IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-23

Filed: 6 March 2018

Iredell County, Nos. 14 CRS 054217-19, 16 CRS 1415

STATE OF NORTH CAROLINA, Plaintiff,

v.

TOMMY DALE CLOER, Defendant.

Appeal by defendant from a judgment entered by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 16 May 2017.

Attorney General, Joshua H. Stein, by Assistant Attorney General Kimberly Randolph, for the State.

Ben G. Irons, II, for defendant-appellant.

STROUD, Judge.

Tommy Dale Cloer ("Defendant") appeals from his convictions for failure to register as a sex offender and attaining the status of an habitual felon. On appeal, he contends that (1) his indictment was fatally flawed; and (2) the trial court erred in denying his motion to dismiss. After careful review, we conclude that Defendant received a fair trial free from error.

I. Background

On 12 December 2014, Defendant was indicted on six charges of failing to register as a sex offender in violation of N.C. Gen. Stat. § 14-208.11. On 4 April 2016, Defendant was also indicted for attaining the status of habitual felon under N.C. Gen. Stat. § 14-7.1. Defendant was tried before a jury at the 29 August 2016 Criminal Session of the Superior Court of Iredell County, the Honorable Mark E. Klass presiding. At trial, the State elected to proceed with only three of the six charges for failure to register as a sex offender.

The evidence presented by the State showed that in 1990, Defendant was convicted of Sexual Abuse in the First Degree and Rape in the First Degree in the State of Oregon. In 2004, Defendant was also convicted of and placed on probation for Failure to Register as a Sex Offender in Oregon.

On 17 August 2014, Defendant called the Iredell County Sheriff's Office dispatch center and asked to speak with a law enforcement officer, stating that he wanted to confess to a crime that occurred 30 years ago. Later that day, Sergeant Ryan Sherrill of the Iredell County Sheriff's Office telephoned Defendant, determined Defendant sounded intoxicated, and responded to the address Defendant provided in the initial telephone call. When Sergeant Sherrill arrived, he found Defendant visibly impaired and sitting in a recliner in the living room with a bottle of alcohol near his chair. After a conversation with Defendant about the crime for which Defendant called to confess, due to the severity of the crime, Sergeant Sherrill called the Sheriff's

Office and ran a Division of Criminal Investigation (DCI) background check on Defendant. The DCI background check revealed Defendant had an outstanding warrant for a parole violation following a conviction for a sexual offense in the State of Oregon.

Sergeant Sherrill then used the computer database in his vehicle, called "CJLEADS," and determined Defendant had lived at three addresses in Iredell County and filed three warrants for Failure to Register as a Sex Offender based on this information. The warrants alleged that Defendant lived at three addresses: (1) an address on Ivanhoe Lane in Statesville, NC, the address Defendant provided to 9-1-1 on 17 August 2014, between 9 September 2013 and 17 August 2014; (2) an address on Jane Sowers Road in Statesville, NC, on 29 August 2012; and (3) an address on Crater Road in Harmony, NC, on 10 August 2010[1]. The State proceeded to trial on indictments charging Defendant for failure to register on 18 August 2014, 18 July 2011, and 24 September 2012, but the indictments did not list the addresses where Defendant had failed to register.

Defendant had also filed three separate "Affidavits of Indigency" in 2011, 2012, and 2014, to obtain a court-appointed attorney for pending criminal charges. A Clerk of Superior Court in Iredell County, Anne Tutero, testified that the affidavits must include identifying information about the person submitting the affidavits, including

[1] We have omitted the street numbers for purposes of this opinion but the warrants included the numbers.

their name, address, and certain financial information. Ms. Tutero further testified that the person filing the affidavit must swear an oath to the truthfulness of the affidavit and sign the back.

On 18 July 2011, Defendant swore to and signed the 2011 Affidavit and listed his address on Crater Road in Harmony, NC. He also indicated that he was working locally, filed his taxes in 2011, and was paying rent at that address. On 24 September 2012, Defendant swore to and signed the 2012 Affidavit, stated his address on Jane Sowers Road in Statesville, NC, and indicated that he was receiving food stamps and was paying rent at that address. Finally, on 18 August 2014, Defendant swore to and signed the 2014 Affidavit, listed his address on Ivanhoe Lane in Statesville, NC. The three addresses Defendant listed in his affidavits were the same three addresses found by Detective Sherrill on the "CJLEADS" database.

Captain Julie Gibson of the Iredell County Sheriff's Department also testified that she had seen Defendant's "hit" from the DCI system, indicating Defendant was a registered sex offender in the State of Oregon. Captain Gibson testified that based on Defendant's Oregon convictions, he was also required to register as a sex offender in North Carolina under N.C. Gen. Stat. § 14-208.7. Defendant originally registered in Oregon on 7 August 2000, after his parole in July 2000. Captain Gibson testified that when Defendant moved to North Carolina, he had three days to register in Iredell County, but Defendant never appeared at the Sheriff's Office in Iredell County

to register as sex offender at any of the three addresses Defendant provided in his affidavits.

