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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0100**

State of Minnesota,  
Respondent,

vs.

Jose Carlos Lopez,  
Appellant.

**Filed March 24, 2009  
Affirmed  
Larkin, Judge**

Todd County District Court  
File No. K0-06-394

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, Jenifer Kopischke, Certified Student Attorney, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

Charles Rasmussen, Todd County Attorney, Todd County Government Center, 212 First Avenue South, Long Prairie, MN 56347 (for respondent)

Joel O'Malley, Special Assistant Public Defender, 50 South Sixth Street, Suite 1500, Minneapolis, MN 55402-1498 (for appellant)

Considered and decided by Minge, Presiding Judge; Larkin, Judge; and Stauber,  
Judge.

## **UNPUBLISHED OPINION**

**LARKIN**, Judge

Appellant challenges the district court's order requiring him to register as a predatory offender. Appellant argues that the district court erred by concluding that (1) appellant's controlled-substance conviction arises out of the same set of circumstances as his kidnapping charges, (2) appellant failed to assert a liberty interest necessary to sustain a procedural-due-process challenge, and (3) appellant failed to offer sufficient evidence to support a discriminatory-enforcement claim. Because the district court's legal conclusions are not erroneous, we affirm.

### **FACTS**

On April 3, 2006, law enforcement officers from the Todd County Sheriff's Office and the Central Minnesota Drug Task Force met with a confidential informant (CI) to arrange the purchase of methamphetamine. Later that day, the CI purchased methamphetamine from appellant Jose Carlos Lopez and his brother Gabriel. On April 6, the CI purchased an additional eight grams of methamphetamine from Lopez for \$800. Lopez also gave the CI an additional 3.4 grams of methamphetamine to be paid for at a later date.

On April 16, Lopez and his brother Gabriel approached the CI and his juvenile companion at a gas station in Long Prairie. According to the CI, Lopez entered the front-seat-passenger compartment of the CI's vehicle and told the CI that he needed the \$300 that the CI owed him for the 3.4 grams of methamphetamine. Lopez threatened to punch the CI and told the CI that he was going to hold him hostage until he received \$300. The

CI claims that Lopez and his brother forced the CI to drive to Lopez's home. The CI's juvenile companion followed in his own vehicle. The CI asserts that when they arrived at Lopez's home, Lopez told the CI and the juvenile that they had to remain in Lopez's garage until the \$300 was paid. According to the CI, he and the juvenile were forced to remain in the garage for approximately 40 minutes. During that time, Lopez locked the garage door, and the CI did not feel free to leave.

The CI called the Central Minnesota Drug Task Force from the garage and made arrangements for agents to hide money at a softball field for the CI. Lopez and his brother drove the CI to the softball field to pick up the money. After Lopez obtained the money, he released the CI and the juvenile.

The state charged Lopez with one count of aiding and abetting first-degree controlled-substance crime in violation of Minn. Stat. §§ 152.021, subds. 1(1), 3(a), 609.05, subd. 1 (2004), and two counts of aiding and abetting kidnapping in violation of Minn. Stat. §§ 609.25, subds. 1(2), 2(1), 609.05, subd. 1 (2004).<sup>1</sup> Lopez moved the district court to dismiss the kidnapping charges for lack of probable cause. The district court denied the motion.

Lopez originally pleaded guilty to one count of aiding and abetting first-degree controlled-substance crime in exchange for dismissal of the kidnapping charges. At sentencing, Lopez objected to the imposition of a predatory-offender registration requirement. Lopez argued that due process requires the use of a clear and convincing

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<sup>1</sup> The original complaint charged two counts of aiding and abetting controlled-substance crime in the first degree and one count of aiding and abetting kidnapping in violation of Minn. Stat. § 609.25, subd. 2(1). The complaint was later amended to reflect the referenced charges.

evidence standard when determining whether an offender must register as a predatory offender. Lopez moved the district court to either hold that Lopez was not required to register as a predatory offender, or to allow Lopez to withdraw his plea. The parties agreed that the district court would determine whether Lopez was required to register based on a stipulated record. The district court ultimately (1) declined to apply a clear and convincing evidence standard to the registration determination, (2) concluded that Lopez's kidnapping charges and controlled-substance conviction arose from the same set of circumstances, and (3) held that Lopez was required to register as a predatory offender. But the district court granted Lopez's motion to withdraw his plea and scheduled the case for further proceedings.

