IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-377

No. COA20-239

Filed 20 July 2021

Forsyth County, Nos. 17 CRS 61704, 18 CRS 361

STATE OF NORTH CAROLINA

v.

DEMARCUS ANTONIO BLAKLEY

Appeal by defendant from judgment entered 7 December 2018 by Judge Casey M. Viser in Forsyth County Superior Court. Heard in the Court of Appeals 28 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Bryan G. Nichols, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for defendant.

DIETZ, Judge.

¶ 1 Defendant Demarcus Antonio Blakley, a registered sex offender, was convicted of willful failure to notify the sheriff's office of an address change. On appeal, he argues that the trial court plainly erred by instructing the jury inconsistently on the element of willfulness. He also argues that changes to the registration laws nearly a decade after he became subject to them render those laws unconstitutional.

¶ 2 As explained below, the trial court's instructions as a whole were an accurate statement of the law and were not plain error. In addition, Blakley's *ex post facto* argument is precluded by controlling precedent from this Court. We thus find no error in the trial court's judgment.

Facts and Procedural History

¶ 3 As a result of a 1998 conviction in Forsyth County Superior Court, Defendant Demarcus Antonio Blakley was required to register as a sex offender. At the time of his registration, Blakley was required to be registered for ten years, and his registration was to terminate automatically after that time period. In 2006, the sex offender registration statutes were amended, removing the provision allowing for automatic termination of registration. 2006 N.C. Sess. Laws 247. As a result, Blakley, who did not petition to be removed from registration, was still registered in 2017.

¶ 4 On 27 June 2017, Blakley signed an updated duty to register document that included additional restrictions imposed in the 2006 change to the law. The new agreement required Blakley to notify the sheriff's office in person of any changes of address within three business days. Previously, Blakley was required to notify the authorities of a change of address within ten days.

¶ 5 Blakley was evicted from his home in August 2017. On 6 October 2017, he completed a change of address form notifying the sheriff's office that he was living at a new address, but that he would be changing his address to homeless and living

under a bypass. Blakley did not provide any notification of his change of address between his eviction in August and the change of address notification in early October.

¶ 6 In 2018, the State charged Blakley with violating the sex offender notification requirements by (1) failing to notify the sheriff's office of his change of address in writing within three business days after moving from his last registered address, and (2) submitting information under false pretenses on a change of address form by providing an address where he was not residing. The matter went to trial before a jury, and the jury convicted Blakley on the charge of failure to notify the sheriff's office of a change of address. The jury deadlocked on the charge of submitting information under false pretenses, and the trial court declared a mistrial on that charge. Blakley pleaded guilty to attaining habitual felon status. The trial court sentenced Blakley to an active sentence of 101 to 182 months in prison. Blakley appealed.

Analysis

I. Jury instruction on failure to notify of a change of address

¶ 7 Blakley first argues that the trial court plainly erred by instructing the jury inconsistently on the willfulness element of the failure to notify charge. Blakley concedes that he did not object to the challenged portion of the instruction, so this issue is reviewed for plain error on appeal. N.C. R. App. P. 10(a)(4).

¶ 8 "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* Plain error should be "applied cautiously and only in the exceptional case" where the error seriously affects "the fairness, integrity or public reputation of judicial proceedings." *Id.*

¶ 9 The relevant statute, N.C. Gen. Stat. § 14-208.9(a), states that 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." Section 14-208.11(a)(2) enforces this requirement, providing that any person required to register who willfully fails to notify the last registering sheriff of a change of address is guilty of a Class F felony. N.C. Gen. Stat. § 14-208.11(a)(2).

¶ 10 The court instructed the jury as follows, with the relevant portions emphasized:

> The defendant has been charged in the first count with *willfully failing to comply with the sex offender registration law*. Willfulness is defined as knowingly and intentionally doing a wrongful act without justification or excuse, or the commission of an act purposely and deliberately in violation of law.

> For you to find the defendant guilty of the first count, the State must prove three things beyond a reasonable doubt:
>
> First, that the defendant was a resident of this state.
>
> Second, that the defendant had previously been convicted of a reportable offense for which the defendant must register. Recall the stipulation of the parties.
>
> *Third, the defendant willfully failed to provide written notice of a change of address* in person at the sheriff's office no later than three business days after the change of address to the sheriff's office in the county with whom the defendant had last registered.
>
> If you find from the evidence beyond a reasonable doubt that on or about September 7th, 2017 the defendant was a resident of this state, that the defendant had previously been convicted of a reportable offense for which the defendant must register, and *that the defendant willfully changed the defendant's address and failed to provide written notice of the defendant's new address* in person at the sheriff's office no later than three days after the change of address to the sheriff's office in the county with whom the defendant had last registered, it would be your duty to return a verdict of guilty.

