

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY TAYLOR NUNEZ,

Defendant-Appellant.

FOR PUBLICATION

July 21, 2022

No. 356659

Shiawassee Circuit Court

LC No. 20-005144-AR

Before: GLEICHER, C.J., and SAWYER and GARRETT, JJ.

SAWYER, J. (*dissenting*).

I respectfully dissent.

We are asked to determine whether a person is entitled to discontinue their registration under the Sex Offender Registration Act (SORA)¹ where the judgment of sentence omitted the requirement to register. I conclude that the obligation to register is an independent requirement under SORA that must be met regardless whether the judgment of sentence contains such a provision. Accordingly, defendant is not entitled to be removed from the SORA registration list, and I would affirm the decision below.

Defendant was convicted by plea of attempted fourth-degree criminal sexual conduct.² Defendant was sentenced to one year in jail, which he served. After his release from jail, the prosecutor’s office sent a letter informing defendant of his obligation to register under SORA. Defendant registered as advised. Thereafter, defendant filed a motion in district court “to enforce judgment of sentence.” He argued that he was not required to register under SORA because it was not part of the judgment of sentence. He further argued that, although his sentence erroneously

¹ MCL 28.721 *et seq.*

² MCL 750.520e.

omitted the registration requirement,³ it was too late for correcting the judgment of sentence. The district court denied defendant's motion, reasoning that the original sentence had been fully enforced and that there was no need for further enforcement. Defendant then filed an application for leave to appeal to the circuit court, which in lieu of granting leave affirmed the district court. This Court then granted leave.

The flaw in defendant's argument is that his obligation to register is imposed by statute, not, as he suggests, as a condition of a criminal sentence. We review de novo the construction and application of SORA.⁴ We summarized the applicable rules of statutory construction in *Hopkins v Mich Parole Bd*:⁵

When interpreting a statute, our goal is to give effect to the Legislature's intent, focusing first on the statute's plain language. In so doing, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme. When a statute's language is unambiguous, . . . the statute must be enforced as written. No further judicial construction is required or permitted.

MCL 28.723(1) sets forth the list of individuals who "are required to be registered under" SORA. It does not establish that it is an element of a sentence to be imposed by the sentencing judge. MCL 28.724 does set out the procedures to be followed in the registration process, with subsection (1) directing that registration "must proceed as provided in this section." Subsection (5) would be relevant to defendant and provides that an individual "shall register before sentencing" and that the "court shall not impose sentence . . . until it determines that the individual's registration was forwarded to the department as required under section 6." While it would appear that the district court at the time of defendant's sentencing failed to comply with the requirement to determine that defendant had registered before sentence was imposed, I see no provision in the statute that the court's failure in any way excuses defendant's statutory duty to register.⁶ Moreover, nothing in MCL 28.724 requires that SORA registration be made part of the sentence.

Turning to MCL 769.1, the general sentencing statute, MCL 769.1(13) specifically addresses a particular issue involving SORA:

If the defendant is sentenced for an offense other than a listed offense as defined in section 2(d)(i) to (ix) and (xi) to (xiii) of the sex offenders registration act, 1994 PA 295, MCL 28.722, the court shall determine if the offense is a violation of a law of this state or a local ordinance of a municipality of this state

³ Defendant concedes that the offense for which he was convicted would "normally" require registration under SORA.

⁴ *People v Golba*, 273 Mich App 603, 605; 729 NW2d 916 (2007).

⁵ 237 Mich App 629, 635; 604 NW2d 686 (1999) (quotation marks and citations omitted).

⁶ Defendant refers to no statutory provision other than MCL 28.724(5) as establishing any requirement that SORA registration be included as a condition of sentence.

that by its nature constitutes a sexual offense against an individual who is less than 18 years of age. If so, the conviction is for a listed offense as defined in section 2(d)(x) of the sex offenders registration act, 1994 PA 295, MCL 28.722, and the court shall include the basis for that determination on the record and include the determination in the judgment of sentence.

There are two important points to this statutory provision. First, it only necessitates action by the sentencing court and inclusion in the judgment of sentence for those crimes that are not specifically listed in SORA, but fall under the catchall provision for a non-listed crime that by its nature is a sexual offense, which was not the case here. Second, even in those cases, it does not require that registration be a condition of the sentence; rather, it only requires the judgment of sentence to include the court's determination that the offense constituted a sexual offense.

For these reasons, I find no statutory basis for the conclusion that the judgment of sentence must contain a requirement to register under SORA in order for a defendant to be required to register. Indeed, if the Legislature intended there to be such a requirement, it easily could have explicitly included that in either the provisions of MCL 28.724(5) or MCL 769.1.

