

MSC Opinion: Defendant cannot be required to register under Sex Offenders Registration Act 20 months after sentencing

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In *People v. Lee*, No. 141570, the Michigan Supreme Court held that the trial court erred when it required defendant to register as a sex offender under the Sex Offenders Registration Act (SORA) twenty months after defendant had been sentenced. In doing so, the Supreme Court overturned the Court of Appeals, which had affirmed the trial court's decision.

In this case, defendant was charged with second-degree criminal sexual conduct and second-degree child abuse after an incident occurred while defendant was babysitting his neighbor's son, three year old JW. According to defendant, he used his finger to "flick" JW's penis because JW was being uncooperative as defendant tried to clothe and diaper him before bed. Defendant eventually pled *nolo contendere* to third-degree child abuse as a second-offense habitual offender.

At defendant's sentencing, the prosecution recited statements, not included in the record, indicating defendant had rubbed JW's penis and given him candy after the incident. As a result, the prosecution requested that defendant be required to register as a sex offender under SORA. The judge denied the request, noting that the prosecution's allegations were not in the record, and the actions that were in the record did not constitute a "sex act." Twenty months after sentencing, the prosecution again moved for an order requiring defendant to register under SORA. This motion was heard before a different judge, because the original trial judge had retired. The successor judge granted the motion, stating that the defendant's act was "certainly something that would be envisioned by the law . . . and would constitute the registration that the People seek."

The Court of Appeals affirmed, reasoning that there was no procedural bar to requiring registration, because registration may be imposed at any time while the trial court has jurisdiction over a defendant. The Court of Appeals determined that the trial court retained jurisdiction over the defendant because he was still on probation.

The Michigan Supreme Court overturned the decision because the trial court failed to comply with SORA's procedural requirements. Specifically, SORA requires: (1) defendant must register under SORA *before* sentencing; (2) defendant must be given the registration form and have his duties under SORA explained to him; (3) defendant's sentence may not be imposed until his registration is forwarded to the state police department; and (4) for crimes falling under SORA's catchall provision, the trial court must include in its judgment of sentence a determination that the crime is a listed offense for which registration is required. In this case, the trial court had not required registration before sentencing, failed to give the registration form to the defendant and inform him of his duties under SORA, failed to ensure the registration was forwarded to the state police before imposing sentence, and when entering the sentence, failed to determine that the crime was a listed offense requiring registration. Thus, because the trial court failed to satisfy the statutory requirements, the Court determined that the trial court's decision to require registration was erroneous.

The Court also stated that to the extent the original trial court entered an invalid sentence when it indicated that the prosecutor could bring a motion for registration under SORA after sentencing, the prosecutor failed to timely file a motion to correct an invalid sentence. Such a motion must be filed within 6 months when the defendant enters a plea in the case, but the prosecutor waited until 20 months after sentencing to move for registration under SORA. Finally, the Court noted that the original trial court determined that registration under SORA was not proper on the record before the court. The prosecutor failed to present any new evidence at the postsentencing hearing, and therefore, the successor judge's conclusion was in direct conflict with the original judge's determination. The Court stated that the predecessor trial judge's determination should have been afforded substantial deference.