

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA

Petitioner,

v.

Case No. SC19-912
5th DCA No. 5D18-2206

BRIAN K. MCKENZIE,

Respondent.
_____ /

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with four counts of sexual activity with a child while in a position of familial or custodial authority, a first-degree felony, and one count of contributing to the delinquency of a minor, a first-degree misdemeanor. (R. 22-25).

On October 28, 2009, Respondent entered a plea of no contest to one count of sexual activity with a child while in a position of familial or custodial authority, (§ 794.011(8)(B), Fla. Stat. (2018)), and the State entered a *nolle prosequi* of the remaining counts. (R. 27-28, 44). A written plea agreement between the State and Respondent called for an adjudication of guilt, six months in jail, two years of community control, three years of sex offender probation, and no contact with the victim. (R. 29-30). Respondent was sentenced in accordance with his plea agreement on November 30, 2009. (R. 31-32). He subsequently completed all terms of his sentence.

On April 17, 2018, the State filed a “State’s Notice that Defendant Qualifies as Sexual Predator Under Sec. 775.21 for Offense After October 1, 1993.” (R. 49-50). The notice informed the trial court that, pursuant to section 775.21, Florida Statutes, it was required to designate Respondent as a sexual predator. (R. 49-50). Respondent filed a written response through counsel on May 14, 2018. (R. 55-62). Respondent argued that the circuit court lacked subject matter jurisdiction because

Respondent's probation terminated on April 24, 2015. (R. 56-57). He also argued that being designated as a sexual predator was not part of his original plea agreement, and that, since Respondent was already designated as a sexual offender by the trial court, the matter was res judicata. (R. 57-60). Additionally, asserted Respondent, the principles of collateral estoppel and laches applied. (R. 61).

A hearing on the State's notice was held on May 15, 2018. (R. 53, 74). Counsel for Respondent argued that there was nothing in section 775.021 that granted the court jurisdiction to consider the State's request for Respondent to be designated as a sexual predator. (R. 77-79). After hearing briefly from the attorneys, the trial court advised that it would take the matter under advisement. (R. 82).

On June 20, 2018, the trial court entered an order finding that Respondent qualified as a sexual predator, and requiring him to comply with the registration requirements of section 775.21, Florida Statutes. (R. 64-65). On May 10, 2019, the Fifth District Court entered an opinion reversing the trial court's entry of the order designating Respondent as a sexual predator, holding that the court was without jurisdiction to enter the order. McKenzie v. State, 272 So. 3d 808 (Fla. 5th DCA 2019). McKenzie certified conflict with Cuevas v. State, 31 So. 3d 290 (Fla. 3d DCA 2010).

SUMMARY OF THE ARGUMENT

Based upon the plain language of section 775.21, Florida Statutes, (“The Florida Sexual Predators Act”) the circuit court was required to designate Respondent as a sexual predator. Sections 775.21(4)(a), (5)(a), and (c) gave the court jurisdiction to do so when the State filed a notice of Respondent’s sexual predator status. The fact that Respondent had already completed his sentence in connection with his criminal case was irrelevant. The Fifth District Court of Appeal erred when it held that by including specific instructions for the designation of persons determined to be sexual predators in civil commitment proceedings or due to out-of-jurisdiction convictions, section 775.21(5)(c) thereby excluded from the court’s jurisdiction the designation of all other sexual predators. Such a reading is inconsistent with the plain language of the statute, is contrary to clearly stated legislative intent, and leads to an absurd result.

Further, Respondent’s arguments on direct appeal that the absence of a sexual predator designation was part of his plea agreement with the State, or that the doctrines of laches, res judicata, waiver, and collateral estoppel applied, were without merit.

ARGUMENT

THE CIRCUIT COURT HAD JURISDICTION TO IMPOSE THE SEXUAL PREDATOR DESIGNATION UNDER SECTION 775.21.

