

TENTH CIRCUIT

Legal Advisor

Jerry Hill, State Attorney



Volume 15, Number 3

March, 2001

FAILURE OF A SEX OFFENDER OR PREDATOR TO REGISTER BY BETH ACKEN

In the fall of 2000, the statutes dealing with the registration of sexual offenders and predators were modified. Florida Statute 943.0435 addresses what is necessary to prosecute a sexual offender for failure to register and Florida Statute 775.02 addresses what is necessary to prosecute a sexual predator for failure to register. Each of these statutes have qualified elements that must be proven in order to sustain a charge of failure to register.

SEXUAL OFFENDER

To prosecute a sexual offender for failure to register pursuant to Florida Statute 943.0435, you must be able to prove two elements: (1) the suspect is a sexual offender, and (2) the suspect failed to comply with the provisions of F.S. 943.0435. Both elements are defined in F.S. 943.0435.

1. Definition of Sexual Offender

To determine if a suspect is a sexual offender, you must be able to establish two elements. First, the suspect must have been convicted of committing, attempting, soliciting, or conspiring to commit any of the following crimes: (1) kidnapping, pursuant to F.S. 787.01, or false imprisonment pursuant to F.S. 787.02, if victim is a minor and defendant is not victim's parent; (2) luring or enticing a child pursuant to F.S. 787.025; (3) sexual battery pursuant to F.S. 794; (4) procuring a person under 18 for prostitution pursuant to F.S. 796.03; (5) lewd or lascivious offenses on children and the elderly pursuant to F.S. 800.04 and F.S. 825.1025; (6) sexual performance by a child pursuant to F.S. 827.071; (7) obscenity and computer pornography pursuant to F.S. 847.0133 and F.S. 847.0135; OR (8) selling or buying minors pursuant to F.S. 847.0145.

The second element needed to show that the suspect is a sexual offender is that the suspect must have been released on or after October 1, 1997 from the sanction imposed for the conviction of the above qualifying offense. Sanction is defined in F.S. 943.0435(1)(a)(2) as "fine, probation, community control, conditional release, controlled release, or incarceration in a state prison, federal prison, private correctional facility, or local detention facility." Conviction is also defined in the statute under F.S. 943.0435(1)(b) as

“a determination of guilt as a result of a trial or the entry of a plea of guilty or nolo contendere, regardless of whether adjudication is withheld”

2. Failure to Comply

Once you have established that the suspect is a sexual offender, you then must be able to prove that the suspect failed to comply with the requirements of F.S. 943.0435. These requirements include the following: (1) registration in person with FDLE or the sheriff’s office in the county where the offender establishes or maintains a permanent or temporary residence within 48 hours after establishing a permanent or temporary residence, (2) registration in person with the Department of Motor Vehicles within 48 hours after reporting initially to FDLE or the sheriff, (3) registration in person with the Department of Motor Vehicles each time the offender’s driver’s license is subject to renewal and within 48 hours after any change in the offender’s permanent or temporary residence, OR (4) notification to the sheriff of the county where the offender currently resides or FDLE if the offender intends to establish a residence in another state or jurisdiction within 48 hours before the offender intends to leave the state. If the offender decides to remain in Florida, the offender, within 48 hours after the date upon which the offender indicated he/she would leave, must notify the sheriff or FDLE, whichever he/she previously notified, of his/her intent to remain.

When determining whether a suspect has reported within 48 hours to the sheriff’s office or to FDLE, you must be able to prove that the suspect had established a permanent or temporary residence. Both permanent and temporary residence are defined in F.S. 943.0435(1)(c) and F.S. 775.21. A permanent residence is a “place where the person abides, lodges, or resides for **14 or more consecutive days.**” A temporary residence is “a place where the person abides, lodges, or resides for a period of 14 or more days in the aggregate during any calendar year and which is not the person’s permanent residence. For a person whose permanent residence is not in this state, it is a place where the person is employed, practices a vocation, or is enrolled as a student for any period of time in this state; or a place where the person routinely abides, lodges, or resides for a period of 4 or more consecutive or nonconsecutive days in any month and which is not the person’s permanent residence.” The definition of **permanent residence requires proof of 14 or more consecutive days** in a residence before the suspect has 48 hours to report to the sheriff’s office or FDLE. This proof can include a lease, utility bills, neighbors’ information, family information, or any other evidence which demonstrates that the suspect has “abided, lodged, or resided for 14 or more consecutive days” followed by 48 hours to report to the sheriff’s office or FDLE.

SEXUAL PREDATOR

To prosecute a sexual predator for failure to register pursuant to F.S. 775.21, you must be able to prove two elements: (1) the suspect is a sexual predator, and (2) the suspect failed to comply with the provisions of F.S. 775.21. Although this is similar to what is needed to prove failure of a sexual offender to register, there are several distinct differences.

