This opinion will be unpublished and
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Minn. Stat. § 480A.08, subd. 3 (2008).

STATE OF MINNESOTA
IN COURT OF APPEALS
A09-982

State of Minnesota,
Respondent,

vs.

James Clifford LeMasters,
Appellant.

Filed May 25, 2010
Affirmed
Connolly, Judge

Nicollet County District Court
File No. 52-CR-07-36

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

Michael K. Riley, Sr., Nicollet County Attorney, St. Peter, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaitas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant challenges his convictions and subsequent concurrent sentences for five counts of failure to register as a predatory offender, alleging that he is being punished multiple times for the same offense, which would violate constitutional and statutory protections against double jeopardy. Because appellant's failure to register was a continuous offense, and each of the five verification forms sent to him by the state over the course of 15 months was a distinct event triggering a separate duty to register, his failure to respond to each verification form was a separate offense for the purposes of double jeopardy. We affirm.

FACTS

Appellant James Clifford LeMasters was indeterminately committed in May 1999 as a sexually dangerous person and sexual psychopathic personality pursuant to Minn. Stat. § 253B.185 (1998). While at the Minnesota Sex Offender Program (MSOP) facility in St. Peter, appellant did not respond to five verification forms that he received from the bureau of criminal apprehension (BCA) on April 18, 2005; July 18, 2005; January 16, 2006; April 17, 2006; and July 17, 2006. The BCA is required to provide committed sex offenders with at least four verification forms per year. Minn. Stat. § 243.166, subd. 4(e) (2008).[1] The verification forms require a person registered as a predatory offender to provide, among other things, his current and last address. *Id.*, subd. 4(e)(2). Verification

[1] For our purposes, the current versions of the statutes cited herein do not differ materially from the versions in effect when appellant failed to respond to the verification forms. *See* Minn. Stat. §§ 243.166, subds. 4, 5 (Supp. 2005), 609.035 (2004).

forms must be returned within ten days of receipt. *Id.* Failure to register as a predatory offender is a felony. *Id.*, subd. 5(a) (2008).

Appellant deliberately did not complete and return the verification forms. He tore the form sent to him in April 2005 into small pieces and placed it in an envelope, on the back of which he wrote, "I refuse to fill these out, tell the police to come get me for refusing to register, by law," and "I am turning you people in for sexual abuse." In response to the July 2005 verification form, appellant did not complete the form, but wrote "I WILL NOT REGISTER—ARREST ME!!" on the outside of the return envelope. He did not complete or return the remaining forms. Appellant ultimately sought to introduce evidence at his trial that sexual abuse was widespread and that he was personally threatened, abused, and mistreated at the MSOP facility, but the district court ruled that this evidence was inadmissible because appellant lacked a viable necessity defense as a matter of law.[2]

Following a bench trial, the district court convicted appellant of each count of felony failure to register as a predatory offender. It imposed concurrent sentences of one year and one day in prison for each of the five counts. Appellant now challenges his convictions and multiple sentences, arguing that they violate his constitutional and statutory double-jeopardy rights. He concedes that he did not raise a double-jeopardy

[2] The district court also noted that investigations in response to appellant's allegations of this activity did not support appellant's claims. Documentation did not identify any specific acts, dates, locations, or actors, and the district court concluded that appellant's allegations lacked credibility.

claim below, but asks this court to consider the double-jeopardy implications of his convictions and concurrent sentences in the interests of justice.

D E C I S I O N

"We do not ordinarily decide issues that are raised for the first time on appeal, even constitutional questions of criminal procedure." *State v. Anderson*, 733 N.W.2d 128, 134 (Minn. 2007) (quotation omitted). However, appellate courts have discretion to do so "when the interests of justice require consideration of such issues and doing so would not unfairly surprise a party to the appeal." *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Although the supreme court has specifically found a double-jeopardy claim to be waived when not raised in district court, *State v. Michaud*, 276 N.W.2d 73, 77 (Minn. 1979), waiver is a discretionary rule, and this court has also exercised its discretion to review an appellant's double-jeopardy claim despite the appellant's failure to raise it in district court, *State v. Vang*, 700 N.W.2d 491, 494 (Minn. App. 2005). Because this case presents a legal question that can be decided on the facts already in the record, we opt to exercise our discretion to consider the merits of appellant's double-jeopardy claim in the interests of justice.

