

NO. COA14-447

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2015

STATE OF NORTH CAROLINA

v.

Gaston County
Nos. 13 CRS 51451, 51461

KEITH ANTONIO BARNETT

Appeal by defendant from judgment entered 10 December 2013
by Judge F. Donald Bridges in Gaston County Superior Court.
Heard in the Court of Appeals 24 September 2014.

*Attorney General Roy Cooper, by Assistant Attorney General
J. Joy Strickland, for the State.*

Guy J. Loranger for defendant.

McCULLOUGH, Judge.

Keith Antonio Barnett ("defendant") appeals from a judgment
entered upon his convictions for failure to register as a sex
offender and resisting a public officer. For the following
reasons, we vacate defendant's conviction for failure to
register as a sex offender.

I. Background

The record in this case tends to show that defendant pled
guilty to and was convicted of taking indecent liberties with a
child in Gaston County Superior Court in 1997. As a result of

said conviction, a reportable offense under N.C. Gen. Stat. § 14-208.6(4)(a), defendant was sentenced to an active term of imprisonment and required to register as a sex offender. See N.C. Gen. Stat. § 14-208.7 (2013).

At the time of defendant's conviction, N.C. Gen. Stat. § 14-208.7 required defendant to register for a period of 10 years following his release from prison in 1999. See N.C. Gen. Stat. § 14-208.7 (1997). However, the statute has since been amended several times, lengthening defendant's registration requirement to a period of at least 30 years following the date of initial county registration. See Jessica Lunsford Act for NC effective Dec. 1, 2008, Sec. 8, 2008 N.C. Sess. Laws 2008-117 (lengthening the registration requirement).

On 6 January 2010, defendant pled guilty to and was convicted of failing to register as a sex offender. Defendant received a probationary sentence as part of a plea arrangement.

On 15 February 2010, defendant registered as a sex offender with the Gaston County Sherriff's Office. At that time, defendant completed an offender acknowledgement whereby defendant represented that he understood the registration requirements. Defendant listed his address as 554 South Boyd St., Gastonia, North Carolina.

Subsequent to defendant's registration, defendant was incarcerated from 17 August 2011 to 14 November 2012.

On 1 February 2013, Luther Hester, a Gaston County Sheriff's Office deputy working in the sex offender registration unit, received a telephone call in reference to defendant's whereabouts. Upon receiving the phone call, Hester researched defendant's records and determined that defendant was no longer incarcerated and had not registered as a sex offender anywhere upon his release from prison.

On 6 February 2013, Hester, accompanied by two other deputies, went to the address where the caller informed Hester defendant could be found, 332 North Mountain St., Gastonia, North Carolina. Upon arrival, Hester saw defendant run from the front yard into the house. When Hester approached the house, a woman, who identified herself as defendant's mother, allowed Hester inside to look for defendant. Hester found defendant on the back porch.

When Hester attempted to arrest defendant, defendant resisted and became combative. Following a warning from Hester to defendant that he would use a Taser if defendant did not comply, Hester used his Taser to gain control over defendant and made the arrest.

On 18 February 2013, a Gaston County Grand Jury indicted defendant in case number 13 CRS 51451 of failing to register as a sex offender and in case number 13 CRS 51461 of resisting a public officer. Defendant entered not guilty pleas on 7 May 2013 and his case came on for jury trial in Gaston County Superior Court on 9 December 2013, the Honorable Forest D. Bridges, Judge presiding.

Defendant moved to dismiss the charge of failure to register as a sex offender at the close of the State's evidence and at the close of all the evidence. The trial court denied those motions.

On 10 December 2013, the jury returned verdicts finding defendant guilty of failing to register as a sex offender and resisting a public officer. The trial court consolidated the offenses for judgment and sentenced defendant in the presumptive range to a term of 25 to 39 months imprisonment. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant contends the trial court erred by denying his motion to dismiss the charge of failing to register as a sex offender. Specifically, defendant contends there was no evidence to support the charge as alleged in the indictment

and there is a fatal variance between the indictment and the proof submitted to the jury.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

"A fatal variance between the allegations of the indictment and the proof is properly raised by a motion to dismiss. Not every variance, however, is sufficient to require a motion to dismiss." *State v. Tyndall*, 55 N.C. App. 57, 61-62, 284 S.E.2d 575, 577 (1981) (citations omitted). "In order for a variance to warrant reversal, the variance must be material. A variance

will not result where the allegations and proof, although variant, are of the same legal significance. If a variance in an indictment is immaterial, it is not fatal." *State v. Roman*, 203 N.C. App. 730, 733-34, 692 S.E.2d 431, 434 (2010) (quotation marks and citations omitted).