Lopez was later convicted of the first-degree controlled-substance crime after a stipulated-facts trial. The state dismissed the kidnapping charges before the trial. At the sentencing hearing, Lopez again argued that he should not be required to register as a predatory offender, this time claiming an equal-protection violation. Lopez cited the case of a Washington County police officer who was charged with assault in the fifth degree and kidnapping. Lopez claimed that the officer was not required to register as a predatory offender after he was convicted of assault and the kidnapping charge was dismissed. Lopez argued that the fact that he is required to register but the officer is not demonstrates discriminatory enforcement by the state. The district court rejected Lopez's argument, concluding that Lopez failed to offer substantial and reliable data to support a prima facie claim of disproportionate treatment. The district court sentenced Lopez to

110 months of imprisonment and ordered him to register as a predatory offender. This appeal follows.

## DECISION

### *Predatory Offender Registration*

Minnesota's predatory offender registration statute, states:

A person shall register under this section if:

(1) the person was charged with or petitioned for a felony violation of or attempt to violate, or aiding, abetting, or conspiracy to commit, any of the following, and convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances:

. . . .

(ii) kidnapping under section 609.25.

Minn. Stat. § 243.166, subd. 1b(a)(1) (2004 & Supp. 2005). The statute anticipates that the district court will notify an offender of the registration requirement at the time of sentencing. Minn. Stat. § 243.166, subd. 2 (2004 & Supp. 2005). If the district court does not notify the offender of the registration requirement, then the assigned corrections agent must do so. *Id.*

Under section 243.166, Lopez is required to register if his controlled-substance conviction arises out of the same set of circumstances as his kidnapping charges. *Id.* at subd. 1b(a)(1). The state contends that the district court's determination that Lopez's kidnapping charges and controlled-substance conviction arise from the same set of circumstances is a finding of fact that must be upheld unless it is clearly erroneous.

Lopez contends that application of section 243.166 involves more than fact finding and that the proper standard of review is de novo.

The determination of whether Lopez is required to register under section 243.166 presents a mixed question of fact and law. Factual findings are necessary regarding the circumstances surrounding the charged offense and the conviction offense. And a statutory criteria (i.e., whether the offenses arise from the same set of circumstances) must be applied to these factual findings. While we review a district court's factual findings for clear error, the application of a statute to facts found is a question of law that we review de novo. *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996); *State v. Bunde*, 556 N.W.2d 917, 918 (Minn. App. 1996) (stating that a district court's application of statutory criteria to facts found is subject to de novo review).

Lopez does not challenge the district court's factual determinations regarding the circumstances surrounding his charged offenses and conviction offense. Instead, Lopez challenges the district court's determination that his controlled-substance conviction arises out of the same set of circumstances as his kidnapping charges. Lopez argues that the district court's determination was erroneous because the conduct underlying Lopez's kidnapping charges and the conduct underlying his controlled-substance conviction were not united in time or place, involved different victims, and involved different criminal behavior. Lopez cites unpublished opinions of this court in support of this argument. But our unpublished cases carry no precedential authority. Minn. Stat. § 480A.08 (2008).

Lopez was charged with kidnapping for the purpose of facilitating commission of a felony, namely the controlled-substance crime for which he was convicted. Minn. Stat.

§ 609.25, subd. 1(2) (stating, whoever, for the purpose of facilitating the commission of any felony, “confines or removes from one place to another, any person without the person’s consent or, if the person is under the age of 16 years, without the consent of the person’s parents or other legal custodian, is guilty of kidnapping”). The district court determined that there was probable cause for the kidnapping charges, and Lopez does not challenge the district court’s probable cause determination on appeal. The district court concluded that the controlled-substance offense arises from the same set of circumstances as the kidnapping offenses because all of the offenses relate to Lopez’s sale of drugs to the CI on April 6. The district court reasoned that the April 6 transaction was not complete until the final \$300 payment was made and that the \$300 payment was made as the direct result of the alleged kidnapping. The district court’s reasoning is sound.

