ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PERNELL BYAS,

APPELLANT

APPELLATE CASE NO. 2014-000673

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial judge erred in denying Appellant's motion for a directed verdict where the indictment stated Appellant failed to register as a sex offender but the State disproved its own case with testimony that Appellant had been in compliance with his requirements to register as a sex offender.

II. Whether the trial judge erred in denying Appellant's motion to quash the indictment where the indictment stated that Appellant did not register as a sex offender with Beaufort County but he was on trial for not updating his address.

STATEMENT OF THE CASE

On April 7, 1986, a Beaufort County grand jury indicted Appellant for criminal sexual conduct, first degree. R. 113 – R. 115 (State's Exhibit 1). Appellant pleaded guilty to lewd act upon a minor on November 11, 1986, and was sentenced to ten years imprisonment. R. 113 – R. 115 (State's Exhibit 1). On October 31, 2013, a Beaufort County grand jury indicted Appellant for failure to register as a sex offender, in violation of S.C. Code Ann. § 23-3-470 (1976) (2013-GS-70-1580). R. 116 – R. 121 (Indictment). The matter proceeded to a bench trial before the Honorable D. Craig Brown on March 18, 2014. Jessica Saxon and Lauren Carroway represented Appellant. R. 2. Samantha Prinsen and Patrick A. Hall represented the State. R. 2.

After a one-day trial, Judge Brown found Appellant guilty and sentenced him to four years imprisonment. R. 102, lines 17-21; R. 111, lines 12 – 15. Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

I. The trial judge erred in denying Appellant's motion for a directed verdict where the indictment stated Appellant failed to register as a sex offender, but the State disproved its own case with testimony that Appellant had been in compliance with his requirements to register as a sex offender.

Relevant Facts

Arthur Murray testified that in June or July of 2013, he rented Appellant a trailer at 10 Lemon Lane, Lot 1, in Beaufort County. R. 38, line 24 – R. 39, line 8; R. 41, line 16. After two and a half months, Appellant had not paid rent. R. 39, lines 9 – 17. Murray then initiated eviction proceedings against Appellant. R. 40, lines 1 – 6. He filed eviction papers and cut off the electricity where Appellant lived. R. 40, lines 8 – 18.

On cross-examination, Murray stated he cut off the power because the electric company notified him that the bill had not been paid. R. 42, line 14 – R. 43, line 1. Murray also conceded that he did not change the locks on the door and that Appellant had not moved any of the furniture out of the home. R. 43, lines 2 – 22. Murray never completed the eviction process. R. 44, lines 14 – 18. He explained that he did not have another address for Appellant to have the eviction papers served. R. 40, lines 8 – 12.

Agent Tyrone Hicks testified that he was in charge of GPS monitoring for Appellant. R. 46, lines 20 – 22. Agent Hicks stated that he had spoken with Appellant at Walmart in Beaufort on September 2, 2013. R. 51, lines 21 – 24. Appellant informed him that he had secured an address on Broad River Boulevard in Beaufort County. R. 51, line 23 – R. 52, line 1.

The final witness for the State was Staff Sergeant Katrina Light. R. 69, lines 6 – 7. Sgt. Light managed the sex offender registry for Beaufort County. R. 69, lines 23 – 25. She stated that she last completed a sex offender registration form for Appellant on July 2, 2013. R. 70, line 24 – R. 71, line 1. She and Appellant both signed the registration contract. R. 71, line 24 – R. 72, line 5. She explained that Agent Hicks called her to advise that Appellant had been evicted and was no longer living at his 10 Lemon Lane address. R. 75, lines 7 – 9. After her conversation with Agent Hicks, Sgt. Light obtained a warrant for violation of the sex offender registry. R. 75, lines 21 – 22.

On cross-examination, however, Sgt. Light conceded that Appellant was in compliance with his duty to register as a sex offender. R. 77, lines 1 – 7. She further admitted that the next date Appellant was scheduled to register was October 2, 2013. R. 77, lines 8 – 11. Because of Appellant's risk level, he was required to register every ninety days. R. 77, lines 12 – 14.

Motion for Directed Verdict

At the conclusion of the State's case, defense counsel moved for a directed verdict. R. 83, line 7 – R. 84, line 6. Counsel argued that the indictment specifically stated that Appellant failed to register as a sex offender. R. 83, lines 18 – 20. Sgt. Light admitted that Appellant was registered on July 2, 2013 and that he was not due to register again until October 2, 2013. R. 83, lines 20 – 25. Sgt. Light also agreed that Appellant was in compliance with his registration order. R. 83, line 23.

Defense counsel explained that "[b]ecause the law doesn't specify what out of the laundry list in the penalty section we're supposed to be defending against . . . the State has disproved its own case in its testimony." R. 84, lines 1 – 5. Judge Brown denied

Appellant's motion for a directed verdict. R. 84, lines 20 – 21. He noted Appellant's objection for the record but denied the motion based upon his previous ruling regarding Appellant's motion to quash the indictment.[1] Defense counsel renewed the motion for a directed verdict. R. 92, lines 13 – 16. Appellant chose to put the State to its burden of proof and did not offer a defense.

