

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 6, 2012

v

JOSEPH ALBERTO GENTILE,

Defendant-Appellant.

No. 295570
Oakland Circuit Court
LC No. 2007-218331-FH

AFTER REMAND

Before: M. J. KELLY, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as on leave granted¹ his guilty-plea conviction of surveilling an unclothed person, MCL 750.539j. Defendant was sentenced to three years' probation with 137 days in jail for the surveilling an unclothed person conviction. We affirm defendant's conviction, but vacate the portion of the judgment of sentence that requires defendant to register as a sex offender under the Sex Offenders' Registration Act (SORA), MCL 28.721 *et seq.*

This case arises from defendant's surveillance of an unclothed person on October 6, 2007, in Farmington, Michigan. On that date, a father, a mother and their two daughters, ages seven and three, were shopping for costumes at a Halloween USA store. The mother entered a changing booth to try on costumes, taking her daughters into the booth with her. The father noticed that the curtain was closed in the booth to the right of the one the mother was using. The mother removed all of her clothing except for her bra and underwear to try on costumes. After the mother had been in the booth for approximately ten minutes, the father noticed that in the booth next to the mother was an individual who did not appear to be changing clothes, but instead had both feet pointed directly at the mother's booth. The father reached into the mother's booth and felt a perforation or hole in the wall separating the two booths. The father loudly stated, "[e]xcuse me." Approximately 10 to 30 seconds later, defendant emerged from the booth looking nervous and "made a beeline right to the door."

¹ See *People v Gentile*, 488 Mich 952; 791 NW2d 104 (2010).

Defendant was charged with surveilling or attempting to surveil the mother, who was clad only in her undergarments, under circumstances where she had a reasonable expectation of privacy. On September 3, 2008, defendant pleaded guilty to the surveilling an unclothed person charge. To establish the factual basis for the plea, the prosecution asked defendant the following question:

Q. Sir, it is true on October 6, 2007 while you were in the County of Oakland you did surveill [sic] or attempt to surveill [sic] Ms. Rozsa who was in her undergarments without her permission?

A. Yes, sir.

Also, defendant signed a document titled, "Plea Form, Acknowledgement Form," in which, in response to an instruction to state in his own words what he did, defendant wrote, "I surveilled Ms. Rozsa who was dressed only in her underwear." The trial court accepted defendant's guilty plea and sentenced defendant to three years' probation with 137 days in jail. The trial court, at the request of the prosecutor, then ordered sex offender registration, to which defense counsel objected. The trial court stated:

The court appreciates your arguments [defense counsel] but the court's purview is not on the constitutional rights of a defendant as to his accusation but on his compliance with the court's probation while he's under my watch. Recognizing the case that's been presented and the arguments, the court feels it appropriate under these circumstances and I'm not happy about doing it but I feel it appropriate and I do order compliance with Sex Offender Registration requirements.

On December 18, 2009, defendant filed a delayed application for leave to appeal in this Court, arguing that the trial court had erred in ordering him to register as a sex offender. This Court denied the delayed application for leave to appeal for lack of merit in the grounds presented. *People v Gentile*, unpublished order of the Court of Appeals, entered April 29, 2010 (Docket No. 295570). Defendant then filed an application for leave to appeal in the Michigan Supreme Court (Docket No. 295570). On November 24, 2010, the Michigan Supreme Court remanded the case to this Court for consideration as on leave granted. *People v Gentile*, 488 Mich 952; 791 NW2d 104 (2010). On December 19, 2011, this panel, on its own motion, remanded this case to the trial court and directed that the trial court, "indicate the factual basis for its order that defendant register under [SORA]" and "indicate which provision of the SORA provided the basis for his conclusion that defendant was required to register under the SORA." The trial court held a hearing on January 12, 2012 at which the trial court stated the factual basis for plaintiff's registration under SORA and the provision under which it was making the finding.

Defendant argues that the trial court erred in ordering him to register as a sex offender because the offense of which defendant was convicted was not specifically identified as a listed offense in the SORA and because the trial court made no findings to establish that the offense fell within a catchall provision of the SORA. We conclude that the trial court's articulated basis for its determination that defendant was required to register under a catchall provision of the SORA was improper.

The construction and application of the SORA presents a question of law that is reviewed de novo. *People v Anderson*, 284 Mich App 11, 13; 772 NW2d 792 (2009). This Court reviews any factual findings at sentencing for clear error. *Id.* Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.*

“[The] SORA requires an individual who is convicted of a listed offense after October 1, 1995, to register as a sex offender. MCL 28.723(1)(a).” *People v Golba*, 273 Mich App 603, 605; 729 NW2d 916 (2007). At the time of the trial court’s decision, MCL 28.722(e) defined “listed offense” to include violations of specific statutes and various catchall situations. The statute under which defendant was convicted, MCL 750.539j, was not identified as a listed offense when the trial court decided this issue. The catchall provision that the prosecution argues should apply was contained in MCL 28.722(e)(xi), which defined a “listed offense” to include “[a]ny other violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than 18 years of age.”

Three requirements must be met for this catchall provision to apply: “(1) the defendant must have been convicted of a state-law violation or a municipal-ordinance violation, (2) the violation must, ‘by its nature,’ constitute a ‘sexual offense,’ and (3) the victim of the violation must be under 18 years of age.” *Golba*, 273 Mich App at 607, quoting *Meyers*, 250 Mich App at 647. Defendant argues that no basis exists for finding that the victim of the violation was below 18 years of age. The prosecution counters that the evidence of defendant’s long pattern of sexual misconduct directed at young girls and at adult women accompanied by young girls supports an inference that defendant was attempting to surveil the two minor daughters.

On remand, the trial court stated that its finding was based on MCL 28.722(e)(x), which was, at the time of sentencing, the catchall provision that required SORA registration for a conviction of a crime, “that by its nature constitutes a sexual offense against an individual who is less than 18 years of age.” The trial court stated that the factual basis for this determination was that children were present in the changing room with their mother. The court concluded:

peeping on a mother in the presence of her children is a sexual offense against an individual or, here, individuals, plural, who are less than 18 years old.

The mind of the child or children—in this Court’s conclusion and finding and rationale—is pondering a stranger watching his or her mom in her underwear and these things, naturally, are going on in the child’s mind, why is that man looking at mommy in her underwear.

And the Court analogizes that to the other—another rhetorical query, why is that man touching my private, for example.

This Court finds that these scenarios, a man observing his [sic] mother in her underwear in the presence of her children and a man touching a child’s privates are, in some sense or, at least for purposes of registration under the SORA, equivalent, in that they conjecture [sic] up in the minds of the children matters of sexuality.

The trial court did not conclude that defendant was attempting to surveil the complainant's daughters (as argued by the prosecutor), but rather that knowing that a man was watching their mother in her underwear could "conjecture [sic] up in the minds of the children matters of sexuality." This finding does not form the requisite basis that the victim be under 18 years of age. Therefore, requiring defendant to register under the SORA was in error. We conclude that defendant's actions in this case did not constitute a sexual offense against the daughters, particularly in light of the fact that the girls were unaware of the defendant's actions while they were occurring.

Affirmed as to defendant's conviction, but vacated as to the requirement that defendant register as a sex offender under the SORA. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Donald S. Owens

/s/ Stephen L. Borrello