Moving on to other arguments offered by defendant, he first argues that, under *People v Lee*,⁷ failure to follow the procedures set forth in MCL 28.724(5) precludes requiring a defendant to register under SORA. *Lee*, however, is factually distinguishable from this case. In *Lee*, the defendant was not convicted of a specified listed offense.⁸ Rather, any registration requirement would fall under the catchall provision for those offenses that by its nature constitute a sexual offense. As discussed above, that would require the trial court to have decided that the nature of the offense would require registration and included that determination in the judgment of sentence. While that was requested, the trial court did not hold the hearing and make the determination before sentencing.⁹ It was not until 20 months later that the prosecutor moved to impose a registration requirement and the original sentencing judge's successor determined that the defendant had to register.¹⁰ Although it was necessary in *Lee* for a determination to be made that the defendant was required to register, as discussed above, I find no such requirement where, as here, a defendant is convicted of a specified listed offense. Therefore, *Lee* is not applicable to this case.

Second, defendant relies on *People v Comer*,¹¹ which is even less on-point than is *Lee*. *Comer* did not even involve SORA. Rather, it involved the requirement of MCL 750.520b(2)(d) that someone convicted of first-degree criminal sexual conduct be sentenced to lifetime electronic

⁷ 489 Mich 289; 803 NW2d 165 (2011).

⁸ *Id.* at 295.

⁹ *Id.* at 293.

¹⁰ *Id.* at 293-294.

¹¹ 500 Mich 278; 901 NW2d 553 (2017).

monitoring.¹² In *Comer*, the trial court failed to include monitoring in the judgment of sentence, but attempted to correct the oversight 19 months later on its own initiative.¹³ The Court concluded that the sentence was, in fact, invalid for failure to include the monitoring requirement, but that once sentence is imposed the trial court lacked the authority to modify the sentence on its own initiative and it would have required a motion by a party to correct the sentence.¹⁴ But, again, SORA does not make registration a condition of sentence, unlike electronic monitoring, nor did the trial court attempt to modify its original sentence.

Defendant next argues that his plea was not knowing and voluntary because he was not informed of the SORA requirement in the course of taking his plea. First, there is some evidence to suggest that defendant was, in fact, aware of the SORA registration requirement during the plea proceedings. But, in any event, if there is merit to defendant's argument, it would merely provide him with a basis to move to withdraw his plea. Defendant, however, ultimately concedes that, due to the time that has passed, there is no remedy even if the plea is deemed involuntary.

Defendant also argues that the prosecutor's office exceeded its authority by issuing an "order" to defendant to register, crossing the line into a judicial function. I disagree with defendant's characterization of the prosecutor's letter. As discussed above, SORA creates an obligation to register independent of any provision in the judgment of sentence. That is, it was defendant's conviction that triggered his obligation to register, not the judgment of sentence or other order of the court. Thus, the prosecutor's letter was merely a reminder to defendant of that obligation. While it is true that the statute imposes duties on various officials to inform a defendant of that obligation, and to supply the forms, defendant points to no provision in the statute that prohibits a prosecutor from supplying that information as well. Indeed, I agree with the lower court's observation that it is a proper exercise of the prosecutor's discretion to issue a warning and to provide an opportunity to come into compliance with the law before filing charges.

Finally, I do not disagree with the majority's observation that the trial court did not follow proper procedures in this case with regard to the SORA registration. If defendant had never registered and was now being prosecuted for that failure, I might well agree that the defects would preclude such prosecution.¹⁵ Similarly, the defects in the process might well have provided a basis for a successful timely motion for defendant to withdraw his plea. But defendant is not being prosecuted for a failure to register, nor is he seeking to withdraw his plea. Rather, he is seeking to be excused from his obligation to register, and I find no basis in the law to do so.

In conclusion, I conclude that where a defendant is convicted of a crime specified under SORA to require registration, there exists an independent obligation for that defendant to register.

¹² That section explicitly states that "the court shall sentence the defendant to lifetime electronic monitoring under section 520n."

¹³ 500 Mich at 283.

¹⁴ *Id.* at 300-301.

¹⁵ But I would point out that defendant would still be obligated to register and could be prosecuted for failure to register if he refused to register after being informed of his obligation to do so.

Such requirement to register is not dependent on it being made a condition of the sentence. Accordingly, the absence of registration being a part of the sentence in this case does not entitle defendant to the relief of “enforcement of sentence” that he sought below.

I would affirm.

/s/ David H. Sawyer