

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0302

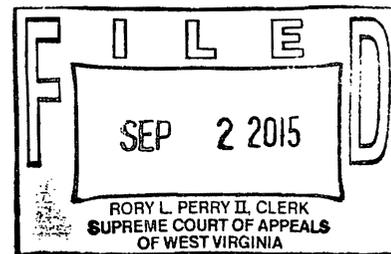
STATE OF WEST VIRGINIA

Plaintiff Below, Respondent,

vs.

WILLIAM LEONARD BEEGLE,

Defendant Below, Petitioner.



RESPONDENT'S BRIEF

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COMES NOW, Respondent, State of West Virginia, by counsel, David A. Stackpole, Assistant Attorney General and responds to Petitioner's Brief.

I.

STATEMENT OF THE CASE

On March 23, 2014, Petitioner updated his information with the West Virginia State Police to reflect a change in his address to 1117 Ninth Street, Moundsville, West Virginia. (App. at 171, 175.) A West Virginia State Trooper named William Nathaniel Beck (hereinafter "Trooper Beck") updated Petitioner's information. (App. at 171.)

Beth Shank (hereinafter "Ms. Shank") is a civil process server with the Marshall County Sheriff's Office. (App. at 177-78.) On April 25, 2014, Ms. Shank attempted to serve divorce papers on Petitioner between the hours of 8:00 a.m. and 4:00 p.m. at the 1117 Ninth Street address. (App. at 180, 183, 185.) Petitioner was not at the address, so she left a door hanger.

(App. at 181.) On April 29, 2014, Ms. Shank attempted to serve the divorce papers on Petitioner between the hours of 11:00 a.m. and 7:00 p.m., but Petitioner was not there. (App. at 179-81, 183.) Ms. Shank attempted to call Petitioner, but did not get an answer. (App. at 180.) Ms. Shank spoke with Richard Kennedy (hereinafter “Mr. Kennedy”), who lived at the house, about Petitioner, but Mr. Kennedy was not comfortable taking the papers and so she left another door hanger. (App. at 181.) Petitioner did not pick up the papers until May 15, 2014. *Id.*

Ms. Shank saw West Virginia State Trooper Jason Kocher (hereinafter “Trooper Kocher”) at Magistrate Court and inquired if there was another address for Petitioner. (App. at 182, 187.) Trooper Kocher checked for the physical address listed in the registry and found that 1117 Ninth Street was the listed address. (App. at 188.) Trooper Kocher also looked up Petitioner’s vehicle information in the registry. *Id.* For the next week to ten (10) days, Trooper Kocher drove past 1117 Ninth Street on his way to work and on his way home from work, but “never ever saw the car.” (App. at 189.) Trooper Kocher went to the house twice over a period of six (6) days and Petitioner was not there, but he spoke to Mr. Kennedy, who lived at the house. (App. at 189-91.) Trooper Kocher obtained an arrest warrant for Petitioner for Failure to Register or Provide Notice of Registration Changes. (App. at 191.)

On November 12, 2004, Petitioner was indicted on the charge of Failure to Register or Provide Notice of Registration Changes. (App. at 3.) A Stipulation of Parties was entered, where Petitioner stipulated that he is a Registered Sex Offender and “is required by law to [r]egister for the remainder of his lifetime, pursuant to the West Virginia Sex Offender Registration Act.” (App. at 28.)

On February 6, 2015, there was a one (1) day jury trial of the matter. (App. at 87-371.) At trial, Mr. Kennedy testified that he lived at 1117 Ninth Street, Moundsville, West Virginia for a period of twelve (12) years and lived there during April and May of 2014. (App. at 200-01.) Mr. Kennedy is Petitioner's stepfather. (App. at 202.) Mr. Kennedy testified that Petitioner "came to my house and asked me if he could get his mail there and put clothes upstairs in the bedroom, and I told him yeah." (App. at 203.) Petitioner told Mr. Kennedy to tell the police that "he stayed there." *Id.* However, when Trooper Kocher and Ms. Shank came looking for Petitioner, Mr. Kennedy told them that he "hadn't seen [Petitioner]." (App. at 205.) He had not seen Petitioner for a period of two (2) weeks at the time that he spoke to Trooper Kocher the first time. *Id.* The second time that he spoke to Trooper Kocher, Mr. Kennedy had seen Petitioner the night before, when Petitioner came and picked up his mail. *Id.* Mr. Kennedy testified that Petitioner only slept at the house "[o]nce in a while" about "once or twice a month." (App. at 208.)

