APPEAL NO. 18-4663

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY HELTON,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

BRIEF OF APPELLANT ANTHONY HELTON

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OPENING BRIEF OF ANTHONY HELTON

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STATEMENT OF JURISDICTION

On March 6, 2018, a grand jury sitting in the Northern District of West Virginia at Clarksburg returned a single-count Indictment charging Anthony Helton ("Helton") with the failure to register as a sex offender as required under the Sex Offender Registration and Notification Act ("SORNA").

Because this charge constituted an offense against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Helton pleaded guilty to the charge against him. The United States Court of Appeals for the Fourth Circuit has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Whether the District Court erred in denying Helton's motion to dismiss when Helton's prior South Carolina conviction for voyeurism does not qualify as a sex offense under the Sex Offender Registration and Notification Act ("SORNA")?

STATEMENT OF THE CASE

On March 6, 2018, a grand jury sitting in Clarksburg, West Virginia, returned a single-count indictment against Helton, charging him with failure to register as a sex offender or update his registration as required by SORNA in violation of 18 U.S.C. § 2250(a). J.A. 6. In the indictment, the government alleged that Helton was a person

required to register under SORNA because of his prior South Carolina conviction for voyeurism. J.A. 6.

According to South Carolina court records, on March 13, 2014, Helton pleaded guilty to one count of becoming an eavesdropper or a Peeping Tom in violation of S.C. Code Ann. § 16-17-0470. J.A. 125-26. The South Carolina Criminal Data Report (CDR) code attached to this charge was 0120, indicating the charge alleged was a violation of § 16-17-0470(A). J.A. 127-29. Pertinently, Helton pleaded guilty to voyeurism, which is a violation of S.C. Code Ann. § 16-17-0470(B)(1), with a CDR of 2865. J.A. 130. Helton was sentenced to 3 years of incarceration, with 524 days of credit for time served, and one year of probation to follow. J.A. 130, 131.

Upon his release from incarceration, Helton moved to Virginia and registered as a sex offender there under the laws of the Commonwealth of Virginia. J.A. 140. In early 2017, Helton moved to West Virginia, and registered there as a sex offender as he had been instructed to do under the laws of the State of West Virginia. J.A. 140. The government alleged in the instant case that on or about November 3, 2017, Helton left the State of West Virginia without updating his sex offender registration. J.A. 6.

Helton filed a motion to dismiss, arguing that his South Carolina voyeurism conviction is not a predicate offense that created a duty to register as a sex offender

under SORNA. J.A. 7-16. The government responded in opposition. J.A. 17-25. The District Court held that South Carolina's voyeurism offense "is a sex offense because it is a criminal offense that has an element involving a sexual act..." and denied Helton's motion to dismiss. J.A. 33.

After the denial of Helton's motion to dismiss, the case proceeded to plea negotiations, and on May 9, 2018, Helton entered a conditional guilty plea to the charge against him, reserving the right to appeal the denial of his motion to dismiss. J.A. 35. At sentencing, the District Court imposed a sentence of 24 months' incarceration to be followed by a term of supervised release of 20 years. J.A. 116-17. Helton timely filed his notice of appeal on September 13, 2018. J.A. 123-24.

SUMMARY OF ARGUMENT

Under SORNA, a prior conviction qualifies as a sex offense for registration purposes if it fits into one of five categories listed in 34 U.S.C. § 20911(5). Helton's prior South Carolina conviction for voyeurism in violation of S.C. Code Ann. §16-17-0470 does not fit into any category that would make it a qualifying sex offense.

If Helton's voyeurism conviction is not a sex offense, then he is not a sex offender under 34 U.S.C. § 20911(1). If Helton is not a sex offender, then he is not required to register under § 20913 of SORNA. Since Helton is not a sex offender required to register under SORNA, the government has failed to allege an actual

offense in the indictment returned by the grand jury in this case. As such, Helton respectfully requests that the Court vacate his conviction and sentence, remanding the case to the District Court for further proceedings.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING HELTON'S MOTION TO DISMISS.

It appears that the question presented in this case involves a matter of first impression in this Circuit, to wit, whether a South Carolina conviction for voyeurism under S.C. Code Ann. § 16-17-0470(B) creates an obligation for an individual to register as a sex offender under SORNA.

A. Standard of Review.

The Fourth Circuit reviews de novo a district court's denial of a motion to dismiss an indictment where the denial depends solely on questions of law. *United States v. Hatcher*, 560 F.3d 222, 224 (4th Cir. 2009).

