STATE OF MINNESOTA
IN COURT OF APPEALS
A10-104

State of Minnesota,
Respondent,

vs.

Ron Joseph Meyers,
Appellant.

Filed February 8, 2011
Affirmed
Huspeni, Judge[*]

Olmsted County District Court
File No. 55-CR-09-930

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, James S. Martinson, Chief Deputy County Attorney, Rochester, Minnesota (for respondent)

Bradford Colbert, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and Huspeni, Judge.

[*]Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HUSPENI, Judge

Appellant challenges his 2009 conviction for failure to register as a predatory offender, arguing that (1) he was not required to register as a predatory offender because he did not commit a predatory offense and the charge underlying his duty to register was not supported by probable cause; (2) requiring him to register as a predatory offender violates the separation-of-powers doctrine and his rights to substantive and procedural due process; and (3) extending his registration requirement beyond the initial 10-year period violates the ex post facto clauses of the federal and state constitutions. Because appellant was required to register under the statute and because his constitutional arguments fail, we affirm.

FACTS

On July 20, 1995, the state charged appellant Ron Joseph Meyers with criminal sexual conduct in the fourth degree under Minn. Stat. § 609.345, subd. 1(c), subd. 2 (1994). The complaint, signed by a district court judge, provided the following facts to establish probable cause: Appellant and another man approached J.A.S., an acquaintance, while she was lying in the sun outside her house. Appellant asked J.A.S. if he could put lotion on her, and she consented. "[Appellant] put his hand inside her pants and began touching her pubic area; she told [appellant] to stop, but he refused; she pushed [appellant] off and ran into the house; [appellant] followed her inside and she told him to leave, which he did."

At the plea hearing, appellant's attorney indicated that the parties had been discussing a possible negotiated plea. The prosecutor stated that upon review of the file, the state concluded that appellant did not commit fourth-degree criminal sexual conduct, which requires the use of force or coercion to accomplish sexual contact, but instead committed fifth-degree criminal sexual conduct, which only requires lack of consent to the sexual contact. *See* Minn. Stat. § 609.345, subd. 1(c) (1994) (defining fourth-degree criminal sexual conduct); Minn. Stat. § 609.3451, subd. 1(1) (1994) (defining fifth-degree criminal sexual conduct). Appellant then pleaded guilty to criminal sexual conduct in the fifth degree.

At the subsequent sentencing hearing, the district court addressed whether appellant was required to register as a predatory offender under Minn. Stat. § 243.166, subd. 1b (1994). Relying on the psychosexual evaluation presented to it, the district court concluded that appellant was not a "predatory offender" under the statute.

Despite the district court's statements, in January 1998, appellant received and signed a sex offender notification and registration form. The form indicated that, based on his conviction for fifth-degree criminal sexual conduct, appellant was required to register as a sex offender for a period of ten years from the date of initial registration. Following appellant's initial registration, he submitted change-of-address notices to law enforcement agencies on November 13, 1998; July 8, 1999; February 2, 2004; November 18, 2004; January 13, 2005; May 16, 2008; September 3, 2008; and December 18, 2008. On July 19, 2004, appellant was convicted of failure to register as a predatory offender in Blue Earth County, and was sentenced to 12 months and 1 day.

On June 20, 2008, appellant filled out a duty-to-register form, initialing 28 different statements regarding his duty to register, and signing the form. In December 2008, prior to his release from prison on an unrelated sentence, appellant submitted a change-of-information form indicating that he planned to reside at the Dorothy Day House in Rochester beginning on January 8, 2009. As anticipated, appellant was released from prison on January 8, 2009.

On January 23, 2009, Rochester police officers visited the Dorothy Day House to verify that appellant was staying there and discovered that he was not. On February 5, 2009, appellant, having heard the police were looking for him, presented at the police department and admitted that he had not been staying at the Dorothy Day House. The next day, the state charged appellant with failure to register as a predatory offender under Minn. Stat. § 243.166 (2008), providing, in pertinent part, that one is required to register when charged with an offense requiring registration and convicted of another offense "arising out of the same set of circumstances."