At trial, Petitioner took the stand and testified that he did reside at 1117 Ninth Street between March and May 16, 2014. (App. at 221.) Petitioner claimed that he would sleep at the 1117 Ninth Street house and Mr. Kennedy would not even know he was there because Mr. Kennedy would be asleep the entire time that he was there. (App. at 227.) Petitioner admitted that he stayed at his work location at 1367 Cherry Hill Road, Wheeling, West Virginia. (App. at 224.) Petitioner estimated that he stayed at that address "[s]ometimes . . . for a week; sometimes . . . for a week and a half." *Id.* Petitioner testified that when he moved out of the 1117 Ninth Street house, that he moved to 1367 Cherry Hill Road. (App. at 230.)

Tracy Jean Gray (hereinafter “Ms. Gray”) testified at trial that she was Petitioner’s fiancé. (App. at 235.) Ms. Gray testified that Petitioner kept clothes at his job site where he would stay for a week and a half at a time. (App. at 240.)

After first being given an *Allen* Charge due to being deadlocked, the jury found Petitioner guilty of Failure to Register or Provide Notice of Registration Changes. (App. at 53-4, 280-82, 294-95.) On March 5, 2015, the Court held a Hearing on Post-Trial Motions and for Sentencing. (App. at 339-71.) The Trial Court sentenced Petitioner to a term of one (1) to five (5) years, but suspended the sentence and ordered thirty-six (36) months supervised probation. (App. at 63-6, 360.) This appeal followed.

II.

SUMMARY OF THE ARGUMENT

The evidence demonstrated that Petitioner was not staying at his registered residence. Petitioner’s stepfather testified that he only stayed there one (1) to two (2) nights a month and picked up his mail. Ms. Shank and Trooper Kocher each visited twice and Petitioner was not at his registered residence. Even Petitioner and his fiancé both testified that he was staying at the 1367 Cherry Hill Road address for a week and a half at a time.

Additionally there was sufficient evidence to show that Petitioner knew his registration requirements, even to the extent that he knew that he had to register the parking space of the vehicle that he lived out of for a time. It was reasonable for the jury to infer that Petitioner’s failure to update the State Police as to where he was spending the night most nights in a month was done knowingly.

Moreover, Petitioner's provision of the address that he used to pick up his mail is insufficient to satisfy the purpose and intent of the West Virginia Sex Offender Registration Act, which is concerned with the ability of the public to protect themselves and their children.

The West Virginia Sex Offender Registration Act is presumed to be constitutional. The regulations define the term "address" and the term "residence" is not a term of art, but rather is defined by the ordinary and common meaning. This Court has already twice denied claims that the Act is unconstitutionally vague because the term "residence" is not defined. The lack of a definition does not make the Act ambiguous.

To the extent that Petitioner raises an issue in a footnote, regarding jury instructions, Petitioner failed to raise the issue as an assignment of error and in fact, expressly withdrew the assignment of error. The Trial Court had no duty to instruct the jury on the ordinary and common meaning of terms that are not defined by statute, especially when Petitioner's trial counsel did not object to any of the instructions.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

All the issues raised by Petitioner have been authoritatively decided. The facts and legal arguments are adequately presented in the Briefs and the Appendix. The decisional process would not be aided by Oral Argument. This matter is appropriate for a Memorandum Decision.

IV.

ARGUMENT

Petitioner raises two (2) assignments of error: [1] insufficiency of the evidence and [2] the West Virginia Sex Offender Registration Act is unconstitutionally vague. Pet'r's Br. at 1. Both of Petitioner's claims fail.

