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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1285

Filed: 5 June 2018

Catawba County, No. 15 CRS 004600

STATE OF NORTH CAROLINA

v.

DEXTER LEON SURRATT

Appeal by defendant from judgment entered 3 August 2017 by Judge Forrest D. Bridges in Catawba County Superior Court. Heard in the Court of Appeals 17 May 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General J. Joy Strickland, for the State.

Drew Nelson for defendant-appellant.

TYSON, Judge.

Dexter Leon Surratt ("Defendant") appeals from judgments entered after the jury returned verdicts finding him guilty of failure to register as a sex offender and attaining habitual felon status. We find no error.

I. Background

Defendant was released from prison on 16 July 2015 and was informed of his duty to register as a sex offender. Due to a compliance issue, Defendant remained in custody with the Catawba County Sheriff's Office until 22 July 2015. At a meeting with his parole officer, Sarah Lackey, on 27 July 2015, Defendant provided her the address of a Sleep Inn Hotel in Hickory, North Carolina, as his residence.

On 29 July 2015, Officer Lackey went to the Sleep Inn, but was unable to locate Defendant. Officer Lackey contacted Catawba County Sheriff's Deputy Tom Scarborough, who indicated to Officer Lackey that Defendant had not yet registered as a sex offender with the sheriff's office. Officer Lackey requested a warrant to arrest Defendant for absconding.

Deputy Scarborough attempted to locate Defendant at previous known addresses to inform him he was in violation for his failure to register as a sex offender. Deputy Scarborough requested an arrest warrant on 30 July 2015 for Defendant's failure to register as a sex offender within three business days of his release, as required by law. The warrant was served on 31 July 2015.

On 5 October 2015, Defendant was indicted for failure to register as a sex offender and for attaining habitual felon status. Defendant moved to dismiss the charges prior to trial, at the close of the State's evidence, and at the close of all evidence. The trial court rejected all of Defendant's motions.

The jury found Defendant guilty of all charges. The trial court sentenced Defendant to a mitigated, active term of 58 to 82 months imprisonment. Defendant entered timely notice of appeal.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Issues

Defendant argues the trial court erred by: (1) denying his motion to dismiss; and, (2) failing to instruct the jury that it had to find Defendant was incarcerated on 1 January 1996 in order to find him guilty of failure to register as a sex offender. Defendant also challenges the retroactive application of North Carolina's sex offender registration. He argues the requirement to register violates the *ex post facto* clauses of the Constitution of the United States and the North Carolina Constitution.

IV. Motion to Dismiss

Defendant argues the trial court erred by denying his motion to dismiss the charge of failure to register as a sex offender due to a fatal variance between the indictment and the evidence introduced at trial.

A. Standard of Review

In ruling on a motion to dismiss, the trial court must consider:

> whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the

> perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (internal citations and quotations omitted).

A variance between allegations in an indictment and the proof at trial requires reversal only when the defendant is prejudiced as a result of the variance. *State v. Fink*, __ N.C. App. __, __, 798 S.E.2d 537, 540 (2017). "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) (citation omitted).

B. Analysis

Defendant asserts the date on the indictment (1) alleges an offense that is not subject to prosecution; (2) is an essential element of the offense; and, (3) prejudiced Defendant.

Section 15A-924(a)(4) of the North Carolina General Statutes requires indictments to include "[a] statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time." N.C. Gen. Stat. § 15A-924(a)(4) (2017). Section 14-208.7 requires a person convicted of a reportable offense to register as a sex offender with

the sheriff's office of the county in which he or she will reside "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. § 14-208.7(a)(1) (2017). Failure to report in person to the sheriff's office as required is a Class F felony. N.C. Gen. Stat. § 14-208.11(a)(7) (2017).

Defendant's indictment indicated the date of offense as "on or about 07/26/2015." Defendant was released from confinement on 22 July 2015. Defendant requests this Court take judicial notice that 22 July 2015 was a Wednesday, and that 26 July 2015 was a Sunday. Because only two business days had elapsed between his release date and the date listed on the indictment, Defendant asserts he had not committed an offense as of 26 July 2015. Evidence presented at trial shows Defendant did not register as a sex offender at any point after his release until his arrest on 31 July 2015.