Appellant moved the district court to dismiss the charge, arguing, among other things, that requiring him to register when he did not commit a predatory offense violated his right to procedural due process under the federal and state constitutions. The district court denied appellant's motion and held a three-day jury trial on the offense of failing to register as a predatory offender. At the beginning of trial, appellant's attorney, referencing the October 1995 plea hearing, indicated that he intended to argue that appellant had received conflicting information regarding whether he was required to register. The prosecutor declared that in October 1995, the district court "frankly got it all wrong" by

relying on statements in the psychosexual evaluation, but argued that appellant should be precluded from making "a collateral attack on whether or not that was a registerable offense." The district court then stated,

> I too am weary of getting in to jury consideration of what is I think maybe a pretty legitimate legal argument. Was this man ever legitimately charged with fourth degree criminal sexual conduct. . . . [this statute] has real problems if a person is being required to register who never should have been charged in the first place with a registerable offense. But . . . I'm not going to have a jury considering that.

The jury found appellant guilty and the district court imposed an 18-month sentence, with at least 12 to be served in prison and 6 on supervised release. The district court, citing the short amount of time appellant was out of touch with authorities and the passage of time since his original gross misdemeanor, concluded that "it's a less serious case than typical" and departed downward from the guidelines. This appeal followed.

D E C I S I O N

I.

We begin our analysis by addressing appellant's argument that he should never have been convicted of failure to register as a predatory offender because he had never been required to register as one. The 1995 conviction was not appealed – understandably so because it resulted from a plea agreement. Additional proceedings took place after 1995; no appeal resulted from those either. Only at the 2009 proceeding now being appealed were the questions this court is called upon to answer raised. It is against that background that we consider appellant's arguments and those of respondent in opposition.

Respondent asserts that appellant is procedurally barred from challenging the underlying registration requirement because (1) the registration requirement is a civil regulation and appellant's proper remedy is to seek declaratory relief in a lawsuit against the Department of Corrections (DOC), and (2) appellant failed to challenge his obligation to register in 2004 when he was convicted for failure to register as a predatory offender.

Declaratory Action Against Commissioner

We initially address respondent's argument that because the duty to register is a civil regulation, the proper remedy is to seek declaratory relief in a lawsuit against the DOC. Respondent is correct in stating that the requirement to register as a predatory offender is a civil regulation. *See Boutin v. LaFleur*, 591 N.W. 2d 711, 717 (Minn. 1999) ("(W)e conclude that section 243.166 is a civil, regulatory statute and that the presumption of innocence does not attach.") In *Boutin* and *Gunderson v. Hvass,* cited by respondent, the defendants sought relief from the registration requirement by bringing a declaratory action against the Commissioner of Corrections. *Gunderson v. Hvass*, 339 F.3d 639, 642 (8th Cir. 2003); *Boutin*, 591 N.W.2d at 714. But neither case indicates that this is the exclusive way to challenge a registration requirement. Caselaw is informative on this issue. In *State v. Lopez*, the Minnesota Supreme Court addressed the defendant's challenge to his obligation to register as a predatory offender on a direct appeal from his conviction for failure to register. 778 N.W.2d 700, 703 (Minn. 2010). We conclude that such availability should be afforded appellant here. Therefore, we will address the issues raised by him on the merits.

Collateral Attack on Order

Respondent argues that as a result of appellant's failure to challenge his 2004 conviction for failure to register as a predatory offender, he should be barred from now raising the question of whether he should ever have been required to register. In support of its argument, respondent cites a line of cases holding that a defendant may not collaterally attack an order in challenging a conviction for violating that order. In *State v. Cook*, the supreme court determined that the defendant could not collaterally attack the highway commissioner's order suspending defendant's driver's license when defendant challenged his subsequent conviction for driving after suspension. 275 Minn. 571, 571-72, 148 N.W.2d 368, 369 (1967). This court has also applied this rule in the context of challenges to harassment restraining orders, *State v. Harrington*, 504 N.W.2d 500, 502-03 (Minn. App. 1993), *review denied* (Minn. Sept. 30, 1993), and orders for protection (OFP), *State v. Romine*, 757 N.W.2d 884, 889-90 (Minn. App. 2008).