A. There Was Sufficient Evidence To Support Petitioner’s Conviction.

“A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden.” Syl. Pt. 2, *State v. Strock*, 201 W. Va. 190, 190-91, 495 S.E.2d 561, 561-62 (1997) (quoting Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995)). “An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and creditability assessments that the jury might have drawn in favor of the prosecution.” *Id.* “Creditability (sic) determinations are for a jury and not an appellate court.” *Id.* “[A] jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt.” *Id.*

There was sufficient evidence at trial to show that Petitioner was not residing at the 1117 Ninth Street address and there was sufficient evidence for the jury to conclude that the violation was knowing and intentional. Pursuant to the West Virginia Sex Offender Registration Act (hereinafter “the Act”), West Virginia Code § 15-12-1 *et seq.*, “[w]hen any person required to register under this article changes his or her residence, address, place of employment or occupation . . . he or she shall, within ten business days, inform the West Virginia State Police of the changes.” W. Va. Code § 15-12-3 (2012). The responsibility to provide the information falls on the person required to register. W. Va. Code R. § 81-14-17.6 (2014). The information to be provided includes “where they reside, work, attend school or visit for more than fifteen (15) continuous days.” W. Va. Code R. § 81-14-5.1 (2014).

The Act does not define the term “address.” However, the regulations promulgated for the Act expressly defines the term “address” as “[a]ny current physical address(es) including the mailing address and any habitable real property owned or leased that the offender regularly

visits.” W. Va. Code R. § 81-14-2.12 (2014). As the regulations make clear, “address” includes habitable property that the offender regularly visits. *Id.* The regulations also define the term “physical address” as “[t]he actual location of the residence(s).” W. Va. Code R. § 81-14-2.13 (2014).

Neither the Act nor the regulations define the term “residence.” “‘In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.’” Syl. Pt. 6, *Apollo Civic Theatre, Inc. v. State Tax Com’r*, 223 W. Va. 79, 81, 672 S.E.2d 215, 217 (2008) (citations omitted). Black’s Law Dictionary provides a definition of the term “residence”:

1. The act or fact of living in a given place for some time <a year’s residence in New Jersey>. — Also termed *residency*. 2. The place where one actually lives, as distinguished from a domicile <she made her residence in Oregon>. • *Residence* usu. just means bodily presence as an inhabitant in a given place; *domicile* usu. requires bodily presence plus an intention to make the place one’s home. A person thus may have more than one residence at a time but only one domicile. Sometimes, though, the two terms are used synonymously. Cf. domicile (2). 3. A house or other fixed abode; a dwelling <a three-story residence>. 4. The place where a corporation or other enterprise does business or is registered to do business <Pantheon Inc.’s principal residence is in Delaware>.

Black’s Law Dictionary (10th ed. 2014). As the dictionary definition makes clear, bodily presence as an inhabitant is all it takes to make a place a residence and a person can have multiple residences. *Id.*

Under the Act, a person with a life registration requirement can be guilty of a felony with a sentence of one (1) to five (5) years if he or she “knowingly fails to provide a change in any required information.” W. Va. Code § 15-12-8(c) (2012).

In this case there was sufficient evidence adduced at trial to demonstrate that Petitioner was residing at a location other than the 1117 Ninth Street address. The evidence showed that

Petitioner told the State Police that he would be residing at 1117 Ninth Street in Moundsville. (App. at 171, 175.) Petitioner's stepfather, Mr. Kennedy, testified that Petitioner only asked him to "get his mail there and put clothes upstairs in the bedroom." (App. at 203.) Mr. Kennedy also testified that he should tell the police that "he stayed there." *Id.* However, Petitioner only slept at the house "[o]nce in a while" about "once or twice a month" and picked up his mail there. (App. at 205, 208.) Mr. Kennedy's testimony alone was sufficient for the jury to determine that Petitioner had failed to provide notice of registration changes.