The United States and Minnesota Constitutions both prohibit a person from being put in jeopardy twice for the same offense. U.S. Const. amend. V; Minn. Const. art. I, § 7. This protects a person from both multiple prosecutions and multiple punishments for the same offense. *State v. Ehmke*, 752 N.W.2d 117, 121 (Minn. App. 2008).

Double-jeopardy protections are not offended by multiple prosecutions or punishments "when the offense is continuous and the defendant commits the same

violation multiple times." *Id.* "The predatory-offender-registration requirement is a continuing obligation." *Id.* at 122; *see also Longoria v. State*, 749 N.W.2d 104, 107 (Minn. App. 2008) ("[V]iolation of the predatory-offender-registration statute is an offense that continues as long as the person required to register fails to do so . . . ."), *review denied* (Minn. Aug. 5, 2008). Thus, in *Ehmke*, this court held that the defendant could be prosecuted separately for multiple occurrences where he failed to register each time he changed his primary address, as required by statute. 752 N.W.2d at 122. We explained that Ehmke had an ongoing duty, and his repeated failures to register constituted separate and distinct offenses for double-jeopardy purposes. *Id.* We noted that the opposite result would have led "to an absurd result because it would mean that the conviction for failure to register in 2001 would insulate him from prosecution for failing to register on each subsequent change of residence." *Id.*

The instant case is similar to *Ehmke*, and we conclude that appellant committed a separate and distinct offense each time he failed to respond to a verification form sent to him by the BCA.[3] Appellant was required by statute to complete a verification form each time the BCA sent him one. Appellant's argument, which seems to be based on potentially more frequent mailings by the BCA or potentially increased charging

[3] We also note that this conclusion is consistent with the unpublished opinions of this court, which are not precedential, Minn. Stat. § 480A.08, subd. 3 (2008), but may be persuasive. *See, e.g.*, *State v. Larson*, No. A06-623, 2007 WL 2993608, at *6 (Minn. App. Oct. 16, 2007), *review denied* (Minn. Dec. 19, 2007) (holding that twice convicting Larson for failure to register as a predatory offender did not violate double jeopardy because "[t]he double-jeopardy doctrine is a bar to repeated prosecutions for the same act or omission, not a constitutional pass allowing an offender to disregard repeatedly an ongoing duty").

decisions by the state, is a non sequitur. His challenge to the validity of his convictions and sentences must be as applied to the facts of this case, not to hypothetical situations that might raise more serious constitutional concerns. Here, appellant failed to respond to five verification forms sent to him over the course of 15 months, none of which were sent to him less than three months apart. Again, the BCA was required by statute to send him at least four verification forms per year. Minn. Stat. § 243.166, subd. 4(e). Appellant was only convicted of one count of failure to register in relation to each verification form that he failed to submit. Common sense dictates that these were five separate and distinct offenses.

Minn. Stat. § 609.035 (2008 & Supp. 2009) protects defendants from serialized prosecution and multiple punishment. *State v. Bookwalter*, 541 N.W.2d 290, 293 (Minn. 1995). The statute's prohibition of multiple punishment does not apply to multiple convictions, but is only implicated by multiple sentences, including concurrent sentences. *Id.* The statutory prohibition against multiple punishment "applies only if the multiple offenses arose out of a single behavioral incident." *Id.* at 294. Whether the offenses constitute a single behavioral incident depends on the facts and circumstances of the case, and courts "generally consider the factors of time and place and whether a defendant is motivated by a single criminal objective in committing two intentional crimes." *Id.* "Where intent is not a factor, it is the singleness of the conduct or behavioral incident itself that must be given the most significance." *State v. Johnson*, 273 Minn. 394, 404, 141 N.W.2d 517, 525 (1966).

Appellant's violations were separated by substantial periods of time, one of the key considerations under section 609.035. Appellant contends that he had a single criminal objective, which was to be prosecuted so that he could make allegations of sexual abuse at the MSOP during his trial. The supreme court has explained that, for example, a defendant may not be sentenced for both murder and arson when the arson is the means by which he commits the murder, "because the time and place of the offenses coincide and because the defendant is motivated by an effort to obtain a single criminal objective." *Bookwalter*, 541 N.W.2d at 294. That example deals with a single act that results in violations of multiple laws. Appellant apparently wished to be arrested and prosecuted, but this case deals with distinct acts that were several months apart, each of which was in response to a specific stimulus—a separate verification form that he was required to complete. Consequently, appellant's offenses do not constitute a single behavioral incident. Although appellant may have had the ultimate objective of being prosecuted, this alone does not transform multiple behavioral incidents into a single behavioral incident.

Affirmed.