- A. *Under the statute’s plain language, a court retains jurisdiction until the mandatory designation is imposed.*

Section 775.21(3), Florida Statutes, sets forth the Legislature’s intent in promulgating the Florida Sexual Predators Act. It explains that sexual offenders present an “extreme threat” to public safety, and that the State has a compelling interest in protecting the public from them by subjecting them to identification and registration requirements. § 775.21(3), Fla. Stat. (2018). The statute also makes clear that the Legislature seeks the designation of sexual predators “as neither a sentence nor a punishment, but simply a status resulting from the conviction of certain crimes.” *Id.* See also Rickman v. State, 714 So. 2d 538 (Fla. 5th DCA 1998) (the registration requirements of the Florida Sexual Predators Act are procedural and regulatory in nature, and therefore do not constitute punishment in violation of the *ex post facto* clause). Now, despite overwhelming evidence that the Legislature intended for the sexual predator designation to be mandatory in every case in which a defendant satisfied the statutory criteria, the Fifth District Court of Appeal has held that a circuit court loses jurisdiction to impose the designation simply because it neglected to impose the designation prior to the completion of a defendant’s sentence. This Court should reverse that ruling.

To accomplish the Legislature’s stated intent, section 775.21 requires that, “for a current offense committed after October 1, 1993,” “an offender *shall* be designated as a ‘sexual predator’ under subsection (5),” if he or she meets the statutory criteria, § 775.21(4)(a), Fla. Stat. (emphasis added), and dictates that, in the eyes of the Legislature, a person meeting the criteria under the Sexual Predator Act “*is* a sexual predator.” § 775.21(5)(a)2., Fla. Stat. (emphasis added). See also Kelly v. State, 795 So. 2d 135 (Fla. 5th DCA 2001) (“We conclude, based on the unambiguous language of the Act and the clearly stated legislative intent, that the Act is mandatory and affords no discretion to the trial judge to designate an individual a sexual predator if the statutory criteria are established.”).¹

The statute enumerates the crimes that result in sexual predator status upon conviction² in section (4)(a)1., and provides in section (4)(d) that, for the purposes of the statute, a person is a sexual predator if he or she was found to be a sexually violent predator pursuant to a civil commitment proceeding under chapter 394. The statute also provides for designation and registration of individuals who were

¹ In addition, the Adam Walsh Act, codified as the “Sex Offender Registration and Notification Act,” 34 U.S.C. § 20901 et seq., or “SORNA,” provides for a comprehensive national registration system, and requires all states to maintain a sex offender registry conforming to it and results in a loss of funds to states that fail to conform to it. In fact, a sex offender’s duty to register under SORNA is independent of his obligations under state law. See United States v. Paul, 718 Fed. Appx. 360 (6th Cir. 2017) (unpublished).

² Respondent’s sexual predator status comes as a result of having been convicted of a crime under section 794.011, Florida Statutes.

convicted or civilly committed in other jurisdictions after October 1, 1993, of crimes similar to those delineated in section (4)(a)1. § 775.21(5)(a)3., Fla. Stat. Thus, the statute concerns itself not only with individuals who were convicted of a crime by the court tasked with imposing the sexual predator designation, but also individuals who gained sexual predator status in the context of civil proceedings, and individuals who may never have been convicted of a crime in Florida. This fact is relevant because it demonstrates that the intent of section 775.21(4) and (5), is to confer continuing jurisdiction on the circuit courts to designate sexual predators *irrespective* of whether the court happens to continue to have jurisdiction over a criminal case connected to that person. The existence of an active criminal case is not a necessary precursor to the circuit court's independently bestowed jurisdiction and authority to designate sexual predators.

The notion that continuing jurisdiction over a criminal case is not a necessary element to the exercise of jurisdiction for the purposes of entering a sexual predator designation can be seen in the language of section 775.21 in a number of ways. First, as noted above, the Legislature plainly recognized that “sexual predators... present an extreme threat to public safety,” that, “in order to protect the public, it is necessary that [] sexual predator[s] be registered,” and that designation as a sexual predator “is neither a sentence nor a punishment.” § 775.21(3)(a),(c),(d), Fla. Stat. The fact that sexual predator designation is not a

criminal sentence or punishment makes clear that the Legislature did not intend for jurisdiction over the designation of sexual offenders to be inextricably linked to a criminal offense over which the court has jurisdiction. Second, section 775.21(4)(a) mandates the designation of *all* persons who qualify as sexual predators, the definition of which includes both individuals that the court has criminal jurisdiction over, and those who it does not. Third, the statute makes provision for the belated designation by the court of sexual predators who meet the criteria because of prior civil proceedings, prior criminal convictions over which the court *never* had jurisdiction, and prior criminal convictions over which the court had jurisdiction at some point in the past. § 775.21(5)(c), Fla. Stat. See Cuevas, 31 So. 3d at 292 n.3 (“[S]ection 775.21(5)(c) [] specifies (*without limitation*) that the ‘state attorney shall bring the matter to the court’s attention in order to establish that the offender meets the sexual predator criteria.’”) (emphasis added).

