

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1141

Filed: 21 April 2015

Forsyth County, Nos. 13 CRS 121, 50995, 54822

STATE OF NORTH CAROLINA

v.

CLAY DEWAYNE LEAKS, JR.

Appeal by defendant from judgments entered 10 June 2014 by Judge John O. Craig in Forsyth County Superior Court. Heard in the Court of Appeals 4 March 2015.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Richard Croutharmel for defendant.

ELMORE, Judge.

On 11 February 2013, Clay Leaks, Jr. (defendant) was indicted by a Forsyth County Grand Jury pursuant to N.C. Gen. Stat. § 14-208.11(a)(2) for failing to report a change of address as a registered sex offender from 21 November 2012 through 30 January 2013 (case number 13 CRS 50995). Defendant was subsequently indicted for an additional charge of failing to report a change of address as a registered sex offender from 22 April through 20 May 2013 (case number 13 CRS 54822), and attaining the status of habitual felon (case number 13 CRS 121). The matter in case

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number 13 CRS 50995 was called for trial on 9 June 2014 in the Criminal Session of Forsyth County Superior Court. The jury found defendant guilty of the charge.

The additional charge of failing to report a change of address as a registered sex offender from 22 April through 20 May 2013 (case number 13 CRS 54822) was not before the jury at defendant's trial. However, defendant entered a plea bargain on this charge prior to sentencing in case number 13 CRS 50995. In exchange for his plea to the additional charge and stipulation to his status as a habitual felon, the State agreed to consolidate defendant's convictions. The trial court determined that defendant was a prior record Level V offender for felony sentencing purposes. The trial court entered a consolidated judgment, imposing a minimum term of 114 months to a maximum 149 months imprisonment. Defendant entered notice of appeal in open court.

I. Background

At defendant's trial for failing to comply with the sex offender registration program, the State presented evidence that tended to show the following: On 4 June 2001, defendant was convicted of a sex offense that required him to register as a sex offender pursuant to the sex offender registration requirements. Defendant is required to verify his address every six months and report any change of address within three business days. On 17 March 2012, defendant executed a one-year lease agreement for a residence located at 669 Old Hollow Road in Winston-Salem.

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Defendant timely notified the Forsyth County Sheriff's Office of his change of address.

The rental residence was a single-family home with a detached shed and a detached garage in the rear of the house. After occupying the residence for one to two months, defendant ceased making the monthly rental payment to his landlord, Homer Shockley (Shockley). In November 2012, Shockley and a Forsyth County Sheriff's Deputy went to the residence to serve defendant with eviction papers. The residence was empty and the electricity and water had been turned off. Padlocks were placed on the garage and storage building. Shockley testified that he drove by the residence approximately three times per week throughout November and December 2012, but he neither saw defendant on the property nor did he notice any activity at the residence.

During the week of 27 November 2012, the Forsyth County Sheriff's Office sent defendant an address verification letter to 669 Old Hollow Road. The letter was returned to the Sheriff's Office as "undeliverable." Ronald Lewis, a Forsyth County Sheriff's Deputy who worked in the sex offender unit, went to 669 Old Hollow Road in search of defendant. Deputy Lewis noticed that the house was vacant. Deputy Lewis did not look for defendant in the garage or shed.

On 31 January 2013, defendant went to the Forsyth County Sheriff's Office to report that his address had changed from 669 Old Hollow Road. Deputy Chris

Davenport arrested defendant and charged him with failing to report a change of address as a registered sex offender.

Defendant testified on his own behalf at trial. Defendant explained that on 13 November 2012, he removed his personal belongings from the residence and stored them in a warehouse because he knew that he would be evicted from the residence. Defendant claimed that he subsequently moved into the storage shed on the property and resided there until 31 January 2013. The shed had minimal furnishings and electricity, but no water. Defendant testified that he would enter and exit the shed by using a ladder to climb through an air conditioning vent. Defendant alleged that he would rise early to work as a self-employed handyman. If he had no work, he would shower and eat at his wife's house while she was gone. Defendant testified that he would wait until nightfall before returning to the shed, hoping to go unnoticed. Given this, defendant argued that he had not, in fact, failed to report a change in his address because he had continued to reside on the property until 31 January 2013.

