

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent**

vs) No. 11-1297 (Wirt County 11-F-6)

**Jerry Lee Wigal,
Defendant Below, Petitioner**

FILED

November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner's appeal, by counsel Courtney L. Ahlborn, arises from the Circuit Court of Wirt County, wherein the circuit court sentenced petitioner to a term of incarceration of two to ten years by order entered on August 17, 2011. Respondent State of West Virginia, by counsel Laura Young, has filed a response. Petitioner has additionally filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In March of 2011, petitioner was indicted for the felony offense of failure to register after he failed to provide information to the state police about a change in his residence. Because of his prior classification as a sexually violent predator, petitioner was required to register certain information with law enforcement pursuant to the Sex Offender Registration Act as found in West Virginia Code § 15-12-1, et seq. According to the indictment, petitioner failed to provide a change in information pertaining to his place of residence and the State alleged that petitioner was not living at the address he provided to the registry. Following a jury trial, petitioner was found guilty of failure to register and was sentenced to a two to ten year period of incarceration. The sentence was suspended and petitioner was ordered to serve the sentence on electronically monitored home incarceration. On appeal, petitioner alleges four assignments of error, which are addressed below.

Petitioner first alleges that the circuit court erred in denying his motion to dismiss the indictment for the following reasons: because it failed to state with particularity the crime with which he was charged; because two members of the grand jury exhibited bias against him; and, because a witness improperly influenced the grand jury. According to petitioner, the indictment should have contained what information he either refused to provide accurately or what false information he knowingly provided. Further, petitioner argues that two grand jurors had

connections to the matter, yet neither ever affirmatively stated that they could be impartial when questioned. Lastly, petitioner argues that a witness, West Virginia State Trooper Clinton E. Boring, gave the grand jury prejudicial information about when he was released from prison and a prior offense of failure to register. Further, petitioner argues that the witness stated that petitioner moved to Wood County, despite the State's failure to establish an address to which petitioner moved. Petitioner asserts that by telling the jury that petitioner should have notified authorities in both Wood and Wirt Counties within ten days of his move, Trooper Boring inappropriately commented on the present state of the applicable law.

In response, the State argues that the indictment in this matter clearly stated that petitioner failed to inform the registry of a change in his place of residence. The State further argues that allegations of juror bias are not supported by the record. As to Trooper Boring's testimony, the State argues that petitioner's release from prison was relevant because it triggered petitioner's duty to register as a sex offender. Further, his prior failure to register was relevant in determining if the present failure was a result of an innocent misunderstanding or confusion. Lastly, the witness did not usurp the function of the circuit court, as grand jurors are encouraged to ask questions of their own accord. According to the State, it did not have to prove where petitioner was residing to convict him of the offense with which he was charged. The State simply had to prove that petitioner had supplied the registry with an address at which he was residing and that, for a period of time in November and December, he was not physically residing at the stated address.

We have previously held that “[g]enerally, the sufficiency of an indictment is reviewed de novo. An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations.” Syllabus Point 2, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).” Syl Pt. 1, *State v. Legg*, 218 W.Va. 519, 625 S.E.2d 281 (2005) (citation omitted). Upon our review, we find no error in the circuit court's denial of petitioner's motion to dismiss. As the State notes, the indictment contained information sufficient to notify petitioner of the crime with which he was charged. The State alleged that petitioner was no longer living at the address he provided the registry, and the indictment plainly stated that petitioner “fail[ed] to provide a change in information pertaining to his place of residence.”

As to petitioner's claims of juror bias and improper influence over the grand jury, the Court finds no merit in these arguments. The record clearly shows that both grand jurors about whom petitioner complains explicitly stated that they could remain fair and impartial. As to Trooper Boring's testimony, the Court finds that the information relating to petitioner's release from jail and prior failure to register was relevant to the proceedings. Specifically, petitioner's release from incarceration triggered his duty to register under the applicable statute. Further, we do not find error on the part of the witness in addressing the requirements of the act pursuant to the grand jury's questions, and also find that the State was not required to establish an address to which petitioner moved in order to convict him of the crime charged. For these reasons, we find no error in the circuit court's denial of petitioner's motion to dismiss the indictment.

Petitioner next alleges that West Virginia Code §§ 15-12-8 and 15-12-3 are unconstitutionally vague and failed to fully and fairly inform him as to what conduct is criminalized. According to petitioner, West Virginia Code § 15-12-8 does not state what material, if provided falsely or refused to be provided, constitutes a crime, and that a reading of West Virginia Code § 15-12-3 is required to make such a determination. Further, petitioner stresses that the statute in question is unclear as to what constitutes a change in residence. The State argues that statutes are presumptively constitutional and that it is clear the use of the term “residence” in the Sex Offender Registration Act does not render that statute unconstitutionally vague. The State argues that the statute sets forward with sufficient definiteness the information required to be registered, that changes in the required information must be updated within a definite time period, and sets penalties for failing to register or update.

We have previously held that “[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. 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).” Syl. Pt. 7, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). Upon our review of the statutes in question, the Court finds that they set out with sufficient definiteness the conduct that is criminalized. 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. For these reasons, we find no merit in this assignment of error.

Petitioner next alleges that the manner in which the circuit court answered jury questions was a misstatement of the law as the State was attempting to apply it to him. Petitioner takes issue with the circuit court stating that the ultimate issue in the case was whether petitioner changed his residence, and that if he did, then he must have registered that new residence within ten days. According to petitioner, it is clear that this answer was instrumental and persuasive in helping the jury render a verdict. The State argues that when the jury asked for a definition of residence, the circuit court directed it to the charge but did add that the State had to prove that petitioner changed his residence and failed to report the change within ten days. According to the State, petitioner’s trial counsel did not object to this response. For these reasons, the circuit court did not abuse its discretion in handling the jury’s question.

We have previously held that “[w]here the issue on an appeal from the circuit court is clearly a question of law . . . involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. Pt. 1, in part, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).” Syl. Pt. 2, *Thomas v. Morris*, 224 W.Va. 661, 687 S.E.2d 760 (2009). Upon our review of the record, we find no error in the manner in which the circuit court answered the jury’s question. Simply put, petitioner’s argument is a matter of semantics. As noted above, the State proved that petitioner was not residing at the address he provided the registry, which necessarily assumes that he changed his residence. The circuit court simply illustrated that petitioner had ten business days after the change within which to register the new address. For these reasons, the circuit court’s response does not constitute error.

For the foregoing reasons, we find no error in the decision of the circuit court, and the order sentencing petitioner is hereby affirmed.

Affirmed.

ISSUED: November 19, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh