

STATE OF MICHIGAN
COURT OF APPEALS

DOUGLAS TRANDALL,

Plaintiff-Appellant,

v

GENESEE COUNTY PROSECUTOR

Defendant-Appellee

UNPUBLISHED

January 4, 2002

No. 221809

Genesee Circuit Court

LC No. 99-064965-AZ

Before: Owens, P.J., and Holbrook, Jr., and Talbot, JJ.

PER CURIAM.

In this declaratory judgment action, plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant and requiring plaintiff to register pursuant to Michigan's Sex Offender Registration Act, MCL 28.721 *et seq.* We affirm.

In 1997, plaintiff pleaded guilty in federal district court to child sexual exploitation contrary to 18 USC 2252(a)(4). His guilty plea stemmed from charges that in September 1994 he possessed visual material on a computer diskette that was sexually exploitative of minors. The court sentenced him to two years probation. The terms of his probation provided that plaintiff "shall not commit another federal, state or local crime." Thereafter, plaintiff brought this declaratory judgment action in the state circuit court seeking a ruling regarding whether his federal conviction triggered the registration requirements of Michigan's Sex Offender Registration Act, MCL 28.721 *et seq.* (herein "The Act").¹

In his complaint, plaintiff alleged the existence of an actual controversy and claimed to have a good faith question regarding his obligation to register under the Act. Plaintiff had sought guidance from his federal probation officer as well as Michigan's Attorney General's office. Defendant answered that plaintiff's violation of 18 USC 2252(a)(4)(B) is substantially similar to a violation of MCL 750.145c(1)(i), and therefore plaintiff is required to register as a sex offender pursuant to MCL 28.722(d)(vi). Defendant further stated this matter is not appropriate for a declaratory judgment proceeding. Defendant asserted that plaintiff's failure to register pursuant to the Act is a felony, and as such it is a matter properly determinable in a criminal proceeding.

¹ The Sex Offender Registration Act was amended by PA 1999 No. 85, effective September 1, 1999. In this opinion, our references and citations to the Act are consistent with the statute as it was at the time of plaintiff's conviction.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(4), MCR 2.116(C)(8), and MCR 2.116(C)(10). Defendant argued that the trial court lacked jurisdiction because plaintiff failed to present an actual controversy, that plaintiff failed to state a claim for which relief could be granted, and that there was no issue of material fact regarding whether plaintiff must register under the Act and defendant was entitled to judgment as a matter of law. In response, plaintiff maintained that declaratory relief is appropriate because he was being threatened with state prosecution and with a violation of his federal probation pursuant to an unclear statute, which he argued is unconstitutionally vague. Following a hearing on the motion, but without explanation, the trial court issued an order granting defendant's motion for summary disposition and ordering plaintiff to register pursuant to the Act.²

On appeal, plaintiff first argues that a declaratory judgment action is an appropriate proceeding in which to resolve the question of his obligation to register under the Act. Plaintiff raises no contention of error on the part of the trial court, but urges this Court to conclude that his declaratory judgment action was properly entertained. The trial court implicitly agreed that it had the power to issue a declaratory judgment in this matter when it granted summary disposition and ordered plaintiff to register. See *Reo v Lane Bryant, Inc*, 211 Mich App 364, 365 n 1; 536 NW2d 556 (1995). Because the trial court resolved this issue in plaintiff's favor, this issue is moot and we need not address it further.

Next, plaintiff contends that the trial court erroneously granted summary disposition and ruled that plaintiff is required to register under the Act. The grant or denial of summary disposition is a question of law, which we review de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Likewise, we review de novo the trial court's statutory interpretation. *Williams v Williams*, 229 Mich App 318, 321; 581 NW2d 777 (1998). Although the trial court did not state the basis for its ruling, because the question of plaintiff's obligation to register under the Act is purely one of law, the court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(8). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of the pleadings alone. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). All well-pleaded facts are accepted as true and are construed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

The relevant provisions of Michigan's Sex Offender Registration Act require an individual to register as a sex offender if he or she is convicted of a violation of MCL 750.145c or "[a]n offense substantially similar . . . under a law of the United States" after October 1, 1995. MCL 28.723; MCL 28.722(a), (d)(i) and (d)(vi). Plaintiff contends that he should not be required to register because the specific act that he committed was not proscribed by Michigan law at the time of his offense. We disagree.