Despite defendant's testimony, the jury found defendant guilty of the charge. Defendant appeals.

II. Analysis

A. Sufficiency of Indictment

Defendant contends that the indictment charging him with violating N.C. Gen. Stat. § 14-208.11(a)(2) was insufficient to confer subject matter jurisdiction upon the trial court, as it failed to allege all of the essential elements of the offense. Specifically, defendant argues that the indictment failed to allege that he was required to provide “written notice” of a change of address, a prerequisite for the offense as described in N.C. Gen. Stat. § 14-208.9. As such, defendant insists that this error rendered his indictment fatally defective and requires that we vacate his conviction. We disagree.

On appeal, we review the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). In order to be valid and thus confer jurisdiction upon the trial court, “[a]n indictment charging a statutory offense must allege all of the essential elements of the offense.” *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996). The indictment “is sufficient if it charges the offense in a plain, intelligible and explicit manner.” *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972). “[I]ndictments need only allege the ultimate facts constituting each element of the criminal offense,” *State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995), and “[a]n indictment couched in the language of the statute is generally sufficient to charge the statutory offense[.]” *State v. Singleton*, 85 N.C. App. 123, 126, 354 S.E.2d 259, 262 (1987). “[W]hile an indictment should give a defendant sufficient notice of the charges against him, it should not be

subjected to hyper technical scrutiny with respect to form.” *State v. Harris*, 219 N.C. App. 590, 592, 724 S.E.2d 633, 636 (2012) (quotation and citation omitted).

N.C. Gen. Stat. § 14-208.11(a)(2) provides that a person who willfully “[f]ails to notify the last registering sheriff of a change of address” is guilty of a class F felony. In addition, N.C. Gen. Stat. § 14-208.9(a) provides: “If 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.”

While the language of defendant’s indictment largely tracks the operative language of N.C. Gen. Stat. § 14-208.9(a), it does not provide that defendant failed to notify the sheriff’s office in writing. Defendant’s indictment provides that defendant:

unlawfully, willfully and feloniously did as a person required by Article 27A of Chapter 14 of the North Carolina General Statutes to register as a sex offender, knowingly and with the intent to violate the provision of that article fail to register as a sex offender by failing to notify the Forsyth County Sheriff’s Office of his change of address with in [sic] three business days after moving from his last registered address.

Defendant argues that the indictment is fatally flawed because it omits the requirement that he provides “written notice” of a change of address. In advancing his argument, defendant solely relies on a recent unpublished opinion from this Court, *State v. Osborne*, ___ N.C. App. ___, ___, 763 S.E.2d 16, ___, 2014 N.C. App. LEXIS 700, 2014 WL 2993855 (July 1, 2014) (unpublished). We note that

unpublished decisions are not controlling precedent. *State v. Beltran-Ponce*, 203 N.C. App. 373, 692 S.E.2d 487 (2010). Nonetheless, in *Osborne*, this Court acknowledged that the three essential elements of the offense described in N.C. Gen. Stat. § 14-208.9(a) had previously been determined: (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. *Osborne*, ___ N.C. App. at ___, 763 S.E.2d at ___, 2014 N.C. App. LEXIS 700, at *2, 2014 WL 2993855, at *6 (quoting *State v. Barnett*, ___ N.C. App. ___, ___, 733 S.E.2d 95, 98 (2012)). However, in reviewing the defendant’s indictment *sua sponte*, the *Osborne* Court held that the indictment was fatally defective because it failed to allege that (1) defendant did not provide “*written notice*” of his move, and (2) did not specify the time requirements as within “three *business days*” of the defendant’s move to a new address. In effect, the *Osborne* Court imposed two additional essential elements of the offense set forth in N.C. Gen. Stat. § 14-208.9(a)—the “written notice” requirement and the “three *business days*” requirement. *Osborne*, ___ N.C. App. at ___, 763 S.E.2d at ___, 2014 N.C. App. LEXIS 700, at *7–9, 2014 WL 2993855, at *3. Given the holding in *Osborne*, defendant contends that his indictment was fatally defective because it too did not include the “written notice” requirement. We are not persuaded.