In this case, appellant is challenging his conviction for failure to register by collaterally attacking the registration requirement itself. While appellant was not in a position to appeal his 1995 conviction, he did have the opportunity to challenge the probable cause determination before pleading guilty to fifth-degree criminal sexual conduct. Rule 8.03 grants a defendant the right to demand an omnibus hearing to determine, among other potential issues, whether there is sufficient probable cause to precede to trial. Minn. R. Crim. P. 8.03; 11.02(a); *see also State v. Koenig*, 666 N.W.2d 366, 382 (Minn. 2003) ("The purpose of a probable cause hearing is to protect a defendant unjustly or improperly charged from being compelled to stand trial."). Appellant could

have demanded such a hearing and filed a motion to dismiss the fourth-degree criminal sexual conduct charge for lack of probable cause. He did not do so. A proper inference may be drawn that he failed to act because that charge was being dismissed.

The circumstances of this case present a thorny question. Appellant's challenge appears to be directly in line with and governed by *Cook*, *Harrington*, and *Romine* and to be barred under that caselaw.[1] We note also, however, that in *Lopez* the supreme court, without considering the propriety of a collateral attack, did address directly whether the dismissed predatory offender charge was supported by probable cause. The question here is a close one, and all involved unquestionably now possess the hindsight vision that is always 20/20. It would have been far easier to resolve in 1995 the question now before the court in 2011. Nonetheless, after careful consideration we conclude that the interests of justice would most fully be served in this case by fully addressing the merits and reaching a final resolution of all challenges appellant brings.

Predatory Offender

At the time of appellant's sentencing, Minnesota's predatory-offender registration statute provided that a person must register if: (1) the person was charged with and convicted of one of the listed felony offenses, including fourth-degree criminal sexual conduct, or (2) the person was charged with one of the listed felony offenses and convicted

[1] Appellant argues that this line of cases bars the state from challenging the district court's determination that Meyers did not have to register. The argument overlooks the fact that the registration requirement is not at the discretion of the district court judge. *See infra*.

of "another offense arising out of the same set of circumstances." Minn. Stat. § 243.166, subd. 1 (1994).[2]

At the 1995 sentencing hearing, after reviewing a psychological sexual-offender evaluation report, the district court stated: "Well, it's clear to me that he's [the examiner] saying to me . . . that this man is not a predator. Minnesota Statutes 243.166 requires registration of predatory offenders. Based upon [the examiner's] report I find that he is not, by reason of this conviction, a predatory offender."

The prosecutor in the case now on appeal was correct in observing that in 1995 the district court "frankly got it all wrong." A district court does not have discretion with regard to imposing the duty to register under section 243.166. *See* Minn. Stat. § 243.166, subd. 1b (2008) (stating that a person "shall register under this section" if he falls within the description of persons required to register). Therefore, if there was probable cause in 1995 to charge appellant with fourth-degree criminal sexual assault, even though that charge was dismissed as a result of a plea agreement, appellant would have been required to register as a predatory offender.

Probable Cause

Appellant argues that in 1995 the state lacked probable cause to charge him with fourth-degree criminal sexual conduct. Specifically, appellant relies on the following admission of the prosecutor at the October 1995 plea hearing:

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[2] Minn. Stat. § 243.166, subd. 1 (1994) was repealed and replaced with subd. 1b in 2008. 2005 Minn. Laws ch. 136, art. 3, § 31, at 939-40. The amendment added language to include aiding, abetting, or conspiracy to commit the listed offenses, to reflect the addition of a definition section to the statute, and made several other minor changes, none of which impact this appeal.

> In going through [the file] again, we . . . came to the conclusion that [appellant] did not commit a Criminal Sexual Conduct in the Fourth Degree but in fact committed a Criminal Sexual Conduct in the Fifth Degree.
>
> So what I would anticipate is that basically then [appellant] will be entering a plea of guilty to one count of Criminal Sexual Conduct in the Fifth Degree.