Plaintiff pleaded guilty in federal court to:

² According to plaintiff's brief, while this appeal was pending plaintiff was charged criminally for failure to register under the Act. The district court dismissed the action. The prosecution appealed to the circuit court, where the matter is currently pending.

Knowing[ly] possess[ing] 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct. [18 USC 2252(a)(4)(B).]

At the time plaintiff possessed such a visual depiction in 1994, which was contained on a computer diskette, the most closely related Michigan statute defined “child sexually abusive material” as:

a developed or undeveloped photograph, film, slide, electronic visual image, or sound recording of a child engaging in a listed sexual act; a book, magazine, or other visual or print medium containing such a photograph, film, slide, electronic visual image, or sound recording; or any reproduction, copy, or print of such a photograph, film, slide, electronic visual image, book, magazine, other visual or print medium, or sound recording. Child sexually abusive material does not include material that has primary literary, artistic, educational, political, or scientific value or that the average person applying contemporary community standards would find does not appeal to prurient interests. As used in this subdivision, “community” means the state of Michigan. [MCL 750.145c(1)(i).]

In 1994, Michigan law imposed penalties for conduct related to the distribution and promotion of “child sexually abusive material.” MCL 750.145c(2)-(3). The statute defining child sexually abusive material was amended in 1994,³ effective April 1, 1995, to include “computer diskette” in the list of covered materials, MCL 750.145c(1)(i), and also to add a penalty for knowingly possessing child sexually abusive material, MCL 750.145c(4).⁴

The relevant provisions of Michigan’s Sex Offender Registration Act require an individual to register as a sex offender if he or she was convicted of a violation of MCL 750.145c or “[a]n offense substantially similar . . . under a law of the United States.” MCL 28.723; MCL 28.722(a), (b)(i) and (b)(vi). The current version of the Act, as amended effective

³ MCL 750.145c was amended by PA 1994, No 444, § 1.

⁴ The 1994 amendment also deleted the following language from the definition of “child sexually abusive material” in MCL 750.145c(1)(i):

Child sexually abusive material does not include material that has primary literary, artistic, educational, political, or scientific value or that the average person applying contemporary community standards would find does not appeal to prurient interests. As used in this subdivision, “community” means the state of Michigan.

September 1, 1999, is not significantly changed as it applies to the instant case. Both versions of the Act limit the registration requirement to those individuals convicted of violating MCL 750.145c or a substantially similar foreign law after October 1, 1995, or individuals convicted in Michigan on or before October 1, 1995, that are subject to Michigan jurisdiction by being on parole, committed to jail, or otherwise committed to the jurisdiction of the department of corrections after October 1, 1995. MCL 28.723(1)(a)-(b). For individuals convicted of violating a substantially similar foreign law on or before October 1, 1995, the Act requires that their probation or parole have been transferred to Michigan after October 1, 1995. MCL 28.723(1)(c). Plaintiff contends that the Act is not intended to apply to him because he was never subject to Michigan jurisdiction for his possession of the computer diskette.

The primary goal of statutory interpretation is to determine and give effect to the intent of the Legislature. *Frankenmuth Mutual Ins v Marlette Homes, Inc.*, 456 Mich 511, 515; 573 NW2d 611 (1998). The first step in doing so is to examine the specific language of the statute. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). Where there is no ambiguity in the language of a statute, the Legislature is presumed to have intended the meaning it plainly expressed and judicial construction is unwarranted and inappropriate. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999); *Nation v WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997); *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). Where a criminal statute is ambiguous, it must be strictly construed under the rule of lenity. *People v Gilbert*, 414 Mich 191, 211; 324 NW2d 834 (1982); *People v Johnson*, 195 Mich App 571, 575; 491 NW2d 622 (1992). In the instant case, the plain language of the Act requires that plaintiff register as a sex offender, despite the fact that plaintiff could not have been charged under one of the related statutes at the time of his offense.

We agree with plaintiff that at the time of plaintiff's offense, the federal and state statutes at issue here were not substantially similar. Although the prior version of MCL 750.145c did not include "computer diskette" among its list of materials, the statute did encompass "electronic visual image[s]." Arguably, images contained on a computer diskette could be regarded as electronic visual images. However, the 1994 version of the statute prohibited the promotion and distribution of child sexually abusive materials. The statute did not prohibit mere possession until the statute was amended, effective April 1, 1995. MCL 750.145c(4). Therefore, although plaintiff was convicted in federal court of possession of child sexually exploitative images on a computer diskette in 1994, he could not have been convicted in Michigan under MCL 750.145c. Based on the distinction between the mere possession and the promotion and distribution of child sexually abusive materials in the federal and Michigan statutes, 18 USC 2252(a)(4)(B) was not substantially similar to MCL 750.145c at the time of plaintiff's offense.