Discussion

The trial judge erred in denying Appellant's motion for a directed verdict because the indictment stated Appellant failed to register as a sex offender, but the State disproved its own case with testimony that Appellant had been in compliance with his requirements to register as a sex offender.

The United States Supreme Court has long recognized that the constitution prohibits the criminal conviction of any person unless there is proof sufficient to convince the trier of fact of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 315, 99 S.Ct. 2781, 2787 (1979) (citing In re Winship, 397 U.S. 358, 361, 90 S.Ct. 1068, 1071 (1970)). The Due Process Clause of the Fourteenth Amendment guarantees that "no person shall be made to suffer the onus of a criminal conviction except upon . . . evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. at 316, 99 S.Ct. at 2787; U.S. Const. amend. XIV, § 1.

[1] As will be seen in issue two, Judge Brown denied Appellant's motion to quash the indictment. Appellant argued that he did not receive notice of which charge he was to defend against in court because the State indicted him under S.C. Code Ann. 23-3-470, which lists the penalties for violating the preceding sections.

The South Carolina Supreme Court has acknowledged that a criminal defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Brannon, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). The State has the burden of proof as to all the essential elements of the crime. State v. Barksdale, 311 S.C. 210, 214, 428 S.E.2d 498, 501 (Ct. App. 1993). When ruling on a motion for a directed verdict, a trial court should consider the existence or non-existence of evidence. Weston, 367 S.C. at 292, 625 S.E.2d at 648. When reviewing a trial court's denial of a directed verdict, an appellate court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. Walker, 349 S.C. at 53, 562 S.E.2d at 315. A directed verdict motion is properly denied if there is direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused. State v. Lattimore, 397 S.C. 9, 12, 723 S.E.2d 589, 591 (2012); State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001).

In State v. Binnarr, 400 S.C. 156, 165, 733 S.E.2d 890, 894 (2012), the Court held the trial court violated due process in failing to direct a verdict of acquittal. In that case, Binnarr was charged with failing to re-register as a sex offender after the new biannual re-registration requirement was added to the sex offender registry statute. Id. at 164, 733 S.E.2d at 894. Detective Denise Catlett, the State's only witness in the Binnarr case, testified that she managed the Charleston County sex offender registry and mailed letters via first-class mail to all registered sex offenders in Charleston County notifying them of the change in the law. Id. at 159, 733 S.E.2d at 891. She stated that the letter mailed to Binnarr via regular mail was not returned as undeliverable. Id. at 160, 733 S.E.2d at 892. However,

a subsequent certified letter mailed to Binnarr notifying him of his failure to re-register was returned as unclaimed. Id. Detective Catlett admitted that Binnarr "may or may not have received either letter." Id.

In addition to Detective Catlett's testimony in Binnarr, the State could not produce a copy of the actual letter. Id. at 166, 733 S.E.2d at 895. The State failed to present evidence that Binnarr had actual notice of the change in law and his duty to re-register. The Court explained that due process requires notice, an opportunity to be heard in a meaningful way, and judicial review. Id. at 165, 733 S.E.2d at 894. Because the State failed to produce any evidence "from which a jury could determine that [defendant] had actual notice of the change in the law" and, thus, his duty to re-register, "the trial judge erred in failing to direct a verdict of acquittal." Id. at 168, 733 S.E.2d at 896.

Here, Appellant was indicted for failing to register as a sex offender with the Beaufort County Sheriff's Department. Specifically, the indictment reads:

> "That in Beaufort County, South Carolina, on or about September 12, 2013, the Defendant, Pernell Byas, did fail to register as a sex offender with the Beaufort County Sheriff's Department after being instructed to do so, as required by Section 23-3-400, et seq. of the Code of Laws of South Carolina, (1976, as amended)..."

R. 116 – R. 121 (Indictment).

Sgt. Light testified that Appellant had registered on July 2, 2013. R. 70, line 24 – R. 71, line 1. She admitted to being present on that day and both she and Appellant signed the registration contract. R. 71, line 24 – R. 72, line 5. On cross-examination, Sgt. Light agreed that because of his risk level, Appellant was required to register every ninety days. R. 77, lines 12 – 14. She conceded that Appellant "was in compliance as far as coming in to register." R. 77, lines 6 – 7.

The State failed to present evidence that Appellant did not register as a sex offender as required by statute. On the contrary, Sgt. Light's testimony is direct evidence that Appellant did register as required and was not due to register again until October 2, 2013. Because the State failed to present any evidence that Appellant was guilty **of the charge in the indictment**, the judge erred by failing to direct a verdict of acquittal.

ARGUMENT

II. Whether the trial judge erred in denying Appellant's motion to quash the indictment where the indictment stated Appellant did not register as a sex offender with Beaufort County but he was on trial for not updating his address.

Relevant Facts

Before trial, Appellant moved to quash the indictment because "the indictment [did] not meet the standards of notice and sufficiency that are required." R. 10, lines 14 – 16. The indictment alleged that Appellant failed to register as a sex offender with Beaufort County, but that was not the offense he was charged with committing. R. 10, lines 16 – 20. Defense counsel argued that the indictment references S.C. Code Ann. § 23-3-400, which lists numerous offenses that are violations of the sex offender registry statute. R. 10, lines 21 – 23. Counsel explained that while the offenses are all sex offender registry violations, they are specific enough to be enumerated in the indictment to alert Appellant of what charge he is called upon to answer. R. 11, lines 3 – 8.

