

Order

Michigan Supreme Court
Lansing, Michigan

July 2, 2019

Bridget M. McCormack,
Chief Justice

159572

David F. Viviano,
Chief Justice Pro Tem

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

v

SC: 159572
COA: 348890
Oakland CC: 2001-180525-FH

WILLIAM SIM SPENCER,
Defendant-Appellant.

On order of the Court, the application for leave to appeal prior to decision by the Court of Appeals is considered, and it is DENIED as moot, in light of the May 22, 2019 order of the Court of Appeals.

APPENDIX
D



10624

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 2, 2019

Clerk

PEOPLE

V

Defendant,

HON. Nanci J. Grant

Oakland County Clerk - Register of Deeds
By B. Butler
Deputy

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM SIM SPENCER,

Defendant-Appellant.

UNPUBLISHED

January 22, 2019

No. 343367

Benzie Circuit Court

LC No. 17-002485-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

WILLIAM SIM SPENCER,

Defendant-Appellee/Cross-
Appellant.

No. 343468

Benzie Circuit Court

LC No. 17-002485-FH

Before: BOONSTRA, P.J., and SAWYER and TUKEL, JJ.

PER CURIAM.

In Docket No. 343367, defendant, William Sim Spencer, appeals by right the circuit court's decision on his request to discontinue registration under the Sex Offenders Registration Act (SORA) in his SORA violation case. In Docket No. 343468, the prosecution appeals by leave granted the same order quashing defendant's bindover, and defendant cross-appeals, seeking the same relief as in Docket No. 343367 and requesting this Court to declare SORA unconstitutional. We affirm the circuit court's decision to quash defendant's bindover without further relief.

APPENDIX
B

I. BACKGROUND

In 2001, defendant pleaded guilty to eight counts of second-degree criminal sexual conduct (CSC-II) (person under 13 years of age). Following defendant's release from prison in August 2016, he filed a civil complaint against the Benzie County Prosecuting Attorney and the State Police Department Director, arguing that SORA's reporting requirements, as applied to him, were unconstitutional under *Does #1-5 v Snyder*, 834 F3d 696, 705-706 (CA 6, 2016), which held that the 2006 and 2011 SORA amendments retroactively increased a punishment in contravention of the Ex Post Facto Clause of the United States Constitution. Defendant's civil case was split, and it proceeded in both Benzie County and the Court of Claims.

In November 2016, defendant did not verify his address. Defendant was arrested in December 2016 on charges that he had failed to verify his address and failed to pay a fee associated with verification. At the preliminary hearing, defendant testified that, at the hearing in his civil case on November 29, 2016, the prosecutor stated that she was prohibited, on the basis of *Does*, from prosecuting defendant under 2011 PA 17. According to defendant, he had intended to verify his address in November if he did not receive a temporary restraining order. However, he understood from the court hearing that he did not need a restraining order because the prosecution would not enforce SORA against him.

Michigan State Police Trooper Kenneth Smith testified that, as a tier III offender, defendant was required to verify his address in November, February, May, and August. According to Smith, when he spoke with defendant in December, defendant was open about not verifying in November, and defendant told Smith that he had been in court the week before and the prosecutor told him that she would not prosecute him for violating SORA. Smith testified that defendant did attempt to verify his address in January, but because that was not defendant's registration month, the verification was not accepted. The district court bound defendant over on the charges.

Defendant moved to quash the bindover, arguing in pertinent part that he was not required to verify his address in November because the tier III offender classification and registration date scheme was created by 2011 PA 17, which was not applicable to defendant under *Does*. The circuit court remanded to the district court for clarification because the district court had stated that the 1999 version of SORA applied to defendant, but it then bound defendant over on the basis that he had not updated his address in November, which was not a requirement of 1999 PA 85.

On November 14, 2017, this Court released its opinion on defendant's civil appeal against the Benzie County Prosecutor, holding that defendant was correct "that in *Does*, the Sixth Circuit Court of Appeals held that retroactive application of the 2006 and 2011 SORA amendments violates the Ex Post Facto Clause of the United States Constitution." *Spencer v Benzie Co Prosecuting Attorney*, unpublished per curiam opinion of the Court of Appeals, issued November 14, 2017 (Docket No. 337827), p 2. This Court ultimately "remand[ed] for entry of an order enjoining the prosecution of plaintiff for charges based on a violation of the requirements set forth in the 2006 and 2011 SORA amendments." *Id.* at 3.