Thus, McKenzie erred when it ignored the statute’s general grant of jurisdiction and its mandate that all sexual predators sentenced after October 1, 1993, be designated and registered, in favor of reading into the statute a requirement that if the circuit court where designation is sought is the same court where the predator was prosecuted for his crimes, he or she must still be under sentence by that court. No such requirement exists in the statute. As recognized

by Cuevas, a reasonable reading of section 775.21 does not allow the court to ignore section (4)(a)'s mandate simply because it overlooked its obligation at the time of sentencing. Cuevas, 31 So. 3d at 291-92.

Apart from the mandatory nature of the sexual predator designation, a circuit court's continuing jurisdiction to impose the designation at any time is confirmed by section 775.21(5)(c), which creates certain duties on the part of law enforcement agencies and the State Attorney's Offices. It provides, in full:

If the Department of Corrections, the [Florida Department of Law Enforcement], or any other law enforcement agency obtains information which indicates that an offender meets the sexual predator criteria but the court did not make a written finding that the offender is a sexual predator as required in paragraph (a), the Department of Corrections, the department, or the law enforcement agency shall notify the state attorney who prosecuted the offense for offenders described in subparagraph (a)1., or the state attorney of the county where the offender establishes or maintains a residence upon first entering the state for offenders described in subparagraph (a)3. The state attorney shall bring the matter to the court's attention in order to establish that the offender meets the sexual predator criteria. If the state attorney fails to establish that an offender meets the sexual predator criteria and the court does not make a written finding that an offender is a sexual predator, the offender is not required to register with the department as a sexual predator. The Department of Corrections, the department, or any other law enforcement agency shall not administratively designate an offender as a sexual predator without a written finding from the court that the offender is a sexual predator.

Id.

Subsection 5(c) does four things. First, it establishes the responsibility of law enforcement agencies to notify the state attorney if they learn, at any time, that

a circuit court has neglected to enter an order designating a sexual predator. Second, when the particular sexual predator falls into certain categories—those whose designations arose because of a civil commitment (“subparagraph (a)1.”) or whose designations arose because of an out-of-state conviction or civil commitment (“subparagraph (a)3.”)—the statute tells the law enforcement agency *which* state attorney to contact: either the state attorney “who prosecuted the offense” or the state attorney “of the county where the offender establishes or maintains a residence,” respectively. Third, the statute requires that the state attorney “shall” alert the circuit court that the designation was not imposed. And fourth, it protects those defendants who are *not* properly labeled sexual predators by ensuring judicial review and by precluding the Department of Corrections from designating a person without the court’s decree.³

Therefore, although it does not directly address jurisdiction, subsection (5)(c) acknowledges a circuit court’s continuing responsibility to enter the sexual predator designation demanded by multiple provisions of the Act, and proves that a circuit court enjoys continuing jurisdiction to do so.

The Fifth District misread the import of section 775.21(5)(c), believing it to place a *limitation* on a circuit court’s jurisdiction. Interpreting that subsection’s

³ A separate provision of the Sexual Predators Act provides instructions for the Department of Corrections in the scenario where a sexual predator is registered absent a written order from the circuit court designating the defendant. See § 775.21(4)(c), Fla. Stat.

first sentence, it wrote that the “‘recapture’ provision” contained in subsection (5)(c) was “inapplicable on its face because subparagraph (a)1 pertains only to offenders who have been civilly committed under the Jimmy Ryce Act, ... and subparagraph (a)3 pertains to persons who have committed a similar violation in another jurisdiction.” McKenzie, 272 So. 3d at 811 (citation omitted). In its view, by omitting reference to subparagraph (5)(a)2., under which Respondent’s predator status arose, the Legislature must have intended to preclude recapture as to that category of sexual predators. Id.