B. Discussion.

The Sex Offender Registration and Notification Act (SORNA) is found at 34 U.S.C. § 20911 et seq. Under SORNA, a sex offender is required to register as such, and keep the registration current, in each jurisdiction where he or she resides, is an

employee, or is a student.[1] SORNA defines "sex offender" as an individual who has been convicted of a sex offense.[2] The term "sex offense" under SORNA is defined as follows:

> (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
> (ii) a criminal offense that is a specified offense against a minor;
> (iii) a Federal offense (including an offense prosecuted under section 1152 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;
> (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or
> (v) an attempt or conspiracy to commit an offense described in clauses (I) through (iv).[3]

The government conceded in its response to Helton's motion to dismiss that only the first portion of SORNA's primary definition of a sex offense is applicable. J.A. 21. The District Court agreed with the government, putting at issue whether a conviction for voyeurism in South Carolina is a "criminal offense that has an element involving a sexual act or sexual contact with another." J.A. 30.

In order to determine if a prior conviction qualifies as a "sex offense" under SORNA, the Fourth Circuit adopted a "circumstance-specific" approach to determining whether a prior conviction was for a sex offense under SORNA. *United*

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[1] 34 U.S.C. § 20913.

[2] 34 U.S.C. § 20911(1).

[3] 34 U.S.C. § 20911(5).

States v. Price, 777 F.3d 700, 710 (4th Cir. 2015). The "circumstance-specific" approach focuses on the facts—not the elements—relating to the prior conviction. *Price*, 777 F.3d at 705.

The government argued in favor of the application of the categorical approach when evaluating prior convictions under 34 U.S.C. § 20911(5)(A)(i). J.A. 21-24. For the purposes of resolving the motion to dismiss, the District Court adopted the government's reasoning, applying the categorical approach in its analysis. J.A. 31.

Helton reiterates his argument, that the Fourth Circuit should apply the circumstance-specific approach it applied in *Price,* even though *Price* dealt with SORNA's residual clause under a separate subsection of the statute. The Fourth Circuit in *Price* looked to the "text, structure, and purpose of the relevant SORNA provisions." 777 F.3d at 708.

Moreover, as the Fourth Circuit notes in *United States v. Berry*, the Supreme Court has identified additional factors, such as legislative history, equitable considerations, Sixth Amendment implications, which are relevant to the discussion of whether to apply the categorical approach or circumstance-specific approach. 814 F.3d 192, 201 n. 3 (4th Cir. 2016) (citing *Descamps*, 133 S. Ct. at 2287-89). While the text of § 20911(5)(A)(i) shows evidence of Congress's intent with its use of "element," the Court may still address additional factors in its analysis, as equitable

considerations especially could change the result here. *Id.* Particularly, the facts and circumstances of Helton's underlying offense and the supporting documentation from all the parties involved attached to Helton's supplemental motion to dismiss, should be considered in a determination of whether his prior offense should be considered a sex offense for purposes of SORNA. J.A. 134-135.

Whichever analysis the Fourth Circuit chooses to apply in this case, Helton argues that his voyeurism conviction from South Carolina should not qualify as a sex offense under SORNA under either the categorical or the circumstance-specific approach.

In order for an accused to be guilty of § 16-17-0470(A), CDR code 0120, the government must prove that an accused went upon the premises of another for the purposes of eavesdropping or peeping. John R. Ferguson, Criminal Offenses in South Carolina § 4:8 (3d ed. 2017); South Carolina Judicial Department, Summary Court Judges Bench Book.[4] S.C. Code Ann. § 16-17-0470(A) defines "peeping tom" as a person who peeps through windows, doors, or other like places, on or about the premises of another, for the purpose of spying upon or invading the privacy of the persons spied upon and any other conduct of a similar nature, that tends to invade the

[4] Available at http://www.sccourts.org/summarycourtbenchbook/displaychapter.cfm?chapter=offensesH#H14.

privacy of others.

In order for an accused to be guilty of § 16-17-0470(B), CDR code 2865, the government must prove that an accused knowingly viewed, photographed, audio recorded, video recorded, produced, or created a digital electronic file, or filmed another person, without that person's knowledge and consent, while that person was in a place where he or she would have a reasonable expectation of privacy, for the purpose of arousing or gratifying the sexual desire of any person. John R. Ferguson, Criminal Offenses in South Carolina § 4:8 (3d ed. 2017); South Carolina Judicial Department, Summary Court Judges Bench Book.[5] Helton was originally charged in South Carolina with violating § 16-17-0470. While the indictment not does not specify which subparagraph of § 16-17-0470 is implicated, the language of the charge suggests that it was § 16-17-0470(A). However, it appears that, without further indictment or allegation, Helton pleaded guilty to violating § 16-17-0470(B). J.A. 130.