The district court held a second preliminary examination on November 16, 2017. The prosecution argued that the 1999 version of SORA required quarterly registration within the first 15 days of October, which defendant did not do. The district court found that there was probable cause to believe that defendant had not complied with the 1999 version of SORA because he was required to report quarterly, which meant between October 1 and October 15. It found that defendant failed to comply with MCL 28.725a by failing to verify his address and again bound defendant over on the charges.

Defendant moved to quash the new bindover on the basis that the record did not establish that defendant failed in his obligations as a listed offender. The circuit court issued a written opinion in which it stated that this Court's opinion in *Benzie Co* held that defendant could not be prosecuted under the 2006 or 2011 versions of SORA. The circuit court noted that MCL 28.725a existed only in the current version of SORA, and it requires verification for defendants who are tier III offenders. The felony information therefore charged defendant with failing to comply with a later version of SORA, and the circuit court again quashed the bindover.

Defendant moved for reconsideration on the basis that the circuit court should have granted defendant additional relief by discontinuing his SORA registration. The prosecution also moved for reconsideration, arguing that the circuit court applied the wrong version of SORA. The circuit court denied both motions.

II. ADDITIONAL RELIEF

In both defendant's appeal in Docket No. 343367 and his cross-appeal in Docket No. 343468, defendant argues that the circuit court erred by failing to grant him the additional relief of discontinuing or voiding his SORA registration. We disagree.

This Court reviews de novo questions of law, including the interpretation and application of our court rules. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). This Court reviews unpreserved issues for plain error affecting a party's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error is plain if it is clear or obvious, and it affects substantial rights if it affected the outcome of the lower court proceedings. *Id.*

First, defendant argues that the circuit court erred by failing to grant his request to allow him to discontinue SORA registration under MCR 2.601(A).

An error is plain when it is contrary to well-settled law. See *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012). MCR 2.601(A) states, "Except as provided in [MCR 2.601(B)], every final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded that relief in his or her pleadings." However, the court rules governing civil procedure do not apply to criminal cases "when it clearly appears that they apply to civil actions only," among other exceptions. MCR 6.001(D)(3). Defendant has not provided—and this Court has been unable to find—any authority applying MCR 2.601(A) in a criminal case. We conclude that the circuit court did not commit a plain or obvious error by declining to apply this court rule in defendant's case.

Second, defendant argues that the circuit court should have held that he need not verify his address under SORA because the court in his initial criminal case failed to comply with

SORA's mandatory presentencing procedures. We conclude that the circuit court did not err by declining to consider defendant's improper collateral attack on his CSC-II judgment of sentence.

"[A] collateral attack occurs whenever a challenge is made to a judgment in any manner other than through a direct appeal." *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995). The failure of a plea-taking court to comply with procedural requirements during a proceeding does not provide a defendant the opportunity to challenge the conviction through a collateral attack. *People v Ingram*, 439 Mich 288, 295-296; 484 NW2d 241 (1992).

In this case, defendant had the opportunity to challenge on direct appeal his CSC-II judgment's requirement that he comply with SORA. This Court denied defendant's application for leave to appeal. *People v Spencer*, unpublished order of the Court of Appeals, entered September 21, 2012 (Docket No. 308103).¹ Because this case is not on direct appeal, the circuit court properly declined to allow defendant to collaterally attack his prior judgment of sentence.

III. VERSION OF SORA

In Docket No. 343468, the prosecution argues that the district court erred by vacating defendant's bindover. The prosecution asserts that defendant was governed by SORA as it existed in November 2016, when defendant failed to verify his address. We conclude that the prosecution's argument lacks merit because this Court's holding in *Benzie Co* is the law of defendant's case.

This Court reviews de novo questions of law. *Cole*, 491 Mich at 330. This Court also reviews de novo the circuit court's decision regarding whether the district court abused its discretion by deciding whether to bind over a defendant. *People v Norwood*, 303 Mich App 466, 468; 843 NW2d 775 (2013). A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes or when it makes an error of law. *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013).

The law-of-the-case doctrine provides that a prior appellate decision between the same parties binds the lower court on remand or subsequent review, including "that decisions made on a first appeal are not open to review on a subsequent appeal." *People v Wells*, 103 Mich App 455, 462; 303 NW2d 226 (1981). The law-of-the-case doctrine applies regardless of the correctness of the initial decision. *People v Herrera*, 204 Mich App 333, 340; 514 NW2d 543 (1994). However, unlike in civil cases, in criminal cases, the doctrine is flexible and the trial court retains the power to do justice. *Id.* at 340-341.

In this case, in a dispute between the present parties about the applicability of SORA to defendant, this Court held that defendant cannot be prosecuted under the 2006 or 2011 versions of SORA and remanded for entry of an order "enjoining the prosecution of plaintiff for charges based on a violation of the requirements set forth in the 2006 and 2011 SORA amendments."