The state may charge a person with a crime only when there is probable cause to believe that the person committed the crime. *Lopez*, 778 N.W.2d at 703. There is probable cause when the facts show a "reasonable probability that the person committed the crime." *Id.* This court reviews factual findings underlying a probable-cause determination for clear error, and reviews the district court's application of the legal standard to the facts de novo. *Id.*

A person commits criminal sexual conduct in the fourth degree when the person engages in sexual contact with another person, using force or coercion to accomplish the sexual contact. Minn. Stat. § 609.345, subd. 1(c). An actor uses force for purposes of the statute when he "inflicts bodily harm or pain or the threat thereof on another while accomplishing sexual contact." *In re Welfare of D.L.K.*, 381 N.W.2d 435, 438 (Minn. 1986). In *D.L.K.*, the 14-year-old defendant came up behind a female classmate, tapped her on the shoulder, and when she turned around, grabbed and pinched her breast causing pain. *Id.* at 436. The supreme court determined that this was sufficient to show sexual contact "accomplished by the use of force" under the statute. *Id.* at 437-38; (citing *State v. Mattson*, 376 N.W.2d 413, 414-15 (Minn. 1985) (determining that there was sufficient evidence of force to support fourth-degree criminal sexual conduct conviction where the defendant suddenly reached through a car window and grabbed the complainant's wrist

and breast over her clothing, causing pain and bruising)); *State v. Brouillette*, 286 N.W.2d 702 (Minn. 1979).

In *State v. Brouillette*, the defendant approached the complainant in a women's restroom, made a sexual remark, grasped her shoulders, twirled her around, and touched her buttocks. 286 N.W.2d at 704. He then twirled her around again and touched her groin area. *Id.* The complainant screamed and pushed the defendant away. *Id.* The supreme court determined that the defendant's presence in a women's restroom, coupled with the physical grabbing and sexual remarks, was a reasonable basis for a jury to find that defendant acted with the statutory requirement of force. *Id.* at 706; *see also Brouillette v. Ward*, 636 F.2d 215, 216-17 (8th Cir. 1980) (finding the same evidence sufficient to satisfy the statutory requirement of force).

Here, while the 1995 complaint did not specify whether, as in *D.L.K.*, appellant's actions caused J.A.S. pain, the facts set forth do create a reasonable probability that they did. Specifically, J.A.S. told appellant to stop but he refused, and she had to push him off of her. An issue of fact as to whether appellant used force to accomplish the contact was presented. And because the complaint presented an issue of fact regarding each element of the offense, dismissal of the charge for lack of probable cause would have been improper. *See Lopez*, 778 N.W.2d at 704 ("[I]f the facts before the district court present a fact question for the jury's determination on each element of the crime charged, the charge will not be dismissed for lack of probable cause." (quotation omitted)).

Moreover, the prosecutor's October 1995 statements were made in the context of discussing a plea agreement; the state may have lacked the evidence to prove use of force

beyond a reasonable doubt. But "the threshold factual showing of probable cause necessary to support a charge is low. . . ." *Lopez*, 778 N.W.2d at 705. Our independent review of the 1995 complaint leads us to conclude that the charge of fourth-degree criminal sexual conduct was supported by probable cause. In this case, the district court did not err in convicting appellant for failure to register based on that charge.

II.

Appellant argues that requiring him to register violates the separation-of-powers doctrine and his rights to substantive and procedural due process under the state and federal constitutions. Whether a statute is constitutional is a question of law that this court reviews de novo. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). "[W]e proceed on the presumption that Minnesota statutes are constitutional and that our power to declare a statute unconstitutional should be exercised with extreme caution." *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000).

Separation of Powers

First, appellant argues that because the prosecution, an executive branch agent, has "almost complete discretion to determine whether a defendant is required to register," section 645.166 violates the separation-of-powers doctrine. But appellant fails to cite any legal authority supporting this contention. And the *Lopez* court noted that "[w]hile the threshold factual showing of probable cause necessary to support a charge is low, the language requiring a conviction for another offense 'arising out of the same set of circumstances' limits the number of defendants who might be forced to register." 778 N.W.2d at 705. Thus, while the prosecutor here had some discretion in charging appellant

with fourth-degree criminal sexual conduct, this executive-branch discretion was checked by both judicial review of the probable-cause determination and a determination by a jury that the conviction arose from the same set of circumstances as the registerable offense. Appellant's argument fails.