More accurately however, subsection (5)(c)’s “recapture” feature is not confined to the two categories of sexual predators the Fifth District surmised. Instead, the provision states broadly that a law enforcement agency shall notify prosecutors if “an offender”—meaning *any* offender—has been overlooked for sexual predator designation. § 775.21(5)(c), Fla. Stat. When the state attorney learns of such an offender, regardless of the statutory basis for the omitted designation, it “shall” alert the circuit court in order to “establish that the offender meets the sexual predator criteria.” Id. Had the Legislature intended the narrower meaning the Fifth District attributed to it, it could have drafted the first sentence of subsection (5)(c) to read: “If the Department of Corrections, the department, or any other law enforcement agency obtains information which indicates that an offender described in either subparagraph (a)1. or subparagraph (a)3. meets the sexual

predator criteria but the court did not make a written finding that the offender is a sexual predator as required in paragraph (a), ...” (additions in underline). Rather, it used the broad term “an offender,” encompassing all categories of persons described in the Sexual Predators Act.

Moreover, the language seized upon by the Fifth District serves a function quite apart from establishing, expanding, or decreasing the circuit court’s jurisdiction. That wording—“for offenders described in subparagraph (a)1.” and “for offenders described in subparagraph (a)3.”—simply instructs the law enforcement agency which specific State Attorney’s Office to contact, in specifically delineated circumstances, when the agency discovers that a sexual predator has been overlooked. That guidance is necessary because when a law enforcement agency encounters an unregistered sexual predator falling into either of those categories (those who are civilly committed and those who were committed or convicted out-of-state), it might not otherwise be apparent which State Attorney’s Office is responsible for carrying out the statutory duty. The statute answers that question. By contrast, where an agency encounters a sexual predator falling into Respondent’s category (one whose status as a sexual predator arose because of an in-state conviction), that person should quite obviously be referred to the State Attorney’s Office that handled the person’s criminal prosecution.

In any event, nothing suggests that subsection (5)(c) provides the *exclusive* mechanism by which a failure to designate should be brought to a circuit court’s attention. If, for instance, the state attorney realizes the omission without any assistance from a law enforcement agency and independently informs the circuit court, subsection (5)(c) in no way bars the court from taking appropriate action. While subsection (5)(c) is silent as to that circumstance, it surely was not meant by the Legislature to *preclude* corrective measures in that instance. The subsection addresses only the scenario where law enforcement makes the discovery.

Thus, as the Third District observed in Cuevas, a “careful reading of the special language applicable to the two categories (section 775.21(5)(a)1. and 3.) reveals that those are special notice and venue rules for those special cases, not exclusive descriptions of the only circumstances in which the State can perform its duty after the defendant is sentenced.” Cuevas, 31 So. 3d at 292. Indeed, the Third District properly concluded that “[t]he statute expresses no intention that the consequences of a failure to make a written sexual predator finding at the time of sentencing is a waiver of the right to make the finding in the future.” Id. For cases such as Respondent’s, where designation was sought in the same court that had jurisdiction over his criminal case, by the same state attorney, there is no need for special notice and rules.

To the extent there is any ambiguity in the statute’s plain text, a review of the Legislature’s purpose in adopting the sexual predator designation scheme clarifies that in no event would it have intended the result urged here by Respondent. See Alexander v. State, 477 So. 2d 557, 560 (Fla. 1985) (avoiding construction of statute that “would frustrate the intent of the legislature”); Kimbrell v. Paige, 448 So. 2d 1009, 1011 (Fla. 1984) (“It is obvious that if the petitioners’ contentions were to be adopted by us, the legislative purpose of the statute as previously determined by this Court would be entirely frustrated.”).

The court’s purpose in construing a statutory provision is to give effect to legislative intent. Bautista v. State, 863 So. 2d 1180, 1184 (Fla. 2003). To discern legislative intent, the court looks first to the actual language used in the statute. Id. If the statutory language is unclear, the court must apply rules of statutory construction and look to legislative history to determine legislative intent. Id. “To discern legislative intent, courts must consider the statute as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence on the statute.” Id. (quoting State v. Anderson, 764 So. 2d 849 (Fla. 3d DCA 2000)). A statute should not be read in a way that fails to give effect to each clause. Florida Dept. of Env’tl. Prot. v. ContractPoint Florida Parks, LLC, 986 So. 2d 1260, 1265 (Fla. 2008). Nor should it be read to yield an absurd result. See State v. Atkinson, 831 So. 2d 172, 174 (Fla. 2002). However,

McKenzie's interpretation of 775.21 does just that: it fails to give effect to section (4)(a)'s plain language requiring the designation of sexual predators, it fails to give effect to section (5)(c)'s language stating that the state attorney shall bring the matter to the court's attention, it fails to give effect to the clearly stated legislative intent of protecting the public from dangerous predators, and it leads to the absurd result of excluding an entire class of sexual predators from registration requirements. As well put by Cuevas, this is statutory *destruction*, not *construction*. Cuevas, 31 So. 3d at 292.