In *State v. Abshire*, our Supreme Court analyzed the 2005 version of N.C. Gen. Stat. § 14-208.11(a)(2) and N.C. Gen. Stat. § 14-208.9(a) and expressly limited N.C. Gen. Stat. § 14-208.9(a) to the three essential elements set forth above. *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009). Although N.C. Gen. Stat. § 14-208.9(a) has been amended since *Abshire* was published, the requirement that a sex offender report his or her change of address *in writing* has remained part of the statute since its enactment in 1995. See Act of July 29, 1995, ch. 545, sec. 1, 1995 N.C. Sess. Laws 2046, 2048. Notably, our Supreme Court declined to include the manner of the notice—“in writing”—in the essential elements of the offense. See *Abshire*, 363 N.C. at 328, 677 S.E.2d at 449. Because “[t]his Court is bound to follow the precedent of our Supreme Court,” *State v. Scott*, 180 N.C. App. 462, 465, 637 S.E.2d 292, 294 (2006), we are unable to agree with defendant that his indictment is fatally defective merely because it fails to provide that notice must be made “in writing.” Instead, we consider the manner of notice, in person or in writing, to be an evidentiary matter necessary to be proven at trial, but not required to be alleged in the indictment. See N.C. Gen. Stat. § 15A-924(a)(5) (evidentiary matters as to the means and manner in which a crime was committed need not be alleged in an indictment). Facts tending to show that defendant did not furnish the sheriff’s office with “written notice” merely illustrate that defendant failed to comply with the requirements of N.C. Gen. Stat. § 14-208.9(a).

In sum, defendant's indictment in the instant case sufficiently alleged that defendant (1) was a person required to register as a sex offender; (2) changed his address; and (3) failed to notify the appropriate agency within three business days after moving. As such, the indictment was valid as a matter of law and sufficient to confer subject matter jurisdiction upon the trial court. We overrule defendant's argument.

B. Sentencing Error

In his second argument on appeal, defendant contends that the trial court violated defendant's right to be present during sentencing by entering a written judgment imposing a longer prison term than that which the trial court announced in his presence during the sentencing hearing. We agree.

It is well-settled that a defendant has a right to be present at the time that his sentence is imposed. *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999).

The facts of the instant case show that the trial court, in the presence of defendant, sentenced defendant as a Level V offender to a minimum term of 114 months and a maximum term of 146 months imprisonment. Subsequently, the trial court entered written judgment reflecting a sentence of 114 to 149 months active prison time. The sentence actually imposed on defendant was the sentence contained in the written judgment. Given that there is no indication in the record that

defendant was present at the time the written judgment was entered, the sentence must be vacated and this matter remanded for the entry of a new sentencing judgment. *See id.*

In so holding, this Court looks to *Crumbley*, wherein we held that the trial court erred in converting the defendant's sentence in the written judgment to run consecutively when the defendant was not present given that it orally rendered judgment in the defendant's presence to concurrent terms of imprisonment. *See State v. Hanner*, 188 N.C. App. 137, 141, 654 S.E.2d 820, 823 (2008) (vacating the defendant's sentencing judgments when the trial court sentenced the defendant outside of his presence to consecutive terms of imprisonment after it orally imposed concurrent sentences before the defendant in open court.).

Under the North Carolina structured sentencing chart, if the trial court intended to sentence defendant to 114 months minimum incarceration, it was required to impose the 149 month maximum term. However, if the trial court intended to impose a maximum term of 146 months, it was required to impose the corresponding minimum term of 111 months imprisonment. Regardless, there is no evidence that defendant was present when the trial court entered its written judgments. Because the written judgments reflect a different sentence than that which was imposed in defendant's presence during sentencing, we must vacate

defendant's sentence and remand for the entry of a new sentencing judgment. *See Crumbly and Hanner, supra.*

III. Conclusion

Defendant's indictment was sufficient to confer subject matter jurisdiction on the trial court such that the trial court did not err in hearing defendant's case. However, the trial court erred in entering a written judgment that altered the sentence it initially imposed on defendant because defendant was not before the trial court and able to be heard when the new sentence was entered. Accordingly, we hold that defendant received a trial free from error. However, we must vacate defendant's sentence and remand for the entry of a new sentencing judgment.

No error, in part; reversed and remanded, in part; new sentencing hearing.

Judges GEER and INMAN concur.