A. Circumstance-specific approach

The terms "sexual act" and "sexual contact" are not defined in SORNA. However, those terms are defined 18 U.S.C. § 2246. As defined in § 2246(2), the term

[5] Available at http://www.sccourts.org/summarycourtbenchbook/displaychapter.cfm?chapter=offensesH#H14.

sexual act means:

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

As defined in § 2246(3), the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

Based on the allegation in the South Carolina indictment and the arrest warrant, the voyeurism conviction entailed Helton looking through multiple windows of an apartment belonging to Jerome Brown without Mr. Brown's authorization. J.A. 126. The facts and circumstances of the South Carolina offense do not involve Helton touching Mr. Brown or anyone else for that matter. There is no allegation or information to suggest that Helton was filming, videotaping, or otherwise recording what he was peeping. Nothing in the indictment or the sentencing order indicates that Mr. Brown was a minor. In fact, the use of his full name in the indictment and arrest

warrant suggests that he was not a minor. Even though the offense Helton pleaded guilty to in South Carolina (though not the facts of the case) involved arousing or gratifying sexual desires, Helton's conduct did not involve the touching of any body parts as is required to meet the definition of sexual act or sexual contact. Moreover, the South Carolina offense did not involve the touching of—that is a sexual act or sexual contact with—another person. For these reasons, applying a "circumstance-specific" approach, Helton's voyeurism conviction does not meet the first category of "sex offense" under SORNA. For the motion to dismiss, one need go no further in this approach.

E. Categorical approach

In the alternative, if the categorical approach controls the analysis, Helton argues the categorical approach will similarly yield a result in which his motion to dismiss should be granted.

In applying the categorical approach, unless an existing case establishes the nature of the particular state statute of conviction at issue, the court must first determine the modern generic definition of the offense, then whether the statute of conviction falls within that definition.

Here, in its analysis of the motion to dismiss, the District Court does not point to a federal statute analogous to the state offense at issue. Similarly, the

government fails to identify a modern generic categorical definition and fails to determine if the elements of the statute meet the categorical definition.

The categorical approach requires a determination of whether the elements of the offense of conviction meet the generic definition for the enumerated offense. The elements of the offense of conviction must meet the elements of the enumerated offense in its generic, contemporary definition. Reliance upon a statute's title alone to determine the nature of the offense is inappropriate because the statute title may prohibit more than conduct one would assume is covered by such a statute. *See Johnson v. United States*, 559 U.S. 133 (2010) (comparing Florida's "battery" statute with the generic definition of "battery"). Next, courts are not to look at the facts of the specific case, rather only the elements of conviction. *See Taylor v. United States*, 495 U.S. 575, 600 (1990). Then, courts may compare the elements of the statute of conviction to the statutory definition at issue. When the prior offense meets or is narrower than the generic offense, it qualifies under the statutory provision. *See Descamps*, 133 S. Ct. at 2281 ("The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense."); *Mathis*, 136 S. Ct. at 2251 ("We have often held, and in no uncertain terms, that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed

generic offense.")

Here, Helton posits that the closest federal statutory offense to Helton's South Carolina conviction for voyeurism is 18 U.S.C. § 1801 - Video voyeurism. Under this statute, a defendant is guilty of video voyeurism when that individual has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy. 18 U.S. C. § 1801(a). In comparing the closest federal statute to the South Carolina offense at issue, it appears that the federal statute encompasses much less behavior than the South Carolina offense, as the federal offense requires the "capture" through videotape, photograph, film, or record by some means, or broadcast, of the private area of the individual being captured. *See* 18 U.S.C. § 1801(b)(1)-(5). Thus, the modern generic definition and the state offense of conviction are not exact matches, and the state offense of conviction proscribes a larger sphere of conduct than is targeted by the generic offense - it does not qualify. Under the categorical approach, the South Carolina offense of voyeurism should not serve as a SORNA predicate offense, because its elements proscribe greater conduct than the modern generic definition.

In its decision, the District Court inappropriately conflates an element of the South Carolina offense of voyeurism, a crime which much be committed "for the

purpose of arousing or gratifying sexual desire," with a "sexual act" as it has been interpreted in SORNA cases. J.A. 33. An offense which is "sexual" in nature does not necessarily describe a sexual act. There is no published case in this Circuit, or in any other circuit, which holds that proposition. Further, it is of no moment in federal court in reckoning with a federal statute, whether an individual has a state obligation to register.

The District Court states that the definitions of 18 U.S.C. § 2246 may be relevant; however, its analysis then ignores these definitions. The Fourth Circuit specifically incorporated these definitions in its analysis in *United States v. Berry*, 814 F.3d 192 (4th Cir. 2016), in considering whether a sex offender's prior state law offense made him a tier III sex offender under SORNA.

CONCLUSION

Based on the foregoing, under a circumstance-specific approach or a categorical approach, Helton's South Carolina conviction for voyeurism should not create an obligation to register as a sex offender under SORNA. Helton respectfully requests that this Court vacate his sentence and remand to the District Court for reconsideration.

REQUEST FOR ORAL ARGUMENT

Helton requests oral argument before this Court, if it would aid in the decisional process.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on November 13, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the CM/ECF system, which will send notification of such filing to the following CM/ECF user:

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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