1. Definition of Sexual Predator

The first substantial difference is what offenses are considered qualifying offenses. (This statute was modified in **September 2000**, so it is important that you consult a recent copy of the statute.) A qualifying offense must have occurred on or after October 1, 1993.

First, the suspect must have been convicted of a qualifying offense (“a determination of guilt as a result of a trial or the entry of a plea of guilty or nolo contendere, regardless of whether of adjudication is withheld” F.S. 775.21(2)(c)). There are two categories of qualifying offenses under F.S. 775.21(4).

One category of qualifying offenses found under F.S. 775.21(4)(a)(1)(a) include a conviction of a specified offense which does not require any prior convictions. These include all capital, life or first degree felony violations or attempts thereof of (1) kidnapping, pursuant to F.S. 787.01, or false imprisonment pursuant to F.S. 787.02 if victim is a minor and defendant is not victim's parent; or (2) sexual battery pursuant to F.S. 794, lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age pursuant to F.S. 800.04, or buying or selling of minors pursuant to F.S. 847.0145.

The second category of qualifying offenses are found under F.S. 775.21(a)(1)(b) and these convictions require a prior conviction of a specified offense. Qualified offenses include any felony violation or any attempt to commit (1) kidnapping, pursuant to F.S. 787.01, or false imprisonment pursuant to F.S. 787.02, or luring or enticing a child pursuant to F.S. 787.025, if the victim is a minor and the defendant is not victim's parent; OR (2) sexual battery pursuant to F.S. 794 excluding false accusation pursuant to F.S. 794.011(10) and administration of MPA pursuant to F.S. 794.0235; OR (3) procuring a person under 18 for prostitution pursuant to F.S. 796.03; OR (4) lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age pursuant to F.S. 800.04; (5) lewd or lascivious battery upon an elderly or disabled person pursuant to 825.1025(2)(b); OR (6) sexual performance by a child pursuant to F.S. 827.071; OR (7) buying or selling of minors pursuant to F.S. 847.0145.

If the suspect has one of the qualifying offenses in the second category, the suspect must also have been previously convicted or found to have committed or pled nolo contendere or guilty regardless of adjudication to any of the following offenses: (1) kidnapping, pursuant to F.S. 787.01, or false imprisonment pursuant to F.S. 787.02, or luring or enticing a child pursuant to F.S. 787.025, if the victim is a minor and the defendant is not victim's parent; OR (2) sexual battery pursuant to F.S. 794.011(2), (3), (4), (5), or (8); OR (3) unlawful sexual activity with certain minors pursuant to 794.05; OR (4) procuring a person under 18 for prostitution pursuant to F.S. 796.03; OR (5) lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age pursuant to F.S. 800.04; OR (6) lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled adult pursuant to F.S. 825.1025; (7) sexual performance by a child pursuant to F.S. 827.071; OR (8) computer porn pursuant to F.S. 847.0135; OR (9) buying or selling of minors pursuant to F.S. 847.0145. The prior qualifying offense cannot be considered a conviction for the purpose of declaring the suspect a sexual predator if more than ten years has passed between the suspect's prior qualifying offense and the suspect's current qualifying offense, and if the suspect has had no other conviction in that ten year period.

2. Failure to Comply

Once you have established that the suspect is a sexual predator, you then must be able to prove that the suspect failed to comply with the requirements of F.S. 775.21. The provisions of F.S. 775.21(6) require the following: (1) registration with FDLE, (2) registration with the Department of Corrections, if the predator is in custody or under the control or supervision of the Department of Corrections, (3) registration by the custodian of the local jail if the predator is in the custody of the jail, (4) registration may be by the custodian of the federal agency responsible for supervising the predator, (5) registration in person with FDLE or the sheriff's office in the county where the predator establishes or maintains a permanent or temporary residence, within 48 hours after establishing a permanent or temporary residence, if the predator is not in the custody, control, or under the supervision of the Department of Corrections or in a private correctional facility, (6) registration in person with the Department of Motor Vehicles within 48 hours after reporting initially to FDLE or the sheriff, and each time the predator's driver's license is subject to renewal or after any change in the offender's permanent or temporary residence, or (7) notification within 48 hours

before moving to another state with FDLE or the sheriff of the county where the offender currently resides, and if the predator decides to remain in Florida, the predator, within 48 hours after the date upon which the predator indicated he/she would leave, must notify the sheriff or FDLE, whichever he/she previously notified, of his/her intent to remain.