North Carolina's sex offender and public protection registration programs are codified in Chapter 14, Article 27A of the General Statutes. As stated in the Article,

the purpose of [the] Article [is] to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

N.C. Gen. Stat. § 14-208.5 (2013). To that end, "[a] person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides." N.C. Gen. Stat. § 14-208.7(a).

Within the Article, separate provisions govern when a person is required to register or when a person required to register must update their registry. Pertinent to this case, N.C. Gen. Stat. § 14-208.7(a) provides that "[i]f the person

[required to register] is a current resident of North Carolina, the person shall register . . . within three business days of release from a penal institution or arrival in a county to live outside a penal institution[.]” On the other hand, N.C. Gen. Stat. § 14-208.9(a) (2013) provides that

[i]f a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered. If the person moves to another county, the person shall also report in person to the sheriff of the new county and provide written notice of the person’s address not later than the tenth day after the change of address.

In either case, a person who willfully fails to register in accordance with N.C. Gen. Stat. § 14-208.7(a) or fails to update their registry in accordance with N.C. Gen. Stat. § 14-208.9(a) is guilty of a Class F felony. N.C. Gen. Stat. § 14-208.11(a) (1) and (2) (2013).

In this case, defendant was indicted for failing to register as a sex offender on the ground that defendant

unlawfully, willfully and feloniously did as a person required by Article 27A of Chapter 14 of the General Statutes to register as a sexual offender, knowingly and with the intent to violate the provisions of that Article fail to register as a sexual offender, in that the defendant did fail to notify the Gaston County Sheriff’s Office,

within three business days of his change of address.

The indictment cited N.C. Gen. Stat. § 14-208.11.

As this Court recognized in a previous appeal by defendant, "[t]he three essential elements of the offense described in N.C. Gen. Stat. § 14-208.9 are: (1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change." *State v. Barnett*, __ N.C. App. __, __, 733 S.E.2d 95, 98 (2012); see also *State v. Worley*, 198 N.C. App. 329, 334, 679 S.E.2d 857, 861 (2009). Both below and now on appeal, defendant contends there was no evidence he changed his address.

As shown by the evidence produced by the State at trial, defendant registered as a sex offender with the Gaston County Sherriff's Office on 15 February 2010. At that time, defendant listed his address as 554 South Boyd St. Subsequently, defendant was incarcerated from 17 August 2011 to 14 November 2012. Upon his release from incarceration, defendant never updated his registry to list a different address.

Defendant does not dispute the above, but argues there was no evidence that he ever registered an address other than 554

South Boyd St., or that, upon his release from incarceration, he ever resided at a different address. Out of candor to this Court, defendant notes that, in an opinion by this Court in a prior appeal by defendant, this Court indicated that defendant notified the Gaston County Sheriff's Office of several address changes subsequent to his registration on 15 February 2010. See *Barnett*, __ N.C. App. at __, 733 S.E.2d at 97. Defendant, however, points out that evidence of defendant's prior address changes was never introduced at trial in the current case. Defendant claims the only evidence at trial regarding an address different from 554 South Boyd St. was a change of address form completed at the sheriff's office following his arrest on 6 February 2013 that identified defendant's address as the location where he was arrested on 6 February 2013. Yet, defendant refused to sign the form changing his address from the address where he was arrested to the jail. Furthermore, the evidence tends to indicate that, to Hester's knowledge, no one attempted to verify that defendant was living at the residence where he was arrested on 6 February 2013. Hester only knew defendant was present at the residence.

Instead of providing evidence that defendant changed addresses, defendant contends the State prosecuted him on the

theory that he failed to register "within three business days of release from a penal institution or arrival in a county to live outside a penal institution[,]" as required by N.C. Gen. Stat. § 14-208.7(a). Defendant contends this factual basis was not alleged in the indictment and his conviction must be overturned.