There may be cases in which the connection between the conduct underlying the charged offense and the conviction offense is so attenuated that the conviction may not be said to arise out of the same set of circumstances as the charged offense. But that is not the case here. The CI received 11.4 grams of methamphetamine from Lopez on April 6. The CI paid Lopez for 8 grams of the methamphetamine and agreed to pay for the other 3.4 grams at a later date. On April 16, Lopez allegedly kidnapped the CI in a successful effort to obtain final payment for the 3.4 grams of methamphetamine. The same conduct and motive (i.e., completion of the April 6 narcotics transaction) gave rise to Lopez’s kidnapping charges and controlled-substance conviction. We therefore conclude that Lopez’s controlled-substance conviction arises from the same set of circumstances as his kidnapping charges.

Lopez contends that because the definition of “sell” includes to “give away,” Minn. Stat. § 152.01, subd. 15a (2004), the controlled-substance offense was technically completed on April 6 when Lopez gave the CI 3.4 grams of methamphetamine. Therefore, Lopez argues, the completion of the controlled-substance crime predated the alleged kidnapping, and the controlled-substance crime could not arise out of the same set of circumstances as the kidnapping. We reject Lopez’s argument because it ignores the plain language of section 243.166.

Section 243.166 does not require an examination or comparison of the legal elements of the charged offense and conviction offense. Minn. Stat. § 243.166, subd. 1b(a)(1). The statute merely requires a determination whether the offenses arise out of the same “set of circumstances.” “Circumstance” is defined as “[a] condition or fact attending an event and having some bearing on it; a determining or modifying factor.” *American Heritage Dictionary* 338 (4th ed. 2007). When applying a statute, we are governed by its plain language. *State v. Smoot*, 737 N.W.2d 849, 853 (Minn. App. 2007), *review denied* (Minn. Nov. 21, 2007). The supreme court has stated that the statutory language of section 243.166 has a plain and logical meaning. *Boutin v. LaFleur*, 591 N.W.2d 711, 715-16 (Minn. 1999) (rejecting an argument that the statutory phrase, “another offense arising out of the same set of circumstances” should be read to mean, “another [enumerated predatory] offense arising out of the same set of circumstances”). Lopez’s contention that we should determine whether his controlled-substance conviction arises from the same set of circumstances as his kidnapping charges based solely on the legal elements of the offenses requires us to construe “set of circumstances” narrowly, in



a manner that is inconsistent with the plain language of the statute. Because the language of section 243.166 is plain, we will not construe and apply it in the restrictive manner suggested by Lopez.

Because Lopez's controlled-substance conviction arises from the same set of circumstances as his kidnapping charges, we affirm the district court's determination that Lopez is required to register as a predatory offender.

### ***Procedural Due Process***

Lopez argues that the requirement that he register as a predatory offender deprives him of liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution and article I, section 7, of the Minnesota Constitution because the registration statute does not require the state to demonstrate Lopez's kidnapping charges were "legitimate as a matter of law and fact." Whether a party's due-process rights have been violated is a constitutional question, which we review de novo. *Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn. App. 1999), *review denied* (Minn. July 28, 1999).

"When procedural due process is at issue, we must first determine whether a protectable liberty interest is at stake." *Boutin*, 591 N.W.2d at 718 (citing *In re Conservatorship of Foster*, 547 N.W.2d 81, 85 (Minn. 1996); *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976)). The Supreme Court has stated that a liberty interest is implicated when loss of reputation is coupled with the loss of some other tangible interest. *See Paul v. Davis*, 424 U.S. 693, 701-02, 96 S. Ct. 1155, 1160-61 (1976) (adopting the so-called "stigma-plus" test). The Supreme Court held that this

additional interest must be a right that was “initially recognized and protected by state law.” *Paul*, 424 U.S. at 710, 96 S. Ct. at 1165.

Lopez contends that, in addition to the injury to his reputation, application of the predatory-offender-registration statute impacts his constitutional rights to possess a firearm and to bring a defamation-by-implication claim. The district court’s order and memorandum does not indicate that Lopez asserted his rights to possess a firearm and to bring a defamation-by-implication action as a basis for his due-process claim. And it does not appear that the district court considered these rights when deciding Lopez’s claim. The district court only considered whether the registration requirement prevented Lopez from entering the Challenge Incarceration Program, which appears to be the sole interest that Lopez cited in support of his due-process claim. Lopez does not assign error to the district court’s conclusion that Lopez’s purported inability to enter the Challenge Incarceration Program does not satisfy the stigma-plus test. Instead, Lopez advances a new theory in support of his due-process claim.

“A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Because there is no indication that the district court was presented and considered Lopez’s argument that the application of the predatory-offender-registration statute impacts his rights to possess a firearm and to bring a defamation-by-implication claim, the issue is not properly before us for review, and we decline to consider the issue for the first time on appeal. *See id.*; *see also State v. Schmitz*, 559 N.W.2d 701, 705 (Minn. App. 1997) (refusing to decide a

due-process issue that was raised for the first time on appeal), *review denied* (Minn. Apr. 15, 1997).

### ***Discriminatory Enforcement***

The Equal Protection Clause of the United States Constitution prohibits discriminatory enforcement of nondiscriminatory laws. *See Thul v. State*, 657 N.W.2d 611, 616 (Minn. App. 2003), *review denied* (Minn. May 28, 2003). When a discriminatory-enforcement claim is raised, the proponent has the burden of proving discrimination by a clear preponderance of the evidence. *City of Minneapolis v. Buschette*, 307 Minn. 60, 64, 240 N.W.2d 500, 502 (1976). In order to make a threshold showing to trigger a discriminatory-enforcement hearing, “a defendant must allege sufficient facts to take the question past the frivolous state and to raise a reasonable doubt as to the prosecutor’s purpose.” *State v. Hyland*, 431 N.W.2d 868, 873 (Minn. App. 1988). “To take a claim of discriminatory enforcement beyond the frivolous state, the defendant must allege facts which show that he was singled out for enforcement, and that his selection was invidious or in bad faith.” *Id.* at 873. We review Lopez’s challenge to the district court’s determination of his equal protection claim *de novo* because it involves questions of law. *Thul*, 657 N.W.2d at 616.

Lopez contends that the fact that he is required to register as a predatory offender when a Washington County police officer with similar charges is not, is sufficient to establish a *prima facie* case of discriminatory enforcement. In support of his claim, Lopez submitted a copy of the police officer’s sentencing order. The sentencing order contains a section describing conditions of probation, and the box labeled “Register as

Predatory Offender Pursuant to § 243.166” is not marked. The district court concluded that Lopez failed to offer substantial and reliable data to support a prima facie claim of disproportionate treatment. We agree.

We first note that Lopez fails to present any authority for the proposition that a discriminatory-enforcement claim may be based on a judge’s action in a single case. And even if the district court judge failed to notify the Washington County police officer of his obligation to register as a predatory offender, it does not mean that the officer is not required to register. *See* Minn. Stat. § 243.166, subd. 2 (“If a person required to register . . . was not notified by the court of the registration requirement at the time of sentencing or disposition, the assigned corrections agent shall notify the person of the requirements of this section.”). The Minnesota Bureau of Criminal Apprehension has an independent responsibility to enforce the predatory offender registration statute. *See, e.g.*, Minn. Stat. § 243.166, subd. 3(b) (2008). Moreover, the supreme court has stated: “Where . . . the differential treatment [giving rise to an equal-protection claim] is alleged to arise only from bureaucratic errors, the standard of intentional, arbitrary or systematic discrimination necessary to prove a violation of equal protection rights is not satisfied.” *Programmed Land, Inc. v. O’Connor*, 633 N.W.2d 517, 530 (Minn. 2001). Because Lopez failed to show that he was singled out for predatory-offender registration and that

his selection was invidious or in bad faith, Lopez has not established a prima facie case of discriminatory enforcement.

**Affirmed.**

Dated: \_\_\_\_\_

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The Honorable Michelle A. Larkin  
Minnesota Court of Appeals