

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA12-469
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2012

STATE OF NORTH CAROLINA

v.

Moore County
No. 11 CRS 50906

ANDREW AARON BROWN

Appeal by Defendant from judgment entered 7 February 2012
by Judge Anderson D. Cromer in Moore County Superior Court.
Heard in the Court of Appeals 25 September 2012.

*Roy Cooper, Attorney General, by Matthew L. Boyatt,
Assistant Attorney General, for the State.*

Daniel F. Read, for Defendant.

THIGPEN, Judge.

Andrew Aaron Brown ("Defendant") appeals from the trial court's judgment convicting him of the offense of being a sex offender unlawfully on the premises of a place intended primarily for the use, care, or supervision of minors in violation of N.C. Gen. Stat. § 14-208.18(a)(1) (2011). Defendant contends that he had no notice of the offense that served as the basis for his conviction, and, therefore, that "to

convict him would deny him due process of law." After careful review, we conclude that Defendant's contention presents a constitutional challenge not raised at trial, and we accordingly dismiss the appeal as not properly before this Court.

I. Factual & Procedural Background

The State's evidence at trial tended to show the following: Defendant is a registered sex offender based upon a 2005 conviction for taking indecent liberties with a child. Defendant is thus required to register with the Moore County Sheriff's Department every six months and to complete a Verification of Information form as part of the registration process. The Verification of Information form sets forth the following pertinent provision: "Remember: Make sure you understand all your registration requirements. You must comply with the provisions in NCGS 14-208.5 through 208.45."¹ Holly

¹Defendant was charged in this case with violating N.C. Gen. Stat. § 14-208.18(a), which provides as follows:

It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:

(1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to,

Foster, an employee of the Moore County Sheriff's Office, testified that Defendant appeared at the sheriff's office on 13 December 2010 and completed a Verification of Information form in her presence. The record reflects that Defendant printed and

schools, children's museums, child care centers, nurseries, and playgrounds.

(2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

(3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.

N.C. Gen. Stat. § 14-208.18(a) (2011). We note that our ruling in a contemporaneously filed opinion, *State v. Daniels*, __ N.C. App. __, __ S.E.2d __ (2012), invalidates subsection (3) of N.C. Gen. Stat. § 14-208.18(a) on constitutional grounds as applied to the defendant in that case. However, our review of the indictment, the evidence presented at trial, and the trial court's instructions to the jury in the instant case reveals that subsection (1) of N.C. Gen. Stat. § 14-208.18(a) served as the basis for Defendant's conviction. Thus, *Daniels* has no bearing on Defendant's conviction or on our ruling in the instant case. See Act of July 28, 2008, ch. 117, sec. 21.1, 2008 N.C. Sess. Laws 437 (providing that "[i]f any provision of this act is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application").

signed his name beneath a provision that provides, "I understand all my registration requirements."

At approximately 3:30 p.m. on 17 March 2011, Moore County Schools Police Officer Timothy Bullins ("Officer Bullins") observed Defendant in his motor vehicle parked in front of Crain's Creek Middle School. Officer Bullins had been informed that a student's "mother was living with a registered sex offender and he might . . . come on the campus," and he had thus obtained Defendant's information and photograph from the sex offender registry. Officer Bullins approached Defendant and inquired as to his purpose for being on school grounds. Defendant replied that he was there to pick up "his daughter." When questioned further, Defendant acknowledged his status as a sex offender, but denied knowing that he was not allowed on school property. Defendant was subsequently arrested and charged with the offense of being a registered sex offender unlawfully on the premises of a place intended primarily for the use, care, or supervision of minors.

The matter came on for trial in Moore County Superior Court on 7 February 2012. The State's two witnesses, Ms. Foster and Officer Bullins, testified to the factual account set forth above. Defendant moved to dismiss for insufficiency of the

evidence at the close of the State's evidence, and the trial court denied the motion. Defendant did not put on any evidence.

The jury returned a verdict that day convicting Defendant as charged. The trial court designated Defendant a prior record level V offender and sentenced Defendant to 12 to 15 months imprisonment. Defendant appeals.