In addition to Mr. Kennedy's testimony, Ms. Shank testified that she attempted to serve divorce papers on Petitioner at 1117 Ninth Street on two (2) different days at two (2) different times, but Petitioner was not there either time. (App. at 180-85.) She left door hangers and Petitioner did not pick up the papers until more than two (2) weeks after she left the second door hanger. (App. at 181.) Trooper Kocher also testified that he went to the house twice over a period of six (6) days and Petitioner was not there. (App. at 189-91.)

Petitioner even testified that he stayed at his work location at 1367 Cherry Hill Road in Wheeling "[s]ometimes . . . for a week; sometimes . . . for a week and a half." (App. at 224.) Petitioner also testified that when he moved out of the 1117 Ninth Street house, that he moved to 1367 Cherry Hill Road. (App. at 230.) Petitioner's fiancé testified that Petitioner kept clothes at his job site where he would stay for a week and a half at a time. (App. at 240.)

Petitioner argues that there was insufficient evidence. Pet'r's Br. at 10-3. Petitioner contends that "[h]is [p]urported [c]hange [o]f [a]ddress [w]as [n]ot [e]stablished [b]y [a]ny [w]itness. Pet'r's Br. at 10. Petitioner's argument ignores Petitioner's own testimony that he "resided in an old bar that was previously there before, but it was shut down, and [he] had to stay in an office inside of the bar until [they] completed the apartments." (App. at 224.) While

Petitioner attempts to characterize that testimony as “working overnight” and being “permitted to intermittently sleep on a cot,” there is no testimony in the record about any cot or about sleeping intermittently. *Id.* Petitioner also tries to characterize his staying the 1367 Cherry Hill Road address as “staying at a work location for many days in a row.” Pet’r’s Br. at 12. The clear testimony was that Petitioner “resided” and “stay[ed] there for a week and a half” at a time. *Id.* Additionally, Petitioner’s stepfather’s testimony that Petitioner left clothes and picked up his mail at the address, but only stayed one (1) or two (2) nights a month established that Petitioner was not staying at the 1117 Ninth Street address. (App. at 203, 205, 208.) Ms. Shank’s and Trooper Kocher’s testimony about attempting to contact Petitioner at the 1117 Ninth Street address and finding that he was not there corroborated Petitioner’s stepfather’s testimony that he was only there one (1) or two (2) times a month. (App. at 180-85, 189-91.) As such, Petitioner was not just working overnight many days in a row with intermittent sleep on a cot. Petitioner was staying and residing at the 1367 Cherry Hill Road address and only going to the 1117 Ninth Street address to pick up his mail and stay a couple of nights a month.

Petitioner’s claim that he “did not deem his place of employment to be a home requiring the listing of the address in his registration as a home address” is contradicted by the fact that Petitioner testified that at one (1) point in time he understood that he had to list the address of the car that he was sleeping in as his home address because it was where he was staying. *Compare* Pet’r’s Br. at 3 *with* Pet’r’s Br. at 6.

Petitioner goes out of his way in his Brief to impugn the testimony of his stepfather, Mr. Kennedy, by focusing on his drinking and that he took naps at time during the day. Pet’r’s Br. at 4. However, that information was provided to the jury through cross-examination. (App. at 209-10.) The jury was in the best position to assess the credibility of Mr. Kennedy. Petitioner is

asking this Court re-weigh the evidence and the Court should decline to do so. “An appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact.” *State v. Guthrie*, 194 W. Va. 657, 670 fn.9, 461 S.E.2d 163, 176 fn.9 (1995) (citation omitted). “It is for the jury to decide which witnesses to believe or disbelieve.” *Id.* “Once the jury has spoken, this Court may not review the credibility of the witnesses.” *Id.*

Petitioner’s argument that “an address can be defined as a place where a person receives his mail” fails because the purpose of the Act is not to keep track of the sex offender’s mail, but rather to keep track of the sex offender. Pet’r’s Br. at 8, 11; W. Va. Code § 15-12-1a (2000) (stating that “[t]he Legislature finds and declares that there is a compelling and necessary public interest that the public have information concerning persons convicted of sexual offenses in order to allow members of the public to adequately protect themselves and their children from these persons”). Members of the public cannot adequately protect themselves and their children from sex offenders if all they are informed of is the address where the sex offender has clothes and receives mail and are not apprised of the place where the sex offender actually stays.

