

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH ALBERTO GENTILE,

Defendant-Appellant.

UNPUBLISHED

October 27, 2011

No. 295570

Oakland Circuit Court

LC No. 2007-218331-FH

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 remand this case to the trial court for further proceedings while retaining jurisdiction.

Defendant argues that the trial court erred in ordering him to register as a sex offender under the Sex Offenders' Registration Act (SORA), MCL 28.721 *et seq.*, 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 agree that the offense of which defendant was convicted was not specifically identified as a listed offense in the SORA when this issue was decided at the trial court level. We further agree that the trial court failed to state the basis for a determination that defendant was required to register under a catchall provision of the SORA.

For an issue to be preserved for appellate review, it must be raised before, and addressed and decided by, the trial court. *People v Metamora Water Service, Inc.*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Here, defense counsel, at sentencing, expressed opposition to registration under the SORA because it "would be based upon hearsay and double hearsay, and again, [defendant] is entitled to confront any accusers he may have and I think that is awfully drastic in this situation given that fact." Defense counsel did not object on the ground asserted on appeal, i.e., that the conviction offense was not specifically identified as a listed offense and that the trial

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

court did not make findings that would satisfy a catchall provision. An objection on one ground is insufficient to preserve an appellate argument based on a different ground. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). Therefore, defendant failed to preserve this issue, and this Court’s review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

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.² 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.”³ Further, a provision of the Code of Criminal Procedure provides:

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 that by its nature constitutes a sexual offense against an individual who is less

² The Legislature amended various provisions of the SORA effective July 1, 2011. See 2011 PA 17. Notably, the version of MCL 28.722 that took effect on July 1, 2011, defines a “listed offense” to include “a tier I, tier II, or tier III offense,” and it further defines a “tier I offense” as including a violation of MCL 750.539j, if a victim is a minor. MCL 28.722(k) and (s)(v). Because the trial court decided this issue before July 1, 2011, we analyze this issue under the statutory provisions in effect when the trial court decided the case. See *People v Lee*, ___ Mich ___, ___ NW2d ___ (Docket No. 141570, issued June 30, 2011) (slip op at 1 n 1). In any event, because the central issue here pertains to whether a minor was a victim of the offense, and because the amended statute includes MCL 750.539j in the definition of a tier I offense only if a victim was a minor, it does not appear that the recent amendment would affect the ultimate result in this case.

³ An essentially identical catchall provision is contained in the recently amended version of the SORA. MCL 28.722(k) defines a listed offense to mean a tier I, tier II, or tier III offense. MCL 28.722(s)(vi) provides that a tier I offense includes “[a]ny other violation of a law of this state or a local ordinance of a municipality, other than a tier II or tier III offense, that by its nature constitutes a sexual offense against an individual who is a minor.”

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. [MCL 769.1(13) (emphasis added).]

In *Golba*, 273 Mich App at 607, this Court followed the analysis in *People v Meyers*, 250 Mich App 637, 647; 649 NW2d 123 (2002), overruled on other grounds *People v Lee*, ___ Mich ___ (Docket No. 141570, issued June 30, 2011) (slip op at 8 n 5), that the plain language of the SORA catchall provision in former MCL 28.722(e)(xi) requires that three conditions be satisfied to require registration: “(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.

Further, because MCL 769.1(13) requires the sentencing court to place on the record and include in the judgment of sentence its determination that the conviction offense by its nature is a sexual offense against an individual who is less than 18 years of age, the *Golba* Court concluded that the Legislature intended sentencing courts to make findings of fact regarding the underlying conduct in individual cases. *Golba*, 273 Mich App at 611. If the Legislature had intended that courts merely decide as a matter of law based on the statutory language whether an offense by its nature is a sexual offense against a minor, it would not have required courts to include the basis for the determination on the record. *Id.* Further, because the SORA is a remedial regulatory scheme that was not designed to punish sex offenders, the *Golba* Court held that judicial fact-finding in applying the SORA does not violate a defendant’s constitutional rights to a jury trial and due process of law. *Id.* at 620.

In *People v Althoff* (*Althoff I*), 477 Mich 961; 724 NW2d 283 (2006), the Michigan Supreme Court remanded the case to this Court to consider several questions related to the SORA, including whether the catchall provision in former MCL 28.722(e)(xi) requires registration based solely on the legal elements of the conviction offense or whether the facts of the offense may be considered. The Supreme Court’s remand order labeled the analysis in *Meyers* as dictum. *Id.* In *People v Althoff* (*Althoff II*), 280 Mich App 524, 534; 760 NW2d 764 (2008), this Court stated that although the analysis in *Meyers* was dictum, the subsequent holding in *Golba* was binding on this Court. Therefore, following *Golba*, the *Althoff II* Court concluded “that the particular facts of a violation are to be considered in determining whether the violation ‘by its nature constitutes a sexual offense against an individual who is less than 18 years of age’ under MCL 28.722(e)(xi).” *Id.* This Court further held “that a sentencing court may consider all record evidence in determining if a defendant must register under SORA, as long as the defendant has the opportunity to challenge relevant factual assertions and any challenged facts are substantiated by a preponderance of the evidence.” *Id.* at 541-542. The content of PSIRs, testimony taken at evidentiary hearings, and even acquittals may be considered “as long as any challenged facts are substantiated by a preponderance of the evidence.” *Id.* at 543. Finally, the *Althoff II* Court held that the rules of evidence do not apply to a hearing held to determine whether a defendant must register under the SORA. *Id.* at 542.

