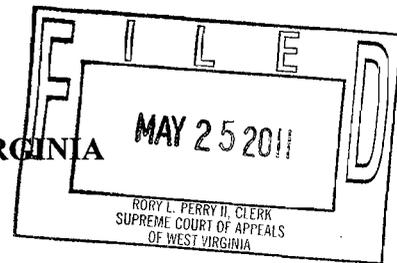


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,
Petitioner

v.

Supreme Court No. 11-0089
Circuit Court No. 10-F-29 (Tyler)

TIMOTHY J. JUDGE,
Respondent.

RESPONDENT'S RESPONSE BRIEF

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STATEMENT OF THE CASE

Respondent will highlight certain facts which are relevant to his response.

On or about September 19, 2002, Mr. Judge was convicted via plea agreement of Sexual Abuse in the Third Degree and was sentenced to ninety (90) days in jail suspended in lieu of eighteen (18) months probation. R. 6, Order of the Honorable John T. Madden filed October 19, 2002. The sentencing court also found that Mr. Judge was required to have a sex offender assessment but that he was not required to participate in sex offender treatment unless by further order of the court or recommendation of a professional. Order of the Honorable John T. Madden filed October 19, 2002. Mr. Judge is required to register for life as a sex offender because the victim of his crime was a minor. R. 6.

Mr. Judge has consistently updated his registration on a yearly basis as required by statute. *See, e.g.*, R. 19 (2010 registration), R. 37 (2008 registration), R. 47 (2006 registration), R. 51 (2005 registration), R. 61 (2004 registration). He re-registered when he moved residences. R. 34. He remained gainfully employed until May 18, 2009. *See, e.g.*, R.32, R. 55. By April 15, 2010, Mr. Judge had regained employment. R. 25. On or about May 7, 2010, to May 8, 2010, Mr. Judge was incarcerated at the local jail on allegations of unrelated charges. R. 5. After release from jail, Mr. Judge returned to his properly registered residence. R. 3.

SUMMARY OF ARGUMENT

The plain language and clear intent of the Sex Offender Registration Act, W. Va. Code § 15-12-1 *et seq.* (2010), does not make it an offense to fail to re-register upon release from jail following an arrest where the qualified offender is returning to his previously registered proper residence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Mr. Judge believes that this case does not require argument because the language and intent of the Sex Offender Registration Act clearly indicates that Respondent did not violate the law and that the trial court's ruling was correct and should be affirmed. This case may be resolved through a memorandum opinion pursuant to Revised Rule of Appellate Procedure 21.

RESPONSE ARGUMENT

The trial judge did not err in dismissing the indictment as it is not a crime under W.Va. Code § 15-12-8 (2010) to fail to re-register within three (3) days of release from an institution where the person returns to his properly registered residence.

In reviewing whether the granting of a motion to dismiss an indictment was proper, this Court's standard of review is "generally, *de novo*. However, in addition to the *de novo* standard, where the circuit court conducts an evidentiary hearing upon the motion, this Court's 'clearly erroneous' standard of review is invoked concerning the circuit court's findings of fact." Syl. Pt. 1, *State v. Grimes*, 701 S.E.2d 449, 2009 W.Va. LEXIS 116 (2009). In this matter, both sides had the opportunity to brief and argue this issue. The trial court judge determined that, as a matter of law, the indictment did not allege an offense, necessitating dismissal. See Order of the Honorable David W. Hummel entered December 27, 2010. The trial court judge emphasized that the law is unclear regarding this particular situation regarding registration and that given the context of this matter, the charge was not proper. Transcript of Motion Hearing dated December 23, 2010, hereinafter "Transcript," p. 7. In reviewing this matter, this Court should give great deference to the trial court's findings.

The West Virginia's Sex Offender Registration Act, W.Va. Code § 15-12-1 *et seq.* (2010), mandates that convicted sex offenders register certain personal information with the State Police. The amount of information regarding an offender and the length of time during which the offender must register is determined by the type of crime committed and the nature of the victim. W. Va. Code §§ 15-12-2; 15-12-4 (2010). The Act provides varying amounts of time in which to initially register and then re-register depending on whether there is a change in

information or a change in circumstances. W. Va. Code §§ 15-12-2; 15-12-3. The statute, however, is not clear regarding what constitutes a release from an institution and if re-registration is necessary if the person is returning to his properly registered residence. The associated State Police form simply states “I must register within three days of release from an institution.” Transcript, p. 3. Further, the Code of State Rules corresponding to this Act permits an offender to visit another person in another location for a period of up to fifteen (15) days without having to re-register. Code of State Rules §81-14-5.1. Additionally, the State “acknowledges that there is an apparent gap or disconnect in the statutory language of §15-12-2 and the State Police’s rule and forms.” Petitioner’s Brief, p. 11.