Petitioner argues that it does not matter whether or not he registered 1367 Cherry Hill Road as his residence because he had registered it as his work address. Pet’r’s Br. at 12. Petitioner is incorrect. If the purpose of the Act is to allow the public to protect themselves and their children from sex offenders, it makes a big difference to the public whether a sex offender is staying alone in a residence overnight for days-on-end in their neighborhood verses working a shift in their neighborhood and returning to another county for the remainder of the time. It would thwart the purpose of the Act to permit sex offenders to list their mailing address as their residence and then live out of their work place in another county. Thus, it matters how the

information is registered. Petitioner was required by the Act to register and to update all changes, including work address and residence address. Just because his work address became his residence address does not exempt him from updating the registry.

Petitioner also asserts that the evidence was not sufficient to show “[a]n [i]ntentional [o]r [k]nowing [v]iolation.” Pet’r’s Br. at 10. Petitioner would have this Court ignore the evidence that was adduced at trial that Petitioner knew that he had an obligation to update his information as seen on March 23, 2014, when Petitioner updated his information with the West Virginia State Police to reflect a change in his address to 1117 Ninth Street or when Petitioner provided information regarding what parking spaces the vehicle he was staying in were located. (App. at 171, 175, 233.) “When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor’s coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict.” Syl. Pt. 2, *State v. LaRock*, 196 W. Va. 294, 299, 470 S.E.2d 613, 618 (1996). There was sufficient evidence for the jury to infer that Petitioner knew and understood the requirement to register where he was actually residing and not just the place that he was picking up mail, but did not provide that information to the State Police as required by the Act.

Therefore, because Petitioner’s stepfather testified that Petitioner merely left clothes and received mail at his place; because Petitioner’s stepfather testified that Petitioner only stayed at his place one (1) or two (2) times a month; because Ms. Shank visited twice at different times and Petitioner was not at his registered residence; because Trooper Kocher visited twice and Petitioner was not at his registered residence; because Petitioner’s finance testified that Petitioner kept clothes and stayed at his work address for a week and a half at a time; because Petitioner admitted on the stand that he would stay at his work address for a week and a half at a time;

because Mr. Kennedy's credibility is an issue for the jury and not for an appeals court; because the purpose of the Act is to protect the public and registration of a place where someone only receives mail, keeps some clothing, and stays one (1) or two (2) times a month is insufficient to satisfy the purpose of the Act; because there was sufficient information that Petitioner knew of his registration requirement and yet knowingly failed to update the State Police regarding the fact that he was actually staying at the 1367 Cherry Hill Road address, this Court should affirm Petitioner's conviction and sentence.

B. The West Virginia Sex Offender Registration Act Is Set Forth With Sufficient Definiteness To Give A Person Of Ordinary Intelligence Fair Notice That His Or Her Contemplated Conduct Is Prohibited.

“When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.” Syl. Pt. 3, *State v. James*, 227 W. Va. 407, 410, 710 S.E.2d 98, 101 (2011) (quoting Syl. Pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967)). “The constitutionality of a statute is a question of law which this Court reviews *de novo*.” Syl. Pt. 2, *James*, 227 W. Va. at 410, 710 S.E.2d at 101 (quoting Syl. Pt. 1, *State v. Rutherford*, 223 W. Va. 1, 672 S.E.2d 137 (2008)). Although the Court reviews constitutionality *de novo*, negation of legislative power must appear beyond a reasonable doubt:

“In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.”

Syl. Pt. 4, *James*, 227 W. Va. at 410, 710 S.E.2d at 101 (quoting Syl. Pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965)).