B. Respondent's additional arguments in favor of relief are without merit.

In addition to asserting that the trial court lacked jurisdiction, Respondent argued in the Fifth District Court of Appeal that the trial court improperly entered the sexual predator designation in violation of Respondent's plea agreement with the State. However, the record is devoid of any suggestion that the failure to designate Respondent as a sexual predator was part of the plea agreement. Nor could it have been. Section 775.24, Florida Statutes, specifically provides that it is the duty of the courts to uphold laws governing sexual predators. § 775.24, Fla. Stat. (2018). That section, entitled "Duty of the Court to Uphold Laws Governing Sexual Predators and Sexual Offenders," provides that where a person meets the criteria for designation as a sexual predator, the court may not enter an order for purposes of a plea agreement or for any other reason that exempts a person who

meets the criteria for designation from such designation, or exempts such person from registration requirements. Id. Additionally, a sexual predator designation is a collateral consequence of a plea, so the trial court is not required to advise the defendant of this consequence during the colloquy. Collie v. State, 710 So. 2d 1000, 1008 (Fla. 2d DCA 1998).

Respondent additionally asserted the principles of waiver, res judicata, collateral estoppel, and laches in the lower courts. However, as argued by Petitioner below, there was nothing for the State to waive or previously litigate. Respondent is a sexual predator by operation of statute and became a sexual predator the day he entered his plea. The prosecutor did not have discretion to choose whether or not to seek a sexual predator designation, and the trial court did not have discretion to decide whether to impose it. See Almond v. State, 89 So. 3d 1056, 1057 (Fla. 2d DCA 2012) (“[T]he trial court is not given the task of deciding whether Mr. Almond is actually dangerous. The designation ‘sexual predator’ arises purely by virtue of Mr. Almond’s criminal record.”). Further, as to the doctrine of laches, the Third District Court of Appeal recently explained in a case where a sexual offender argued that the doctrine should have prohibited the Florida Department of Law Enforcement from enforcing the statutory requirements seventeen years after her release from supervision:

It is a basic tenet of our jurisprudence and the first principle of equity jurisdiction that “equity follows the

law.” Hedges v. Dixon Cnty., 150 U.S. 182, 192 (1893). In fact, “wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim ‘*equitas sequitur legem*’³ is strictly applicable.” Id. (quoting Magniac v. Thomson, 56 U.S. 281, 299 (1853)).

In this domain, the Legislature has clearly mandated a registration requirement for sexual offenders. “Where the legislature has provided such a process, courts are not free to deviate from that process absent express authority.” Pineda v. Wells Fargo Bank, N.A., 143 So. 3d 1008, 1011 (Fla. 3d DCA 2014). “Our responsibility ... is to apply the law as the Legislature has so clearly announced it. We are not endowed with the privilege of doing otherwise regardless of the view which we might have as individuals.” State v. DiGuilio, 491 So. 2d 1129, 1133 (Fla. 1986) (citation omitted). Accordingly, the trial court did not have the authority to blatantly disregard a statutory mandate and supplant its judgment by labeling it equitable relief.

State v. Hernandez, 44 Fla. L. Weekly D2186 (Fla. 3d DCA Aug. 28, 2019)

(footnote omitted). Those considerations are particularly pronounced in the sexual predator context, where the circuit court’s duty to impose the designation is intended to protect children and other potential victims from sexual predation.

Here, as in Hernandez, Respondent cannot rely on equitable doctrines to defeat the will of the Legislature as set forth in section 775.21.

CONCLUSION

WHEREFORE, based on the arguments and authorities presented herein, Petitioner respectfully requests this Honorable Court approve the decision of the

Third District Court of Appeal in Cuevas, and disapprove the Fifth District Court of Appeal's decision in McKenzie.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner has been furnished via Florida's e-Portal to counsel for Respondent, Terrence E. Kehoe, Esq., P.O. Box 540025, Orlando, FL 32854-0025, at tekehoelaw@aol.com, on October 31, 2019.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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