The definition of permanent and temporary residence is the same for a sexual predator as it is for a sexual offender. Again, the definition of **permanent residence** requires proof of **14 or more consecutive days** in a residence before the suspect has 48 hours to report to the sheriff's office or FDLE. This proof can include a lease, utility bills, neighbors' information, family information, or any other evidence which demonstrates that the suspect has "abided, lodged, or resided for 14 or more consecutive days" followed by 48 hours to report to the sheriff's office or FDLE. Please remember that the defendant's statement alone is not sufficient proof. There must be proof of each element independent of a defendant's statement.

In the past, these case have been prosecuted by the Child Sexual Abuse Unit at the State Attorney's Office. These cases will now be prosecuted by the Felony Division at the State Attorney's Office. Please forward all complaint affidavits for failure to register charges to the Felony Intake Division.

*******FROM THE COURTS*******

MIRANDA WARNINGS WERE NOT NECESSARY BEFORE FIELD SOBRIETY TESTS

The defendant was charged with DUI and filed a motion to suppress evidence of the field sobriety tests which were administered to him, asserting that he should have been given *Miranda* warnings prior to the tests. The facts on which the motion was based were that an officer stopped the defendant for speeding and believing that the defendant was under the influence had him perform several field sobriety tests. The officer then arrested him for DUI. The trial court denied the motion to suppress, and the defendant was convicted as charged. On appeal, the Third District affirmed, holding that the stop of the defendant and administration of the tests did not amount to a custodial situation which would require the giving of *Miranda* warnings. *State v. Alvarez*, 26 FLW D386 (Fla. 3d DCA Feb. 7, 2001).

DUI CONVICTION ON APPEAL CAN SERVE AS A PRIOR CONVICTION

The defendant was charged with Felony (Fourth Time) DUI and filed a motion to dismiss asserting that the state could not establish a *prima facie* case. The facts on which the motion was based were that at the time the defendant committed the DUI, one of the predicate convictions was on appeal. The trial court granted the motion, but on appeal, the Supreme Court reversed, holding that a DUI conviction on appeal may be used as a predicate conviction for Felony DUI. *State v. Finelli*, 26 FLW S101 (Fla. Mar. 1, 2001).

RESIDUE SUFFICIENT FOR POSSESSION CONVICTION

The defendant was charged with possession of cocaine and filed a motion to dismiss asserting that the state could not establish a *prima facie* case. The facts on which the motion was based were that the defendant was found in possession of a glass pipe which contained cocaine residue. The court denied the motion, and the defendant was convicted as charged. On appeal, the Second District affirmed, holding that because the glass pipe was not a common item but rather one used for smoking narcotics, the presence of residue was sufficient to support a conviction for possession of cocaine. *Andrews v. State*, 26 FLW D559 (Fla. 2d DCA Feb. 23, 2001).

PARENT OF ADULT COULDN'T CONSENT TO SEARCH

In this Polk County case, the defendant was charged with possession of controlled substances and filed a motion to suppress. The facts on which the motion was based were that officers received information that the defendant who was an adult was selling marijuana. They went to his residence which was his mother's house. They asked the mother for consent to search the defendant's bedroom, and she agreed. They found marijuana and Xanax in a desk drawer. The trial court granted the motion, and on appeal, the Second District affirmed, holding that where an adult lives with a parent, police cannot obtain consent from the parent to search within furniture in the adult's bedroom without establishing that the parent has equal access to and authority over the contents of the furniture. *State v. Miyasato*, 26 FLW D698 (Fla. 2d DCA Mar. 7, 2001).

FORCE SUFFICIENT FOR CARJACKING CONVICTION

The defendant was charged with carjacking. At his trial, the evidence established that when the victim saw the defendant entering her car, she jumped on the hood in an effort to stop him from taking it. He then accelerated, throwing her to the ground. He was convicted as charged. On appeal, the Fifth District affirmed, holding that the act of accelerating the car was sufficient to establish the force or violence element of carjacking. *Lovett v. State*, 26 FLW D703 (Fla. 5th DCA Mar. 9, 2001).

OFFICER WAS NOT PERFORMING LEGAL DUTY WHEN BATTERED

The defendant was charged with Battery on a LEO. At trial, the evidence established that the victim was a uniformed off duty police officer who was working security at a nightclub checking identification. When he refused entry to the defendant, she slapped him. She was convicted as charged, but on appeal, the Fifth District reversed, holding that the state failed to show that the officer was engaged in the performance of a lawful duty. *Nicolosi v. State*, 26 FLW D711 (Fla 5th DCA Mar. 9, 2001).

Tenth Circuit
LEGAL ADVISOR
Staff

Jerry Hill.....Publisher
Chip Thullbery.....Managing Editor
Michael Cusick.....Legal Content Editor

The “**Legal Advisor**” is published by the Office of the State Attorney, Tenth Judicial Circuit, P.O. Box 9000, Drawer S.A., Bartow, FL 33831