II. Analysis

On appeal, Defendant contends that the trial court erred in denying his motion to dismiss for insufficiency of the evidence because the State failed to introduce any evidence demonstrating that his "presence on the school property was in knowing violation of state law, in particular in that there was no proof that he had been told of the requirement he stay off school property, and therefore to convict him would deny him due process of law." Although Defendant has framed his argument as a challenge to the "sufficiency of the evidence," the substance of his argument on appeal is that he was afforded no notice that he was not allowed on school grounds, and, thus, that to convict him on this basis violated his constitutional right to due process. We do not reach the merits of this contention, however, as the constitutional issue presented therein is not properly before this Court.

"To preserve a question for appellate review, a party must have presented a timely request, objection, or motion to the trial court and have obtained a ruling thereon." *State v. Ezell*, 159 N.C. App. 103, 105-06, 582 S.E.2d 679, 682 (2003) (citing N.C. R. App. P. 10(b)(1)). "'Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.'" *State v. Bell*, __ N.C. App. __, __, 728 S.E.2d 439, 444 (2012) (quoting *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001)); see also *State v. Deese*, 136 N.C. App. 412, 420, 524 S.E.2d 381, 386 (2000) (declining to address the defendant's constitutional argument "because it was neither asserted nor determined in the trial court").

Here, the trial transcript reveals that the following exchange occurred when Defendant moved to dismiss at the close of the State's evidence:

THE COURT: Okay. At the close of the State's evidence, does anyone wish to be heard?

[Defense counsel]: Judge, for the record I will move for a directed verdict at the close of [the] State's evidence. I think one of the prongs is that the defendant knowingly entered the premises, and . . . that knowingly . . . is having or showing awareness or understanding; well informed or deliberate, conscious.² In that showing

²We have omitted trial counsel's citation to a case which - as

knowingly, there's no evidence presented to date that [Defendant] knew or should have known that he wasn't allowed on the premises, even in the light most favorable to the State. There's no packet whatsoever that he signed that showed that there was a statute, the statute read you cannot go on. There's no testimony by anyone that says I told him he could not be on the premises prior to that day, and because of that, Your Honor, we move for [a] directed verdict.

THE COURT: State wish to be heard?

[The State]: Your Honor, looking at the charge is that the defendant knowingly was on the premises of any place intended primarily for use, care or supervision of minors, including but not limited to schools. I think there's evidence that he knowingly was on the school property because he drove there, and he drove there to pick up his girlfriend's daughter. And so I would contend that the State has met its burden at this stage.

[Defense counsel]: And just so I'm clear, we're not arguing knowingly went there. I mean, we know that he went there. Knowledge is everything. Yeah, he drove there knowingly, but did he know that he wasn't supposed to be there. So knowingly captures everything, and what I'm arguing is that the knowingly part that he was not supposed to be there, there's no evidence to show by the State that he was ever given any kind of notice that he was not supposed to be on school property.

. . . .

Defendant correctly indicates in his appellant brief - is not relevant to the argument presented at trial.

THE COURT: At this time the motion is denied.

We cannot reasonably surmise from this discussion that Defendant's motion for "a directed verdict" equated to a due process challenge. See *State v. Cornell*, __ N.C. App. __, __, 729 S.E.2d 703, 707 (2012) (holding that the defendant did not preserve a constitutional objection at trial, even though he said the words "First Amendment," because the defendant's motion was, substantively, a motion to dismiss based on an alleged insufficiency of the evidence, and because the trial court did not pass upon the constitutional question). Rather, it appears that Defendant sought to dismiss the case on grounds that the evidence was insufficient to establish Defendant's "knowledge," which is an essential element of the charged offense under N.C. Gen. Stat. § 14-208.18(a)(1) (providing that "[i]t shall be unlawful for any person required to register . . . to knowingly be . . . [o]n the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds"). As Defendant admits, his argument before the trial court never referenced due process or a violation of his constitutional rights. While we agree with Defendant that substance must be elevated over form in this

context, it is evident from the exchange recited *supra* that the trial court was ruling on the sufficiency of the evidence and was not ruling on the question of whether Defendant's due process rights had been violated. Thus, Defendant's constitutional challenge now before us was neither asserted nor determined at trial, and we decline to address it for the first time on appeal.

DISMISSED.

Judges MCGEE and BEASLEY concur.

Report per Rule 30(e).

Judge Beasley concurred in this opinion prior to 18 December 2012.