied each of defendant's motions, and defendant raised each argument again on appeal, as well as an additional argument.

The day before oral argument, defendant filed supplemental authority drawing this Court's attention to *People v Betts*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2021) (Docket No. 148981). Following oral argument, by motion of this Court, defendant was granted leave to file a supplemental brief addressing *Betts*. *People v Jefferson*, unpublished order of the Court of Appeals, entered November 12, 2021 (Docket No. 353488). Defendant filed a supplemental brief, arguing that his conviction violated the prohibition against ex post facto laws under *Betts*, and the prosecution filed a supplemental brief agreeing with defendant's assertion. Because this issue is dispositive of defendant's appeal, we need not discuss the issues originally raised by defendant.

## II. ANALYSIS

Defendant's conviction of failing to register a change of address under the SORA violates the prohibition against ex post facto laws, as provided in *Betts*. Defendant's conviction was a plain error that affected defendant's substantial rights, and is therefore vacated.

An issue must be raised before and addressed by the trial court to be preserved for appellate review. *People v Wiley*, 324 Mich App 130, 150; 919 NW2d 802 (2018). There is no indication that defendant raised any concern regarding the Ex Post Facto Clause of the Michigan and United States Constitutions, Const 1963, art 1, § 10 and US Const, art I, § 10, in the trial court. Rather, this issue was first raised as supplemental authority shortly before oral argument took place. Regardless, appellate review of this constitutional challenge is appropriate. See *Wiley*, 324 Mich App at 150.

“Questions of constitutional and statutory interpretation present questions of law reviewed de novo.” *People v Hall*, 499 Mich 446, 452; 884 NW2d 561 (2016). However, unpreserved constitutional issues are reviewed for plain error affecting substantial rights. *Wiley*, 324 Mich App at 150. The defendant must establish that “(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights.” *Id.* at 151 (quotation marks and citation omitted). The third element requires a showing of prejudice, i.e., that the error affected the outcome of the proceedings in the lower court. *Id.* “Reversal is only warranted if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial.” *Id.* (quotation marks, brackets, and citation omitted).

In *Betts*, \_\_\_ Mich at \_\_\_; slip op at 5, the defendant was convicted of second-degree criminal sexual conduct in 1993. The SORA was amended in 2011, 2011 PA 17, and in 2012, the defendant failed to report his change of address, his e-mail address, and his purchase of a vehicle in violation of MCL 28.725(1)(a), (f), and (g), as amended. *Id.* The defendant was charged with violating the registration requirements of the SORA, MCL 28.729(1)(a), and the defendant ultimately pleaded no-contest, conditional on his ability to appeal on constitutional grounds. *Id.* This Court denied the defendant leave to appeal for lack of merit on the grounds presented, *id.* at 6, and the issue before the Supreme Court was whether retroactive application of the SORA, as amended in 2011, violated state and federal constitutional prohibitions against ex post facto laws, *id.* at 1, 6. The Supreme Court held that

the 2011 SORA, when applied to registrants whose criminal acts predated the enactment of the 2011 SORA amendments, violates the constitutional prohibition on ex post facto laws. As applied to defendant *Betts*, because the crime subjecting him to registration occurred in 1993, we order that his instant conviction of failure to register as a sex offender be vacated. [*Id.* at 40.]

Defendant was convicted of fourth-degree criminal sexual conduct in the year 2000. Defendant was convicted of failing to register a change of address under the SORA in 2020. Because his year-2000 criminal acts predated the 2011 SORA amendments, his conviction violates the constitutional prohibition on ex post facto laws. *Id.* See also *People v Snyder*, 964 NW2d 594 (2021); *People v Nolan*, 964 NW2d 602 (2021). This constitutes a plain error affecting defendant’s substantial rights. *Wiley*, 324 Mich App at 150-151.

Defendant’s conviction and sentence are therefore vacated, and this matter is remanded to the trial court for further proceedings consistent with this opinion and *Betts*. We do not retain jurisdiction.

/s/ Stephen L. Borrello  
/s/ Kathleen Jansen  
/s/ Mark T. Boonstra