II. Sufficiency of Indictment

Defendant first contends that the trial court did not have subject matter jurisdiction to hear this case because the indictments were fatally defective. Defendant specifically argues that the indictments failed to allege an essential element of N.C. Gen. Stat. § 14-208.11(a)(7) (2016) because "they indicated no specific addresses where he allegedly resided without registering," which prevented him from responding specifically to the allegations and subjected him to future double jeopardy.

While Defendant did not raise this issue at trial, "where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000) (citations omitted). "We review the issue of insufficiency of an indictment under a *de novo* standard of review." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008).

The North Carolina Constitution guarantees that, "[i]n all criminal prosecutions, every person charged with crime has the right to be informed of the accusation." N.C. Const. art. I, § 23. An indictment must contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts

> supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2016). In interpreting this statute, our Supreme Court has held that "[i]t is not the function of an indictment to bind the hands of the State with technical rules of pleadings." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). Rather, an indictment serves to "identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *Id.* Furthermore, N.C. Gen. Stat. § 15-153 provides:

> Every criminal proceeding by . . . indictment . . . is sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

N.C. Gen. Stat. § 15-153 (2016). In *Sturdivant*, our Supreme Court held that the defendant's indictment for kidnapping was not fatally defective where it "reasonably notified defendant of the crime for which he was being charged by plainly describing *who did what and when* and by indicating which statute was violated by such conduct." *Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731.

Here, the three indictments alleged that Defendant violated N.C. Gen. Stat. § 14-208.11, which states that "[a] person required by this Article to register who willfully does any of the following is guilty of a Class F felony: . . . (7) fails to report in person to the sheriff's office as required by G.S. 14-208.7, 14-208.9, and 14-208.9A." N.C. Gen. Stat. § 14-208.11(a)(7) (2016). Defendant's three indictments cited "G.S. 14-208.11" and alleged that Defendant "unlawfully, willfully and feloniously did as a person required by Article 27A of Chapter 14 of the General Statutes to register, fail to register, in that the defendant, an Iredell County resident, failed to register within three business days of establishing a residence in this State." Details of the registration requirements are set out in N.C. Gen. Stat. § 14-208.7, which states that " . . . [i]f the person moves to North Carolina from outside this State, the person shall register within three business days of establishing residence in this State, or whenever the person has been present in the State for 15 days, whichever comes first . . . ." N.C. Gen. Stat. § 14-208.7(a) (2016).

In *State v. Harrison*, 165 N.C. App. 332, 598 S.E.2d 261 (2004), the defendant argued that the indictment charging him with failure to register as a sex offender was defective because it did not identify the specific dates of the moves or the defendant's new address. This Court held that the indictment "provided defendant with ample notice of the charge to allow him to adequately prepare a defense for trial," finding that "[t]he indictment sufficiently stated with particularity the violation of

which defendant was charged" and "clearly state[d] the elements of the offense of which the defendant is found guilty." *Id.* at 336, 598 S.E.2d at 263 (citation and quotation marks omitted).

Here, the failure to include the addresses where Defendant allegedly resided without registering on the indictments was not a fatal variance. All three indictments indicated that Defendant was a person required to register as a sex offender and that he willfully failed to do so within three business days of establishing a residence in North Carolina. *Id.* As in *Harrison*, the specific addresses where he established residences did not have to be pled in the indictment as "the indictments sufficiently state with particularity the violation of which defendant was charged" and "clearly state[] the elements of the offense of which the defendant is found guilty." *Id.*

III. Denial of Motion to Dismiss

Defendant next contends that the trial court erred in denying his motion to dismiss for insufficient evidence. He specifically argues that: (1) the State did not provide sufficient evidence he established residence in Iredell County, and (2) the State did not provide sufficient evidence that Defendant *willfully* failed to register as a sex offender. We disagree.

"[T]he extent to which the evidence presented at trial suffices to support the denial of a motion to dismiss for insufficiency of the evidence is a question of law

reviewed de novo by the appellate court." *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016) (citations omitted). When ruling on a motion to dismiss for insufficient evidence, "the court is concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citations omitted). As this Court has stated:

> When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the record evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. The State is entitled to every reasonable intendment and inference to be drawn from the evidence, and any contradictions and discrepancies are to be resolved in favor of the State. The only issue before the trial court in such instances is whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. As long as the evidence permits a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

State v. Worley, 198 N.C. App. 329, 333, 679 S.E.2d 857, 861 (2009) (citations and quotation marks omitted).