In *Anderson*, 284 Mich App at 13, this Court held that, despite the Michigan Supreme Court's declaration in *Althoff I* that the *Meyers* analysis was dictum, the holdings in *Golba* and *Althoff II* are binding on this Court. The *Anderson* Court applied the three requirements for satisfying the catchall provision that were set forth in *Meyers* and followed in *Golba* and *Althoff II*. *Id.* at 14. The *Anderson* Court further rejected the defendant's argument that the record of the underlying facts must be developed at trial or through admissions. *Id.* at 15. This Court explained that "judicial fact-finding outside of the avenues of trial or admissions does not violate due process because SORA is a remedial regulatory scheme that furthers a legitimate state interest of public safety, and compliance with the statute is not a punishment." *Id.* at 15.

In *Lee*, ___ Mich at ___ (slip op at 7), the Michigan Supreme Court found numerous procedural errors in the trial court's decision to order registration under SORA. Most relevant here is that the Supreme Court concluded that if the defendant's conviction fell under the catchall provision in former MCL 28.722(e)(xi), the trial court had "failed to comply with MCL 769.1(13) when it entered the judgment of sentence without including in the judgment its determination that the crime was a listed offense for which registration was required." *Id.* The Supreme Court also held that the 20-month delay between sentencing and the trial court's determination that the defendant must register under the SORA failed to comply with various registration procedures set forth in MCL 28.724(5). *Id.* at 6-7. The Supreme Court found "no support in SORA for permitting a postsentencing hearing to make a determination regarding registration. Indeed, such a hearing is a clear violation of the registration procedures established by MCL 28.724(5)." *Id.* at 7-8.⁴

Here, it is undisputed that when the trial court ordered defendant to register under the SORA, the conviction offense of surveilling an unclothed person, MCL 750.539j, was not identified in MCL 28.722(e) as a listed offense.⁵ The prosecution contends that registration was nonetheless properly ordered because the catchall provision in former MCL 28.722(e)(xi) applied. 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 concedes that the first two elements are satisfied but 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

⁴ Defendant here raises no argument regarding the procedural requirements set forth in MCL 28.724(5). Moreover, although the trial court failed to include the SORA registration requirement in the original judgment of sentence and the first amended judgment of sentence, the trial court determined at the sentencing hearing itself that defendant must register under the SORA.

⁵ As discussed, as of July 1, 2011, this offense is now included in the definition of a listed tier I offense, if a victim is a minor. See MCL 28.722(k) and (s)(v).

surveil the two minor daughters of the complainant who accompanied the complainant into a changing booth in which defendant surveilled her.

Accepting for the sake of argument the prosecutor's contention that the record evidence would support a finding that defendant was attempting to surveil the complainant's daughters, we conclude that the trial court here did not make any such finding in connection with its decision on this issue. Instead, the trial court stated: "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." The trial court did not clarify whether it was ordering registration under the catchall provision in former MCL 28.722(e)(xi). Further, neither the original nor the amended judgments of sentence included any determination by the court regarding the catchall provision, as required by MCL 769.1(13) and *Lee*, ___ Mich at ___ (slip op at 7). Because it is undisputed that the conviction offense was not listed in MCL 28.722 at the time of the trial court's decision, the only ground on which the court could have ordered SORA registration was under a catchall provision.⁶ Thus, the trial court should have stated the basis for its determination.⁷

Accordingly, we remand this case to the trial court to explain the basis for its determination that defendant must register under the SORA. We retain jurisdiction.

/s/ Michael J. Kelly
/s/ Donald S. Owens
/s/ Stephen L. Borrello

⁶ Defendant's brief addresses two other catchall provisions that were formerly contained in MCL 28.722(e)(xii) (sexually delinquent person) and MCL 28.722(e)(xiv) (substantially similar offense), but the prosecution does not argue that either of these provisions is or should be the basis for requiring SORA registration in this case. The trial court on remand should explain the basis for its determination.

⁷ The prosecution states that in scoring OV 9, the trial court found that the complainant's minor daughters were victims. The trial court did not, however, state on the record or indicate in the judgment of sentence that its finding in connection with OV 9 was the basis for its determination that defendant was required to register under the SORA. See MCL 769.1(13); *Lee*, ___ Mich at ___ (slip op at 7). Further, the trial court stated that its decision regarding OV 9 was "subject to reconsideration if the factual basis did not reference the minor girls." Defendant correctly observes that the factual basis for the plea did not refer to the complainant's daughters.

Court of Appeals, State of Michigan

ORDER

People of MI v Joseph Alberto Gentile

Docket No. 295570

LC No. 2007-218331-FH

Michael J. Kelly
Presiding Judge

Donald S. Owens

Stephen L. Borrello
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 28 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, we remand this case to the trial court to explain the basis for its determination that the defendant must register under the SORA. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

OCT 27 2011

Date

A handwritten signature in black ink, appearing to read "Larry S. Royster", is written over a horizontal line.

Chief Clerk