Defendant argues this Court should review the indictment in this case in the same manner as we review indictments in cases where the indictment alleges a date of offense that is beyond the statute of limitations period. Such a review and analysis under that analogy is not appropriate. The date provided in the indictment sufficiently complied with the statute and was not a fatal variance from the evidence presented at trial. *See* N.C. Gen. Stat. § 15A-924(a)(4).

Further, the date was not an essential element of the offense, nor has Defendant showed he was prejudiced by the stated date on the indictment. "Error as

to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice." *Id.* Allegation of a date certain is not an essential element of a violation under N.C. Gen. Stat. § 14-208.11(a)(7). *State v. Pierce*, 238 N.C. App. 141, 147, 766 S.E.2d 854, 858 (2014).

Presuming time is of the essence in this matter, an indictment is subject to dismissal under N.C. Gen. Stat. § 15-924(a)(4) "only if (1) there is an error in the date or period of time listed on the indictment, or the omission thereof, *and* (2) the error or omission misled the defendant to his prejudice." *State v. McKinney*, 110 N.C. App. 365, 370, 430 S.E.2d 300, 303 (1993) (emphasis original) (citations omitted).

Defendant argues the trial court prejudiced him by not dismissing the charge because "it allowed the jury to potentially convict [him] based on the allegation that he failed to report on 26 July 2015," but he has failed to provide any evidence of how the alleged error in the date on the indictment prevented him from preparing a defense or subjected him to subsequent prosecution for the same offense.

"An indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984). Defendant

has failed to show he suffered prejudice in the trial court's ruling. Defendant's argument is overruled.

V. Jury Instruction

Defendant argues his release date is a finding of fact to be determined by the jury in order to establish whether he was required to register as a sex offender, and to be convicted of failing to report and register as a sex offender. Defendant asserts the trial court was required to instruct the jury that it had to find Defendant was incarcerated on 1 January 1996 in order to be convicted of this offense. Defendant's argument attempts to relitigate an issue previously before and resolved by this Court. *State v. Surratt*, 241 N.C. App. 380, 773 S.E.2d 327 (2015).

"The doctrines of *res judicata* and collateral estoppel apply to criminal, as well as, civil proceedings, and their application against a criminal defendant does not violate the defendant's rights to confront the State's witnesses or to a jury determination of all facts." *State v. Dial*, 122 N.C. App. 298, 306, 470 S.E.2d 84, 89 (1996) (citations omitted). The requirements to preclude relitigation are: (1) the parties are the same; (2) the issue in question is the same; (3) the issue was "raised and actually litigated" in the prior action; (4) the issue in question was material and relevant to the disposition of the prior action; and, (5) the determination of the issue was necessary and essential to the resulting judgment. *Id.*

Defendant argues the factual issue of his release date was not "raised and actually litigated" during his 2014 trial for the charge of failing to notify his change of address as a sex offender. Defendant's previous appeal to this Court contained the following findings and conclusions:

In 2014, Defendant was convicted of failing to notify the sheriff's office of a change of address as a sex offender, in violation of N.C. Gen. Stat. § 14-208.11. *Surratt*, 241 N.C. App. at 381, 773 S.E.2d at 329. On that appeal, Defendant argued, in part, that the trial court erred by denying his motion to dismiss on the basis the State failed to prove he was required to register as a sex offender. *Id.* Defendant asserted: (1) the sex offender registration law was not in effect when he was convicted of indecent liberties with a child in 1994; (2) the sex offender registration program did not apply to him; and, (3) "the State failed to prove [he] was released from prison for a reportable offense on or after 1 January 1996." *Id.* at 384, 773 S.E.2d at 330-331.

This Court concluded Defendant's previous conviction for indecent liberties with a child was a reportable offense, and that "the fact that the release date is not part of the record does not automatically warrant the conclusion that defendant was not required to register." *Id.* at 384-385, 773 S.E.2d at 331.