The focus of this appeal is on West Virginia Code §15-12-2(e)(1) (2010), which states that “[a]ny person having a duty to register for a qualifying offense shall register upon conviction, unless that person is confined or incarcerated, in which case he or she shall register within three business days of release, transfer or other change in disposition status.” The statute is ambiguous as to what constitutes a conviction. A fair reading of this language is the conviction referenced in the statute is the conviction for the qualifying offense creating the obligation of registration. Further, all penal statutes are to be construed in favor of the defendant per the rule of leniency. Therefore, it is a reasonable and understandable interpretation of this statute that upon a new arrest and release, re-registration with the State Police is not required. Moreover, the legislature used the word “conviction,” which is an event that happens after the entry of a plea or trial; it did not use the word “arrest,” which is an event that occurs if probable cause exists, a standard significantly lower than the not guilty beyond a reasonable doubt standard required for a conviction. Additionally, Black’s Law Dictionary defines “conviction”

as “the act or process of judicially finding someone guilty of a crime, the state of having been proved guilty,” whereas an “arrest” is defined as “a seizure or forcible restraint” or “the taking or keeping of a person in custody by legal authority, esp. in response to a criminal charge.” Black’s Law Dictionary, Seventh Edition (1999). These definitions reflect the significant difference in meaning between these two terms. If the Legislature intended an offender to re-register after each arrest, it should have clearly stated so; instead, the Legislature chose to use the word “conviction.”

The State concedes this point, but then argues that when section 2(e)(1) is read in conjunction with section 4 of the statute, it becomes clear that a person is to re-register upon release from any source of incarceration or confinement, otherwise section 4 would be deemed frivolous. R. 10. The State does not address, however, the significance difference between the word “arrest” and the word “conviction.” The logical interpretation of section 4 is that a period of incarceration or confinement occurs *after a conviction* and thereby obligates the offender to re-register with the State Police upon release. A period of incarceration or confinement does not necessarily follow an arrest as the arrest is the starting point of a criminal investigation, not the end of a criminal investigation, like a trial or a plea is.

Section 6 of the Registration Act lists the duties of institution officials in this process. Specifically, it states “the official in charge of the place of confinement shall inform any person required to register under this article, before parole or release, of the duty to register. Further, the official shall obtain the full address of the person and a statement signed by the person acknowledging that the person has been informed of his or her duty to register.” W. Va. Code §15-12-6 (2010). The record does not contain the form that the jail official should have

presented Mr. Judge prior to his release. Additionally, the jail official did not testify at the motion hearing to confirm that he acquired the relevant information from Mr. Judge prior to releasing him. This outcome strongly suggests that the jail officials themselves do not believe that they are required to obtain information from a qualified offender and to inform that person of the need to re-register after a simple arrest. This belief is consistent with the statutory interpretation proved above.

The purpose of this Registration Act is to provide the public with information about the location of sex offenders in an effort to improve public safety. *Haislop v. Edgell*, 215 W.Va. 88, 593 S.E.2d 839 (2003). This Court declared that the Notification Act was a regulatory, not punitive act. *Id.* The trial court judge also noted the purpose of the Act, stating “the intent of the legislature was to make sure that law enforcement and the public were aware of where persons who have previously been convicted of the appropriate offenses; just to know where they live.” Transcript, p. 5.

In this matter, the public was kept safe. Mr. Judge remained at his properly registered residence until a brief incarceration in the local jail on an unrelated arrest and then returned to his properly registered address. Any member of the public seeking information about Mr. Judge from the Sex Offender Database would have found that Mr. Judge lived and continues to live at his properly registered address. On the one night when Mr. Judge was not at that address, he was in a secure facility, which gave added protection to the public. Further, by the time any state official became aware of his arrest, Mr. Judge already was released and back at his known residence. At no time was Mr. Judge unaccounted for or missing. Given these facts, it is

impossible to prove beyond a reasonable doubt that harm occurred and therefore, the trial judge correctly dismissed the indictment charging Mr. Judge with failure to register.

CONCLUSION

Mr. Judge respectfully requests that this Honorable Court uphold the trial court's dismissal of the indictment charging him with failure to register.

Respectfully Submitted

TIMOTHY J. JUDGE
By Counsel



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CERTIFICATE OF SERVICE

I certify that I have served the attached RESPONDENT'S RESPONSE BRIEF by delivering a true copy thereof to D. Luke Furbee, Prosecuting Attorney's Office of Tyler County, P.O. Box 125, Middlebourne, WV 26149; by hand delivery or by U.S. States Mail postage prepaid this the 25th day of May, 2011.



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