Substantive Due Process

Appellant argues that the district court violated his right to substantive due process by initially telling him he did not have to register and then convicting him for failure to register. The Due Process Clauses of both the Minnesota and United States Constitutions provide that the government cannot deprive a person of "life, liberty, or property without due process of law." *See* U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7. "Both clauses prohibit certain arbitrary, wrongful government actions, regardless of the fairness of the procedures used to implement them." *Boutin*, 591 N.W.2d at 716 (quotation omitted).

Appellant's case bears some resemblance to *Whitten v. State*. 690 N.W.2d 561 (Minn. App. 2005). In *Whitten*, the appellant was convicted of a non-violent felony and sentenced to probation, which included a ban on the possession of a firearm until his civil rights had been restored. *Id.* at 562. When he was discharged from probation, the district court told him that he was "restored to all civil rights" and it did not check a box on the discharge form that would have denied him the right to possess a firearm for another ten years. *Id.* Whitten was subsequently found with two firearms in his possession and pleaded guilty to unlawful possession of a firearm. *Id.* This court held that his due process rights had been violated and that "[a] person has the right to rely on the promises of a

government representative . . . ." *Id.* at 566 (citing *Raley v. Ohio*, 360 U.S. 423, 439, 79 S. Ct. 1257, 1266-67 (1959). The court also noted that "the state may be precluded from prosecuting a person who acts because of reliance on the state's representations." *Id.* at 565 (citing *State v. White*, 464 N.W.2d 585, 590 (Minn. App. 1990), *review denied* (Minn. Mar. 15, 1991)).

The key difference between *Whitten* and the case before the court now, however, is that here, there is no evidence that appellant relied on the district court's statement. In *Whitten*, the defendant was not aware of the conflicting information and could rely on the statements of the judge and his discharge order. *Id.* Here, to the contrary, appellant was expressly informed that he had to register as a sex offender. He was aware of the conflicting information provided by the state and chose to fill out and submit the sex offender registration form instead of contesting the situation at that time. Because appellant had notice that he had to register, he cannot rely on the statements of the district court judge.

Appellant also argues that there is not a rational basis for requiring him to register. His argument parallels one made in *Boutin*. In that case, the defendant was charged with third-degree criminal sexual conduct, among other charges, only pleaded guilty to third-degree assault, and was required to register as a sex offender. *Boutin*, 591 N.W.2d at 713. He argued that the registration statute was unconstitutional as applied to his circumstances. *Id.* at 716. The supreme court determined that because section 243.166 is civil and regulatory in nature, rather than criminal and punitive, it does not implicate a fundamental right. 591 N.W.2d at 717. Therefore, substantive due process requires only that the statute

have a rational basis. *Id.* The *Boutin* court concluded that because maintaining a registry of predatory offenders is rationally related to the legitimate state interest in solving crimes, the statute did not deprive the defendant of substantive due process. *Id.* at 718.

Appellant fails to provide any basis on which to distinguish this case from *Boutin*. He argues that there is not a rational basis for requiring him to register because he did not commit a predatory offense. But the *Boutin* court rejected the defendant's similar argument that the state did not have an interest in registering nonpredatory offenders. Thus, appellant's argument fails.

Procedural Due Process

Appellant argues that requiring him to register violates his right to procedural due process because he never had a chance to challenge the factual allegations underlying the fourth-degree criminal sexual conduct charge. However, as previously discussed, appellant had the opportunity to challenge the probable cause determination before he pleaded guilty. *See* Minn. R. Crim. P. 8.03; 11.02(a).

Even if appellant did not have the opportunity to challenge the factual allegations, his procedural due process claim would still fail. The Due Process Clauses of the Minnesota and United States Constitutions require that "a party receive adequate notice and an opportunity to be heard before being deprived of life, liberty, or property." *Christopher v. Windom Area Sch. Bd.*, 781 N.W.2d 904, 911 (Minn. App. 2010). The first step in a procedural-due-process analysis is to determine whether there is a protectable liberty interest at stake. *Boutin*, 591 N.W.2d at 718. There is a protectable liberty interest when there is a loss of reputation coupled "with the loss of some other tangible interest."