The Act is not unconstitutionally vague. ““There is no satisfactory formula to decide if a statute is so vague as to violate the due process clauses of the State and Federal Constitutions.”” Syl. Pt. 8, *James*, 227 W. Va. at 411, 710 S.E.2d at 102 (quoting Syl. Pt. 1, *State ex rel. Myers v. Wood*, 154 W. Va. 431, 175 S.E.2d 637 (1970)). ““A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.”” Syl. Pt. 7, *James*, 227 W. Va. at 410-11, 710 S.E.2d at 101-02 (quoting Syl. Pt. 1, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974)). ““The basic requirements are that such a statute must be couched in such language so as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain if he has violated the offense provided and it may be couched in general language.”” Syl. Pt. 8, *James*, 227 W. Va. at 411, 710 S.E.2d at 102 (quoting Syl. Pt. 1, *State ex rel. Myers*, 154 W. Va. at 431, 175 S.E.2d at 637).

“ ‘ “A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” ’ ” Syl. Pt. 2, *State v. Richards*, 206 W. Va. 573, 574, 526 S.E.2d 539, 540 (1999) (quoting Syl. Pt. 1, *Sowa v. Huffman*, 191 W. Va. 105, 443 S.E.2d 262 (1994); Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951)). Moreover, this Court has stated that the Court must “proceed with caution in examining constitutional challenges to legislative enactments because a statute is presumed to be constitutional.” *James*, 227 W. Va. at 413, 710 S.E.2d at 104.

Petitioner argues that the Act has failed to define the terms “address” and “residence” and is therefore unconstitutionally vague. Pet’r’s Br. at 15. Petitioner goes on to claim, without any

citation or reference, that “[m]ost people would identify themselves as having one (1) address regardless of the number of places they slept in the course of a month.” *Id.* Even if that statement were true, Respondent is hard pressed to believe that most people would identify that one (1) address as being the place where they only spent one (1) or two (2) nights a month if they were sleeping a week and a half at a time in another location. However, determining whether the statute is unconstitutionally vague because it does not define the terms “address” and “residence” is not done by speculating as to what most people might think.

First, Respondent agrees that the Act does not define “address” or “residence.” However, the regulations define the term “address” as “[a]ny current physical address(es) including the mailing address and any habitable real property owned or leased that the offender regularly visits.” W. Va. Code R. § 81-14-2.12 (2014).

Second, “[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” Syl. Pt. 6, *Apollo Civic Theatre, Inc.*, 223 W. Va. at 81, 672 S.E.2d at 217 (citations omitted). Black’s Law Dictionary defines residence so that bodily presence as an inhabitant is all it takes to make a place a residence and a person can have multiple residences. Black’s Law Dictionary (10th ed. 2014). To treat the term “residence” as only a single location, such as Petitioner’s stepfather’s house, where he received his mail, kept some of his clothes, and stayed a couple nights every month, would not only thwart the policy underlying the Act, but would also ignore the multiple living situations that people face. While many people only have a single residence, where they live every day, there are people who rotate housing from place to place, such as Petitioner, who was living at the 1367 Cherry Hill Road address for a week and a half and then living at the 1117

Ninth Street address for a night before returning to the 1367 Cherry Hill Road address. Additionally some people live out of their vehicles, as Petitioner did at one (1) time in the past, where he knew he had to register the address of the parking spot of the car he was living in. Moreover, Petitioner even admits that “[u]nder the Act, a sex offender may have multiple addresses and is required to register each one.” Pet’r’s Br. at 15.

Third, this is not the only statute where the term residence is used and not defined. One (1) of the many requirements for a person to be eligible to serve on a jury is that the person be a “resident of the county.” W. Va. Code § 52-1-8 (2013). However, the statute providing the residency requirement for jurors does not define the term “residence.” W. Va. § 52-1-3 (1988). “Residence” is not a term of art as Petitioner advocates, but a word with an ordinary and accepted meaning. To find this Act unconstitutionally vague for failing to define the term “residence” would call into question every other statute that uses the term without defining it, including the statute outlining eligibility for jury service.