(Emphasis added).

¶ 11 Blakley argues that, in the emphasized portion of the final paragraph, containing the trial court's final mandate, the jury may not have understood that it must find willfulness with respect to the failure to provide written notice, and instead believed the willfulness requirement applied solely to the act of changing addresses. As a result, Blakley argues that the trial court altered the State's burden of proof and

erroneously placed the *mens rea* requirement on the change of address rather than the failure to provide written notice of the change. This, Blakley contends, is sufficient to show plain error.

¶ 12 The flaw in this argument is that jury instruction "must be evaluated as a whole." *State v. Roache*, 358 N.C. 243, 311, 595 S.E.2d 381, 424 (2004). "If the entire instruction is an accurate statement of the law, one isolated piece that might be considered improper or wrong on its own will not be found sufficient to support reversal." *Id.* Here, the trial court correctly instructed the jury that, to convict Blakley, the jury must find that Blakley "willfully failed to provide written notice of a change of address" to the sheriff's office. The court also correctly defined the term willful. The court's final mandate could be interpreted consistent with the proper statement of the law that the court gave just seconds earlier, but it also could be interpreted, in isolation, to shift the willfulness requirement to a different element, in conflict with that earlier instruction.

¶ 13 In other words, standing alone, the instruction in the final mandate may not have stated the willfulness element properly. But when viewed as a whole, the trial court's instructions were accurate. Having heard just seconds earlier that the willfulness element applied to the failure to give notice, the jury likely understood the final mandate as conveying that same meaning. Thus, Blakley has not shown that, but for this alleged error, the jury probably would have reached a different

result. More importantly, in light of the instructions as a whole, Blakley has not shown that this case presents the sort of exceptional, fundamental error that seriously affected either the fairness of this criminal proceeding or the fairness and integrity of the justice system. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. We thus find no plain error in the trial court's instructions.

II. *Ex post facto* challenge

¶ 14 Blakley next contends that the trial court erred by failing to dismiss the charges against him as a violation of the state and federal prohibitions against *ex post facto* laws. Blakley preserved this issue by asserting a due process argument based on changes to the sex offender registration laws that imposed new, more severe restrictions on him many years after the initial restrictions were imposed.

¶ 15 Both the North Carolina constitution and United States Constitution prohibit *ex post facto* laws. U.S. Const. art. I, § 10, cl. 1; N.C. Const. art. I, § 16. The prohibition against *ex post facto* laws applies to any "law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *In re Bethea*, 255 N.C. App. 749, 756, 806 S.E.2d 677, 682 (2017) (citation omitted). "An ex post facto analysis begins with determining whether the express or implicit intention of the legislature was to impose punishment, and if so, that ends the inquiry." *In re Hall*, 238 N.C. App. 322, 330, 768 S.E.2d 39, 45 (2014) (citation omitted). "If the intention was to enact a civil, regulatory scheme, then . . . we must

further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the legislature's civil intent." *Id.* (citation omitted).

¶ 16 Blakley contends that the "retroactive application of N.C.G.S. § 14-208.7, *et seq*. represents an impermissible *ex post facto* law" because it imposes greater requirements than those imposed when he was originally registered as a sex offender. He contends that these changes are so punitive that they render the changes criminal rather than civil in nature.

¶ 17 This Court already considered whether the sex offender registration and restrictions at issue are punitive and, thus, should be subject to an *ex post facto* analysis. Specifically, we held that "Article 27A of Chapter 14 [N.C. Gen. Stat. § 14-208.5 *et seq*.] of our North Carolina General Statutes sets forth civil, rather than punitive remedies and, therefore, does not constitute a violation of *ex post facto* laws." *Bethea*, 255 N.C. App. at 757, 806 S.E.2d at 682; *see also Hall*, 238 N.C. App. at 329–33, 768 S.E.2d at 44–46.

¶ 18 Blakley urges this Court to reexamine these statutes and conclude that its restrictions are punitive, but he provides us with no legal authority that would permit us to do so. As an intermediate appellate court, we must follow this controlling authority that already addressed this issue. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We are thus constrained to reject Blakley's argument.

Conclusion

¶ 19 We find no error or no plain error in the trial court's judgment.

NO PLAIN ERROR IN PART; NO ERROR IN PART.

Judges COLLINS and JACKSON concur.

Report per Rule 30(e).