Upon review of the record, we agree with defendant that there was insufficient evidence presented in the present case to show that defendant no longer resided at 554 South Boyd St. Furthermore, it is evident to this Court from a review of the evidence presented by the State and the jury instructions issued by the trial court, which corresponded with N.C. Gen. Stat. § 14-208.7(a), that defendant's conviction for failing to register as a sex offender was based on his failure to register "within three business days of release from a penal institution or arrival in a county to live outside a penal institution." The issues we must now decide are whether such evidence was necessary and whether there existed a fatal variance between the charge alleged in the indictment and the proof at trial.

In response to defendant's arguments, the State contends that there was sufficient evidence to support the charge alleged in the indictment absent evidence of where defendant lived upon his release from incarceration on 14 November 2012. To support

its contention, the State points to testimony elicited at trial tending to show that when a person registered as a sex offender is subsequently incarcerated during the period in which they are required to be registered, their address in the sex offender registry is changed to the address of the penal institution where the person is incarcerated. Thus, the State argues that, unavoidably, defendant's address changed when he was released from incarceration on 14 November 2012, triggering the change of address requirements in N.C. Gen. Stat. § 14-208.9(a).

Although defendant's last registered address would have been the penal institution where defendant was incarcerated, the State contends that pursuant to the language of N.C. Gen. Stat. § 14-208.9(a), defendant was still required upon release to "report in person and provide written notice of [his] new address not later than the third business day after the change to the sheriff of the county with whom [defendant] had last registered [prior to his incarceration;]" in this case, Gaston County. Because the evidence shows that defendant never took steps to update his registration information with the Gaston County Sheriff's Office upon his release from incarceration on 14 November 2012, the State claims there was sufficient evidence to support the charge alleged in the indictment.

We disagree with the State's interpretation of the statutes in Chapter 14, Article 27A, and hold the State errs in combining the requirements of N.C. Gen. Stat. § 14-208.9(a) governing changes in address with the requirements of N.C. Gen. Stat. § 14-208.7(a) governing registration upon release from a penal institution.

It is clear from the language of N.C. Gen. Stat. § 14-208.7(a) that it governs registration upon release from penal institutions. In addition to the requirement in N.C. Gen. Stat. § 14-208.7(a) that the person required to register must register "within three business days of release from a penal institution or arrival in a county to live outside a penal institution[,]" N.C. Gen. Stat. § 14-208.8 (2013), which was not addressed in this case, provides for prerelease notification of the registration requirements to those persons incarcerated who are required to register. N.C. Gen. Stat. § 14-208.8 also requires an official of the penal institution to obtain registration information from a person required to register prior to their release and to forward that information to the sheriff of the county where the person expects to reside. Furthermore, N.C. Gen. Stat. § 14-208.11 provides that "[b]efore a person convicted of a violation of [the registration requirements] is

due to be released from a penal institution, an official of the penal institution shall conduct the prerelease notification procedures specified under G.S. 14-208.8(a)(2) and (3)." N.C. Gen. Stat. § 14-208.11(b).

Nowhere in the provisions governing release from a penal institution is there a requirement that persons required to register must notify the sheriff in the county where they last registered prior to their incarceration of their address upon release from the penal institution. The notification requirement in N.C. Gen. Stat. § 14-208.9(a) is better suited to serve the purposes of the registration program in the circumstance where a person required to register changes from one address outside of a penal institution to another address outside a penal institution, as that statute has customarily been applied; not in the circumstance in the present case where defendant was released from a penal institution.

In this case, the State's evidence tended to show that defendant failed to update his registration information upon release from a penal institution. Because defendant was indicted on an allegation that he failed to register as a sex offender in that he failed to notify the Gaston County Sheriff's Office within three business days of his change of address in

accordance with the requirements of N.C. Gen. Stat. § 14-208.9, we hold the trial court erred in denying defendant's motion to dismiss. There was insufficient evidence to support such a charge alleged in the indictment.

III. Conclusion

For the reasons discussed above, we vacate defendant's conviction for failing to register as a sex offender.

Vacated.

Judges CALABRIA and STEELMAN concur.