Using the ordinary and accepted meaning of the term residence, Petitioner had a duty to inform the State Police of every address where he was physically staying, including the 1117 Ninth Street address if he was receiving mail, keeping his clothing, and spending the night several times a month as well as the 1367 Cherry Hill Road address if he was staying the night there for a week and a half at a time several times a month.

Petitioner also contends that “there is no clear guideline in the Act on how long an offender may stay at any given location before that location becomes a residence or an address.” Pet’r’s Br. at 15 fn.7. However Petitioner admits that the regulations provide that a sex offender must register “where they reside, work, attend school or visit for more than fifteen (15) continuous days.” Pet’r’s Br. at 15 fn.7; W. Va. Code R. § 81-14-5.1 (2014). Petitioner argues

that because he “never stayed at his work site overnight for longer than two weeks” then he did not have a registration obligation. Pet’r’s Br. at 15-6 fn.7. However, the factual finding regarding whether or not Petitioner had been staying at his work site for a time sufficient for him to be required to update his registration was properly a jury issue that the jury reasonably determined and found Petitioner guilty.

Petitioner cites to *State v. Bailey*, No. 12-0234, 2013 WL 949527 (W. Va. Mar. 12, 2013) (memorandum decision), and argues that it is distinguished because the sex offender in *Bailey* failed to provide the address where he was staying while Petitioner provided the address that he was staying as his work address only. Pet’r’s Br. at 5 at fn.3. Petitioner should not be allowed to avoid updating the register to provide the location of the place that he is actually staying on the grounds that it is registered as his work address. “The Legislature finds and declares that there is a compelling and necessary public interest that the public have information concerning persons convicted of sexual offenses in order to allow members of the public to adequately protect themselves and their children from these persons.” W. Va. Code § 15-12-1a (2000). There is a big difference between the place that you stay and the place where you work. Both types of information are required by the Act because they provide different types of information. The categories are not fungible. The public has a right, under the Act, to know both where the sex offender works and where the sex offender stays and sleeps. If the two (2) separate categories are the same, then the public has the right, under the Act, to know that as well. Just because Petitioner’s work address was correct does not mean that his residence address was properly updated as required.

Additionally, *Bailey* is directly on point regarding Petitioner’s assertion that the Act is unconstitutionally vague. Pet’r’s Br. at 14-9. In *Bailey*, the issue was whether the Act was

unconstitutionally vague because the Act does not define the term “residence.” *Bailey*, No. 12-0234, 2013 WL 949527 at *1. This Court held that “the statute in question is not unconstitutionally vague in regard to the term ‘residence.’” *Id.* at *2. This Court reasoned that “[a] plain reading of the Sex Offender Registration Act should have informed petitioner that if he resided in two separate counties, then he was required to register both residences with the West Virginia State Police detachment in each county.” *Id.* at *1. The same logic applies here. If Petitioner was receiving mail and staying one (1) or two (2) nights a week at the 1117 Ninth Street address in Marshall County and was staying a week and a half at a time at the 1367 Cherry Hill Road address in Ohio County, then Petitioner had a registration obligation to provide both addresses to the State Police for his residence.

Bailey is not the only case that this Court has decided where there was a challenge that the Act was unconstitutionally vague due to the lack of a definition for “residence.” *See State v. Wigal*, No. 11-1297, 2012 WL 5851254 at *2 (W. Va. Nov. 19, 2012) (memorandum decision). In *Wigal*, this Court found “no merit” in the assignment of error, reasoning that “[a] plain reading of this statute should have informed petitioner that if he no longer resided at the address he provided the registry, as the State proved below, then he had ten business days to change the information, which he did not do.” *Id.* at *3.

