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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1598**

State of Minnesota,
Respondent,

vs.

Stevie Junior Killett,
Appellant.

**Filed December 19, 2011
Reversed and remanded
Ross, Judge**

Lyon County District Court
File No. 42-CR-10-178

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Richard R. Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

Joseph A. Herriges, Jr., Special Assistant Public Defender, Minneapolis, Minnesota; and

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Minge, Judge; and Hudson,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

The district court ordered William Killett to register as a predatory offender after a jury convicted him of fifth-degree possession of a controlled-substance and acquitted him of criminal sexual conduct. The district court reasoned that Killett's controlled-substance possession and his alleged criminal sexual conduct arose out of the same set of circumstances. Because the district court erred by concluding that Killett's conviction of drug possession arose out of the same set of circumstances as his charges for criminal sexual conduct, we reverse the registration decision.

FACTS

In early February 2010, Stevie Killett's former girlfriend, J.W., had recently moved in with him at his rented house in Marshall. The two were no longer in a romantic relationship. Killett returned home one evening after having been drinking. He began to argue with J.W. about the amount she owed on the electric bill. He asked her to leave, but she did not.

After the argument, Killett told J.W. he wanted to have sex with her, but she refused. They began to drink and went to Killett's bedroom to watch television. They also consumed cocaine that Killett kept in his room. They left the bedroom and went to the basement where they smoked marijuana laced with cocaine. Then they returned to Killett's bedroom.

After some time, Killett again asked J.W. to have sex and she again refused. According to J.W.'s trial testimony, Killett then forced her to have sex with him.

According to Killett's testimony, the two had consensual sex. J.W. testified that, at the time of the alleged assault, she was no longer feeling the effects of the drugs.

J.W. reported to the police the next day that Killett sexually assaulted her. Police arrested Killett and executed a search warrant at the house. During the search, officers seized items from Killett's bedroom: packages containing an unknown white substance, a pill case containing two pills, and cups containing unknown liquids. A laboratory test indicated cocaine in the pill case.

The state charged Killett with criminal sexual conduct in the third degree under Minnesota Statutes section 609.344, subdivision 1(c) (2010), attempted criminal sexual conduct in the third degree under section 609.344, subdivision 1(c), criminal sexual conduct in the fourth degree under section 609.345, subdivision 1(c) (2010), and possession of a controlled substance in the fifth degree under section 152.025, subdivision 2(a)(1) (2010). A jury found Killett guilty of drug-possession but not guilty of sexual assault.

At the sentencing hearing, Killett addressed the pre-sentence investigation report recommendation that he register as a predatory offender under section 243.166, subdivision 1b(a)(1)(iii) (2010). Killett argued that he was not required to register because he was acquitted of the sexual-assault charges. The district court concluded that the sexual conduct and drug possession were sufficiently linked and held that Killett must register as a predatory offender.

Killett appeals.

DECISION

Killett contends that the district court erred by requiring him to register as a predatory offender under section 243.166. He bases his contention on the district court's application of the statute. Whether a district court has properly applied a statute to undisputed facts is a question of law that we review de novo. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996).

A person must register as a predatory offender under section 243.166, subdivision 1b(a)(iii) if he “was charged with . . . a felony violation of [criminal sexual conduct under Minnesota Statutes sections 609.344 or 609.345], and convicted of . . . that offense or another offense arising out of the same set of circumstances.” Because Killett was not convicted of criminal sexual conduct, he must register as a predatory offender only if his alleged criminal sexual conduct arose out of the same set of circumstances as his drug-possession conviction.

The supreme court has addressed the application of section 243.166 in two opinions. Both opinions guide us here.

In *Boutin v. LaFleur*, the defendant had pleaded guilty to a physical assault that immediately preceded an alleged sexual assault of the same victim. 591 N.W.2d 711, 713 (Minn. 1999). The supreme court found a sufficient nexus between the physical assault, for which the defendant was convicted, and the sexual assault, for which he was not, to require him to register as a predator because the circumstances were aggravated by the defendant's forced sexual intercourse with the victim a short while after he physically assaulted and seriously injured her. *Id.* at 716 n.4.

The supreme court recently addressed the statute again and clarified the relationship that must exist between two offenses before they may be held to arise out of the same set of circumstances. In *State v. Lopez*, two defendants had been charged with aiding and abetting a first-degree controlled-substance crime and two counts of aiding and abetting kidnapping. 778 N.W.2d 700, 701–02 (Minn. 2010). The defendants had sold methamphetamine to an informant who failed to pay the full sale price but agreed to pay the remaining amount later. *Id.* at 702. Ten days after the drug sale, the defendants held the informant and his friend hostage in their garage for 40 minutes until the debt was paid. *Id.* The defendants were convicted of the first-degree controlled-substance crime but not of aiding and abetting kidnapping. *Id.* at 703. The supreme court saw an insufficient nexus in *Lopez* because the two offenses were not “sufficiently linked in time, location, people and events.” *Id.* at 706. It is not enough for the dismissed, charged offense and the offense of conviction to be merely related. *Id.* The kidnapping allegations in that case were tied to the prior drug crime only because of the informant’s failure to pay the drug debt. *Id.* In all other respects the kidnapping occurred under different circumstances because the drug sale was complete on the drug transfer and the kidnapping was based on events that occurred later, in a different place, involving different people. *Id.* The court therefore held that the *Lopez* defendants were not required to register as predatory offenders. *Id.* at 707.

Applying *Boutin* and *Lopez*, we hold that Killett’s alleged criminal sexual conduct and his drug possession are not sufficiently linked to have arisen out of the same circumstances. Killett completed the crime of cocaine possession before the alleged

assault occurred, and there is no indication that his acquiring the drugs or his continued possession had anything to do with J.W. or the assault. Because his drug possession was ongoing, it only coincidentally overlapped in time with the alleged sexual assault, and there is little more connection than that. Killett's cocaine was not an instrument in the alleged assault; J.W. testified that she was not under the influence of the drugs when it occurred. It is true that the alleged assault and the drug possession happened in the same location because the cocaine was in Killett's bedroom where the alleged assault occurred. But *Lopez* explains that a single related circumstance is not sufficient to link the charged predatory offense to the nonpredatory conviction. *Lopez*, 778 N.W.2d at 706. And although it was J.W.'s statements to police about the sexual assault that prompted police to search Killett's house and find the drugs, that circumstance links only the discovery of *evidence of* the two crimes, not the crimes themselves.

Only a tenuous link connects Killett's possession of the cocaine and the unrelated alleged sexual assault. We reverse the district court's decision requiring Killett to register as a predatory offender and remand for the district court to modify its order.

Reversed and remanded.