¹ We note that defendant raised 63 issues in his application for leave, but an allegation that the sentencing court failed to comply with SORA's procedural requirements was not among them.

Benzie Co, unpub op at 3.² We conclude that the circuit court did not err when it determined that 1999 PA 85 was the correct version of SORA to apply to defendant on the basis of our decision in *Benzie Co*.

The circuit court also did not err when it found that the district court's findings did not support binding defendant over on violating the 1999 version of SORA. Count I of the information provided that defendant had failed to comply with reporting duties by "fail[ing] to comply with MCL 28.275a, by failing to verify his address as required by MCL 28.725a(3)" 1999 PA 85 provided that an individual required to be registered under the act was also required to notify the local law enforcement agency of a new residence or domicile within 10 days of release, parole, or changing the residence or domicile. Former MCL 28.725(1)(a)-(c), as amended by 1999 PA 85. An individual convicted of a violation of MCL 750.520c(1)(a) was required to comply with registration for life. MCL 28.725(7)(b), as amended by 1999 PA 85. An individual convicted of a felony offense, including a violation of MCL 750.520c, was required to verify his or her address "not earlier than the first day or later than the fifteenth day of each April, July, October, and January following initial verification or registration." MCL 28.725a(4)(b)(i), as amended by 1999 PA 85. Additionally, the 1999 version of SORA provided that each of a defendant's registrations and notices should be maintained in a computerized database, and that "[t]he department shall make the compilation or information from the compilation available to . . . the public by electronic, computerized, or other similar means" MCL 28.728(2), as amended by 1999 PA 85.

The testimony at the original preliminary examination established that defendant did not verify his address in November but did attempt to verify his address in January. At the second preliminary examination, the prosecution declined to offer additional testimony. Accordingly, the evidence before the district court did not establish that defendant violated 1999 PA 85. Additionally, the district court bound defendant over on a charge of failing to comply with MCL 28.275a, which was the crime under which defendant was charged, but which—under the 1999 version of SORA—was a notice mailing provision, see 1999 PA 85. The district court abused its discretion by binding defendant over because the evidence at the preliminary examination did not establish the elements of count I.

Count II of the information provided that defendant "willfully refused or failed to pay the registration fee proscribed [sic] in MCL 28.725a(6) or MCL 28.727(1) within 90 days of the date the individual reported under MCL 28.724a" However, 1999 PA 85 did not provide for a registration fee. The district court also abused its discretion when it bound defendant over on count II.

In sum, we conclude that the circuit court properly quashed defendant's bindover because the law of the case provides that 1999 PA 85 governs defendant's SORA registration, but the

² In a later appeal, this Court itself interpreted our *Benzie Co* decision as stating that the version of SORA in effect at the time of defendant's conviction applies to him. *Spencer v Dir of Dep't of State Police*, unpublished per curiam opinion of the Court of Appeals, issued October 9, 2018 (Docket No. 341769), p 3.

prosecutor charged him with violating 2011 PA 17, and the evidence at the bindover was not sufficient to support a finding that defendant violated 1999 PA 85.

On cross-appeal, defendant argues that the circuit court should have determined that he is not required to comply with SORA because 2006 PA 402 and 2011 PA 17 have nullified the definition of “listed offense” in 1999 PA 85. We reject this argument. Because only 1999 PA 85 applies to defendant, later changes to SORA do not affect his case.

We decline to consider the remainder of defendant’s arguments in his appeal and cross-appeal because they can have no practical effect on this case. See *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010), amended 486 Mich 1041 (2010).

Affirmed.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Jonathan Tukel

Court of Appeals, State of Michigan

ORDER

People of MI v William Sim Spencer

Docket No. **348890**

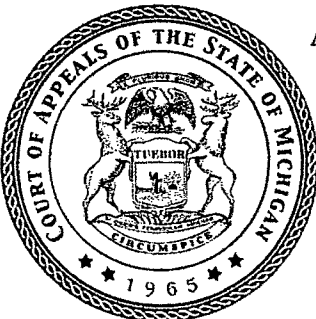
LC No. **2001-180525-FH**

Christopher M. Murray, Chief Judge, acting under MCR 7.203(F)(1), orders:

The motion to waive fees is GRANTED for this case only. MCR 2.002(C).

The claim of appeal is DISMISSED for lack of jurisdiction. MCR 7.203(A)(1). The April 25, 2019, order is not a final order as defined in MCR 7.202(6)(b).

**APPENDIX
C**



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

MAY 22 2019

Date


Chief Clerk

**Additional material
from this filing is
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Clerk's Office.**