Petitioner also cites to *State v. Judge*, 228 W. Va. 787, 724 S.E.2d 758 (2012), for the premise that there is no need to re-register where there is no change in his actual information. Pet’r’s Br. at 6 fn. 3. *Judge* is inapposite as the issue in *Judge* was whether there was a re-registration requirement following a one (1) day incarceration if there was no change in the “previously-registered place of residence.” *Judge*, 228 W. Va. at 788, 724 S.E.2d at 759. In this case, the issue is not re-registration following an incarceration, but rather whether Petitioner was

required to update his registration to include his work address as a place of residence as Petitioner had never previously registered his work address as being his residence. Nonetheless, the *Judge* decision applies to the extent that it states that “[a]s the statute makes clear, an individual subject to the Registration Act commits a felony when he or she provides materially false information; provides inaccurate information; knowingly fails to register; or *knowingly fails to provide a change in required information.*” *Judge*, 228 W. Va. at 789, 724 S.E.2d at 760 (emphasis added).

To the extent that Petitioner claims that the Trial Court failed to define the words “address” and “residence” for the jury, Petitioner has not raised that as an assignment of error and relegation to a footnote in the Brief is improper to raise as an issue for this Court to decide. *See* Pet’r’s Br. at 18 fn.9. That is especially true here, where Petitioner expressly withdrew his assignment of error regarding jury instructions. Pet’r’s Br. at 14. Petitioner recognizes that there was no objection to the instructions. Pet’r’s Br. at 18 fn.9. However, Petitioner’s claim that the Trial Court had a duty to define words that are not defined by statute and that are to be understood in their ordinary and common meaning is incorrect. *See id.* Petitioner has cited no law to suggest that a Trial Court has a duty to define statutory words when the ordinary and common meaning is to be used. *Id.* The jury did not have to speculate as to the definition of those words as Petitioner suggests; rather, the jury merely needed to apply the ordinary and common meaning of those terms. *See* Pet’r’s Br. at 18.

To the extent that Petitioner seeks to apply the Rule of Lenity, the rule is only applied where a statute is ambiguous. Pet’r’s Br. at 18-9; Syl. Pt. 2, *State v. Stone*, 229 W. Va. 271, 273, 728 S.E.2d 155, 157 (2012) (citations omitted). There is no contention that the Act is ambiguous. Petitioner is arguing that the statute is unconstitutionally vague. Pet’r’s Br. at 14-9.

The Act is not unconstitutionally vague and the Act is not ambiguous. Where the ordinary and common meaning of a word can be used to understand a statute, the statute does not become ambiguous; rather, the ordinary and common definition is used, eliminating any possible ambiguity. *See Apollo Civic Theatre, Inc.*, 223 W. Va. at 81, 672 S.E.2d at 217.

Therefore, because statutes are presumed to be constitutional; because the regulations define the term “address”; because the ordinary and common meaning of the term “residence” includes all the places where you are staying; because the ordinary and common meaning of the term “residence” allows for a person to have more than one (1) residence; because Petitioner was actually staying at the 1367 Cherry Hill Road address for a week and a half at a time a couple of times a month; because it is the province of the jury to determine whether or not Petitioner stayed at the 1367 Cherry Hill Road address long enough to have warranted updating the registry; because the various registration categories are not fungible; because this Court has twice reviewed the issue of vagueness related to this Act as it relates to the issue of residence and found the Act constitutional; because Petitioner did not raise the jury instructions as an assignment of error; because the Petitioner expressly withdrew his assignment of error regarding the jury instructions; because Petitioner did not object to the jury instructions; because the Trial Court had no duty to define the ordinary and common meaning of the terms “address” and “residence”; because the Act is not ambiguous; and because the Rule of Lenity does not apply; this Court should affirm Petitioner’s conviction and sentence.

V.

CONCLUSION

For the foregoing reasons and others apparent to this Court, this Court should affirm Petitioner’s conviction and sentence.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

By Counsel,

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CERTIFICATE OF SERVICE

I, David A. Stackpole, Assistant Attorney General and counsel for Respondent, do hereby verify that I have served a true copy of *RESPONDENT'S BRIEF* upon counsel for Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 2nd day of September, 2015, addressed as follows:

Lori M. Waller, Esquire
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