Counsel further argued that the violation specified in the indictment references S.C. Code Ann. § 23-3-470, which lists the penalties for each violation listed in the preceding sections of the sex offender registry statute. R. 11, lines 9 – 15. Defense counsel reasoned that the indictment does not notice Appellant of the offense he was charged with, failure to change his address. R. 11, lines 21 – 23. Failure to register as a sex offender and failure to change an address involve a "different set of facts and circumstances." R. 11, lines 23 – 25.

The assistant solicitor replied that S.C. Code Ann. § 23-3-470 is not broad because subsection (a) states:

> "It is the duty of the offender to contact the sheriff in order to register and provide notification of change of permanent or a temporary address."

R. 12, line 20 – R. 13, line 6.

She informed Judge Brown that the first line of that section is why they were in court. R. 13, lines 4 – 6.

Judge Brown denied Appellant's motion to quash the indictment. R. 13, lines 21 – 22. He ruled that the indictment "more than adequately notices this defendant as to the charge he would have to meet." R. 13, lines 23 – 25. He agreed with the assistant solicitor in that subsection (a) imposed a duty on Appellant to contact the sheriff's department to register and notify of a change in permanent or temporary address. R. 13, line 25 – R. 14, line 3.

Discussion

The trial judge erred in denying Appellant's motion to quash the indictment because the indictment did not notice Appellant as to which charge he would be called upon to answer at trial.

An indictment is a notice document. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). An indictment is sufficient if "(1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged." Id. at 102-103, 610 S.E.2d 500. Therefore, the sufficiency of an indictment is "not whether it could be made more definite and certain but whether it contains the necessary elements of the offense . . . [to apprise] defendant of what he must be prepared to meet" in court. State v. Ham, 259 S.C. 118, 129, 191 S.E.2d 13, 19

(1972); State v. Walker, 366 S.C. 643, 661, 623 S.E.2d 122, 131 (Ct. App. 2005); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).

An indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime. State v. Guthrie, 352 SC 103, 107, 572 S.E.2d 309, 312 (Ct. App. 2002) (citing State v. Reddick, 348 S.C. 631, 637, 560 S.E.2d 441, 444 (Ct. App. 2002)). If phrased substantially in the language of the statute which creates and defines the offense, the indictment is ordinarily sufficient. State v. Shoemaker, 276 S.C. 86, 88, 275 S.E.2d 878, 879 (1981) (citing State v. Tabory, 262 S.C. 136, 140, 202 S.E.2d 852, 853 (1974)). When determining the sufficiency of an indictment as a whole, a court should focus primarily on the charging language in the body of the indictment. Tate v. State, 345 S.C. 577, 581, 549 S.E.2d 601, 603 (2001). However, a court may consider whether the caption or title is consistent with the charging language. State v. Means, 367 S.C. 374, 384, 626 S.E.2d 348, 354 (2006).

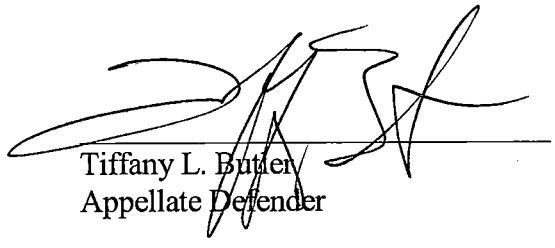
Here, Appellant was charged with failing to notify the Beaufort County Sheriff's Department of a change of address. R. 11, lines 21 – 24. Yet, the language in the body of the indictment states Appellant failed to register as a sex offender as required by S.C. Code Ann. § 23-3-400, et seq. R. 116 – R. 121 (Indictment). This statute lists several violations of the sex offender registry, which include failure to register, failure to notify of change of permanent or temporary address, AND failure to notify of change of employment or attendance at a school. S.C. Code Ann. §§ 23-3-460 (A), (C), (D), and (E) (1976). The language of the indictment also says Appellant violated S.C. Code Ann. § 23-3-470. R. 116 – R. 121 (Indictment). However, this section gives the penalties for each of the violations listed in previous sections.

Failure to notify the sheriff's department of a change in address and failure to register as a sex offender are two distinct violations of the sex offender registry. Because Appellant was charged with the former and indicted for the latter, he had no notice of what to answer to and defend against at trial. The language in the indictment was neither certain nor particular enough to apprise Appellant of which charges the State would pursue against him. There was absolutely no language included from either statute referenced in the indictment. Because Appellant did not receive notice and had no idea what to defend against in court, the trial judge should have granted Appellant's motion to quash the indictment.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court to direct a verdict of acquittal as to Issue I. In the alternative, Appellant respectfully requests this Court to reverse the trial court's ruling with respect to Issue II and remand for a new hearing.

Respectfully submitted,



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Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of April, 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 6, 2015

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