First, Defendant contends there was insufficient evidence he established a residence at any of the three addresses in Iredell County, arguing that the State presented no evidence he conducted any life activities at the three addresses, how

long he had been at the addresses, what he did at the addresses, or that he actually paid the monthly expenses he specified in his affidavits of indigency. In *State v. Worley*, this Court stated that "the sex offender registration statutes operate on the premise that everyone does, at all times, have an 'address' of some sort, even if it is a homeless shelter, a location under a bridge or some similar place." *State v. Worley,* 198 N.C. App. 329, 338, 679 S.E.2d 857, 864 (2009). There is never a time when a registered sex offender "lacks a reportable 'address'" under North Carolina sex offender registration statutes. *Id.* Furthermore, "a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary." *State v. Abshire*, 363 N.C. 322, 331, 677 S.E.2d 444, 451 (2009), *superseded on other grounds by statute as recognized by State v. Moore*, 240 N.C. App. 465, 477-78, 770 S.E.2d 131, 141 (2015). As our Supreme Court has stated:

> Mere physical presence at a location is not the same as establishing a residence. Determining that a place is a person's residence suggests that certain activities of life occur at the particular location. Beyond mere physical presence, activities possibly indicative of a person's place of residence are numerous and diverse, and there are a multitude of facts a jury might look to when answering whether a sex offender has changed his or her address. Adding any further nuance to the definition is unnecessary at this time.

Id. at 332, 677 S.E.2d at 451. In *Abshire*, the Court held that the State presented sufficient evidence that the defendant changed her address where the defendant held

out her address as her father's address in court filings, she stayed overnight there for four to five weeks, and the owner of the house stated the defendant no longer resided there. *Id.* at 332-33, 677 S.E.2d at 452.

Here, as in *Abshire*, the State presented Defendant's own representations from three court filings as evidence of his residences in Iredell County. Defendant's affidavits of indigency, which he signed under oath, showed three different addresses where he purported to pay rent in 2010, 2011, and 2014. They also showed Defendant had worked in Iredell County in 2011, claimed disability benefits in 2014, and collected Medicaid and food stamps. These three addresses also matched the addresses Sergeant Sherrill found for Defendant from "CJLEADS." This evidence is sufficient for a jury to reasonably infer Defendant established a residence in Iredell County and that he lived at each address for a continuous period of time, particularly given that he had three addresses in North Carolina during a period of four years.

Second, Defendant argues that the State did not present sufficient evidence that Defendant *willfully* failed to register as a sex offender. Defendant specifically argues that he was unaware of his duty to register in North Carolina and that he was not "hiding." We hold that the record contained sufficient evidence that a jury could reasonably conclude that Defendant *willfully* failed to report his changes of address.

"'Willful' as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately

in violation of the law." *State v. Davis,* 86 N.C. App. 25, 30, 356 S.E.2d 607, 610 (1987).

> The word wil[l]ful, used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent without which one cannot be brought within the meaning of a criminal statute.

State v. Barr, 218 N.C. App. 329, 335, 721 S.E.2d 395, 400 (2012) (citation and quotations marks omitted). "'Willfulness' is a state of mind which is seldom capable of direct proof, but which must be inferred from the circumstances of the particular case." *Davis,* 86 N.C. App. at 30, 356 S.E.2d at 610 (citation omitted).

Here, when viewed in the light most favorable to the State, the evidence would allow the jury to reasonably conclude that Defendant's failure to register was willful. The State presented evidence that Defendant originally registered in Oregon as a sex offender on 7 August 2000 and that Defendant was convicted in Oregon of felony failure to register as a sex offender on 20 April 2004 and that, as a condition of his parole, he was required to register annually or whenever he changed his address. Defendant contends that his failure to register was not willful because he was not "hiding," stating that he signed Affidavits of Indigency and called 9-1-1. Whether he was willfully *hiding* is irrelevant. The relevant inquiry is whether his failure to register was willful. The defendant in *State v. Crockett*, 238 N.C. App. 96, 104, 767

S.E.2d 78, 84 (2014), unsuccessfully argued that the State did not prove he *willfully* failed to notify the Mecklenburg County Sheriff's Office of his change of address on 20 January 2011 because "the sheriff's office received an email from the Mecklenburg County jail stating that Defendant was going to live at 945 North College Street." *Id.* at 100, 767 S.E.2d at 82. The Court stated that the email was insufficient to constitute "registration" as required by the statute. Likewise, here it does not matter whether Defendant was willfully "hiding," but whether he willfully failed to register in the manner required by law. The Defendant also argues that the State only provided evidence he knew of his duty to register in Oregon, not in North Carolina. But as the United States Supreme Court has noted, "by 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of [a sex offender registration and community notification program]." *Smith v. Doe*, 538 U.S. 84, 90, 155 L. Ed. 2d 164, 175 (2003). "Simply put, a convicted sex offender's failure to inquire into a state's laws on registration requirement is neither entirely innocent nor wholly passive." *State v. Bryant*, 359 N.C. 554, 555-56, 614 S.E.2d 479, 480 (2005). There is sufficient evidence here to reasonably conclude that Defendant's failure to register as a sex offender was willful.

IV. Conclusion

We conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).