Pursuant to the North Carolina Rules of Evidence, Rule 201, this Court took judicial notice of the fact Defendant's release date for the indecent liberties charge

was 24 September 1995, but that date was merely a release "on paper." *Id.* at 385, 773 S.E.2d at 331. Defendant remained incarcerated on a "consecutive sentence resulting from a conviction for committing a crime against nature." *Id.* Defendant was not actually released from prison and placed on parole until 24 January 1999, whereupon he registered as a sex offender. *Id.* This Court held it was this 1999 release date that controlled the sentencing outcome in his previous case, and the sex offender registration law applied to Defendant because it went into effect on 1 January 1996, while Defendant was still incarcerated. *Id.*

"Because a contention not made in the court below may not be raised for the first time on appeal," this Court would not have conducted such an extensive analysis of the issue of Defendant's release date and the applicability of the sex offender registration act unless it was "raised and actually litigated" below. *See Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 (1989).

The settled issue of Defendant's release date and the applicability of the sex offender registration act from the prior appeal meets all five of the *Dial* factors to preclude relitigation. *Dial*, 122 N.C. App. at 306, 470 S.E.2d at 89. The trial court did not commit reversible error by failing to instruct the jury that it had to find as a fact the date of Defendant's release. Defendant's argument is inapposite and overruled.

VI. Application of Sex Offender Registry Act

Defendant asserts a re-evaluation of the current sex offender registry act would "compel a conclusion that its restrictions are punitive in effect" and as such its application is in violation of both federal and state *ex post facto* clauses. Defendant acknowledges that under the Supreme Court's precedent of *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), this Court is bound by its earlier decisions holding that such statutes do not violate federal or state *ex post facto* clauses. *See, e.g., State v. White*, 162 N.C. App. 183, 590 S.E.2d 448 (2004); *In re Hall*, 238 N.C. App. 322, 768 S.E.2d 39 (2014), *cert. denied*, __ U.S. __, 193 L. Ed. 2d 519 (2015); *In re Bethea*, __ N.C. App. __, 806 S.E.2d 677 (2017).

Defendant argues the recent cases of *Hall* and *Bethea* relied upon reasoning from *State v. White*, a case decided in 2004, and that the registration program in effect when *White* was decided contained fewer restrictions and burdens than the current scheme.

In *Hall*, this Court noted "it is well established that N.C.G.S. § 14-208.12A creates a non-punitive civil regulatory scheme." 238 N.C. App. at 330, 768 S.E.2d at 45 (citation omitted). However, as urged by the defendant's "vigorous argument" this Court proceeded to "further examine whether the statutory scheme is so punitive . . . as to negate the legislature's civil intent." *Id.* at 331, 768 S.E.2d at 45 (citation and internal quotation marks omitted).

This Court acknowledged the defendant's arguments and noted they had been previously reviewed, addressed, and rejected by our appellate courts. *Id.* at 332, 768 S.E.2d at 46. This Court then reaffirmed that the "regulatory means of addressing the need for law enforcement officers and the public to have information regarding certain convicted sex offenders may seem burdensome, but it is not penal or punitive." *Id.* Being bound by precedent, this Court held the defendant's arguments lacked merit. *Id.*

In the case of *In re Bethea*, a case decided after the Supreme Court of the United States denied the petition for writ of *certiorari* in *Hall*, this Court followed *Hall* in rejecting the defendant's argument the registration scheme violates *ex post facto* proscriptions. *In re Bethea*, __ N.C. App. at __, 806 S.E.2d at 682.

Defendant argues the current sex offender registration program is punitive under the factors outlined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 9 L. Ed. 2d 644 (1963), an argument this Court previously rejected in *Hall*. *In re Hall*, 238 N.C. App. at 331, 768 S.E.2d at 45-46. Defendant cites to non-binding authority from other jurisdictions to also support his argument. We do not find these other jurisdiction's cases persuasive or instructive of the issue before us.

Following the precedents in *Hall* and *Bethea*, we reject Defendant's arguments. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37 ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel

of the same court is bound by that precedent, unless it has been overturned by a higher court."). Defendant's arguments are overruled.

VII. Conclusion

The trial court properly denied Defendant's motions to dismiss. The date on the indictment is not an essential element of the offense. Defendant cannot show any prejudice from the entry of the date as stated on the indictment.

Defendant's request for an instruction to require the jury to find Defendant's date of release was inappropriate. Such a conclusion would allow relitigation of an issue settled by this Court on a previous appeal. We remain bound by precedents on the application and enforcement of the sex offender registry act. *Id*.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered*.

NO ERROR.

Judges DIETZ and BERGER concur.

Report per Rule 30(e).