Although plaintiff could not have been convicted in Michigan for his possession of child sexually abusive material on a computer diskette, he is still required to register as a sex offender. By the express language of the Act, an individual is required to register as a sex offender if he or she is convicted of certain sexual offenses after October 1, 1995. The time of the offense is irrelevant. MCL 28.723. Plaintiff was convicted in 1997⁵ of possessing images of a minor

⁵ We note that there is some confusion about the date of plaintiff's conviction. In his complaint, plaintiff gives the date as February 6, 1998. In his brief on appeal, plaintiff states that "[t]he plea in Federal Court was entered February 6, 1997." Plaintiff attaches a copy of the federal
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engaging in sexually explicit conduct. At that time, plaintiff was required to register in Michigan as a sex offender if his offense was “substantially similar” to a “listed offense.” The listed offenses include MCL 750.145c, which, at the time of defendant’s conviction and when the Act was triggered, prohibited the possession of child sexually abusive material on a computer diskette. MCL 750.145c(1)(i) and (4). The fact that plaintiff could not be convicted of violating MCL 750.145c is irrelevant where the statute is merely used as a tool for defining conduct that triggers the registration requirement. Because the Act does not require an actual conviction under MCL 750.145c, plaintiff’s 1997 federal conviction makes him subject to the Act’s registration requirements.⁶

Finally, plaintiff argues that the Act is void for vagueness because persons with convictions from foreign jurisdictions will be unable to ascertain whether their convictions are “substantially similar” to a listed offense such that registration under the Act is required. We need not reach the merits of this issue because plaintiff has not argued how the statute is vague as it is applied to him. *People v Knapp*, 244 Mich App 361, 374 n 4; 624 NW2d 227 (2001).

A claim that a statute is impermissibly vague “must be examined in the light of the facts of the case at hand.” *People v Howell*, 396 Mich 16, 21; 238 NW2d 148 (1976), citing *United States v Nat’l Dairy Products Corp*, 372 US 29; 83 S Ct 594; 9 L Ed 2d 561 (1963). Further, “[w]hen a defendant’s vagueness challenge does not implicate First Amendment freedoms, the constitutionality of the statute in question must be examined . . . without concern for the hypothetical rights of others.” *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998). [*Knapp*, *supra* at 374 n 4.]

“[T]he proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in this case.” *Id.*; *Vronko*, *supra* at 652.

In this case, plaintiff argues that the term “substantially similar” in the Act is subject to different interpretations and provides no guidance regarding the obligation to register under the Act. Plaintiff fails to articulate how the term “substantially similar” in the Act is vague as

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judgment to his brief, which indicates the judgment was imposed on April 30, 1997. These differences are not meaningful to the resolution of this appeal because the applicable section of the Act covers convictions for listed offenses after October 1, 1995. MCL 28.723(a).

⁶ We note for clarification that this Court has determined that the Act, as a regulatory statute, can be applied retroactively. See *People v Pennington*, 240 Mich App 188, 194-197; 610 NW2d 608 (2000). It appears from defendant’s brief on appeal that defendant misconstrues plaintiff’s argument. Plaintiff does not claim that he should not be required to register ex post facto. Rather, he argues that because MCL 750.145c(1) did not include possession of material on computer diskette at the time of his offense, he could not have been convicted under the Michigan statute. Plaintiff’s argument seems to imply that the application of MCL 750.145c to his case is ex post facto. However, because plaintiff is merely being required to register and is not being punished under MCL 750.145c, the application of the statute is not impermissibly ex post facto. See *Pennington*, *supra* at 197.

applied in this case. At the time of plaintiff's 1997 conviction, both the federal and the Michigan statutes expressly prohibited the possession of child sexually abusive material contained on computer diskette. Because defendant has failed to raise any argument on appeal that the statute is unconstitutionally vague with regard to the facts of this case and defendant's specific conduct, we deem this issue abandoned. *Knapp, supra; People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992).

Affirmed.

/s/ Donald S. Owens

/s/ Donald E. Holbrook, Jr.

/s/ Michael J. Talbot