Id. (citing *Paul v. Davis*, 424 U.S. 693, 701-02, 96 S. Ct. 1155, 160-61 (1976) (adopting the "stigma-plus" test)). The *Boutin* court determined that while being required to register as a predatory offender results in a loss of reputation, it does not result in the loss of any other recognizable interest, and thus fails the stigma-plus test. *Id.*

Appellant attempts to reinvigorate the argument rejected in *Boutin* by asserting that registration requirements have become more rigorous and confining since *Boutin*. In *State v. Jones*, the supreme court, in concluding that section 243.166 was a criminal/prohibitory offense for purposes of determining whether a state court had subject-matter jurisdiction to prosecute a tribal member, noted that the 2000 amendments to the statute expanded the scope of its application. 729 N.W.2d 1, 7 (Minn. 2007). Among other things, the amendments "required registration by additional offenders, lengthened the registration period for certain offenders, required the collection of additional information from certain offenders, [and] required the BCA to maintain a computerized database of information on sex offenders. . . ." *Id.* (citing 2000 Minn. Laws ch. 311, art. 2, at 189-207). But the *Jones* court acknowledged that it was addressing "an entirely different issue" than in *Boutin*—whether violation of section 243.166 was generally prohibited conduct under "the highly refined *Cabazon/Stone* test," not whether the duty to register was "punitive" for purposes of the *Kennedy* analysis in *Boutin*. *Id.* at 10-11. The *Boutin* court's statement that "there is no recognizable interest in being free from having to update address information" remains good law. *See* 591 N.W.2d at 718. In sum, because appellant fails to show that he has a protectable liberty interest at stake, his procedural-due-process claim fails.

III.

Finally, appellant argues that the extension of his registration period for 10 years in 2004 violated the Ex Post Facto Clauses of the federal and state constitutions because section 243.166, subdivision 6, was not in effect at the time of appellant's 1995 conviction. Because appellant failed to raise this argument below, it is waived on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1998) (providing that issues not presented to and considered by the district court are waived on appeal). We choose, nonetheless, to address the substance of appellant's argument on this issue and conclude that the argument must fail.

Both the Minnesota and United States Constitutions prohibit the enactment of ex post facto laws. *See* U.S. Const. art. I, § 10; Minn. Const. art. I, § 11. A statute constitutes an ex post facto law when it: (1) punishes as a crime an act that was innocent when committed; (2) increases the burden of punishment for a crime after it was committed; or (3) deprives one charged with a crime of a defense that was available when it was committed. *State v. Manning*, 532 N.W.2d 244, 247 (Minn. App. 1995) (citing *Collins v. Youngblood*, 497 U.S. 37, 52, 110 S. Ct. 2715, 2724 (1990)), *review denied* (Minn. July 20, 1995). In determining whether a statute increases the burden of punishment, courts look to whether the statute is punitive or regulatory. *Id.* In *Manning*, we applied the analysis of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169, 83 S. Ct. 554, 568 (1963), to determine that section 243.166 is regulatory in nature, and thus not subject to the ex post facto prohibitions. 532 N.W.2d at 247-48. And since *Manning*, the supreme court has confirmed that section 243.166 is a civil, regulatory statute. *See Boutin*, 591 N.W.2d at

717. Section 243.166, subdivision 6(c), requiring extension of the registration period upon commission of an additional offense, is part of the statute's regulatory scheme, and is not punitive in nature. Therefore, appellant's argument that the extension of his registration period in 2004 violated ex post facto laws fails.

A final note is appropriate: While we believe that the decision in this case is one compelled by the law and the facts presented, we are not insensitive to the very basic question appellant raises—why should one be required to register as a predatory offender based upon a conviction arising out of the same set of circumstances as a charged predatory offense when that predatory offense charge is supported not by proof beyond a reasonable doubt, not by clear and convincing evidence, or not even by a preponderance of the evidence, but is supported only by that lowest of thresholds, probable cause? Mindful of the doctrine of separation of powers, however, we conclude that this question is one more properly brought before the legislative branch of government than before the judicial branch.

Affirmed.