

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

Derek Dewey Lee Shawn Hutchison,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.



April 2, 2024

Court of Appeals Case No.
23A-CR-1071

Appeal from the
Madison Circuit Court

The Honorable
Scott A. Norrick, Judge

Trial Court Cause No.
48C05-2206-F6-1628

Memorandum Decision by Senior Judge Shepard
Chief Judge Altice and Judge Kenworthy concur.

Shepard, Senior Judge.

- [1] Derek Hutchison appeals his convictions of two counts of failure to register as a sex offender, challenging them as violating double jeopardy and unsupported by sufficient evidence. Concluding the convictions violate double jeopardy but the evidence is sufficient to sustain the remaining conviction, we affirm in part, reverse in part, and remand for the trial court to vacate one of the convictions.

Facts and Procedural History

- [2] In 2016, Hutchison was released from prison on charges unrelated to the cause now before us. At that time, he was required to and did register as a sex offender. At some subsequent point, he was again incarcerated.
- [3] On May 23, 2022, Hutchison was released from the Madison County Jail. He was required to re-register on the sex offender registry within seventy-two hours of his release. When Hutchison still had not registered by June 6, he was arrested. The State charged him with two counts of failure to register and alleged that he was an habitual offender. Following trial to the bench, Hutchison was convicted of both counts and was determined to be an habitual offender. The court sentenced him to concurrent thirty-month terms and enhanced one count by thirty-six months for his habitual offender adjudication. Hutchison now appeals.

Issues

Hutchison presents two issues, which we restate as:

- I. Whether his convictions of two counts of failure to register as a sex offender violate double jeopardy; and
- II. Whether there was sufficient evidence to sustain his remaining conviction.

Discussion and Decision

I. Double Jeopardy

[4] As our Supreme Court recently explained in *Wadle v. State*, there are “two principal varieties” of substantive double jeopardy claims. 151 N.E.3d 227, 247 (Ind. 2020). One arises when a single criminal act violates multiple statutes with common elements and harms one or more victims. *Id.* The present case implicates this variety because Hutchison has two convictions for failure to register as a sex offender. For its part, the State concedes that Hutchison’s two convictions violate double jeopardy principles.

[5] When evaluating such a double jeopardy claim, we begin by determining whether the statutory language “clearly permits multiple punishment, either expressly or by unmistakable implication[.]” *Id.* at 248. Here, Hutchison was convicted of Level 6 felony failure to register as a sex offender when required to do so in Count I and of Level 6 felony failure to register in person as a sex offender in Count II. Both offenses arise under Indiana Code section 11-8-8-17 (2020), and at no point does the statute clearly permit multiple punishment.

[6] Where, as here, the statutory language does not clearly permit multiple punishment, we move on to the second step of the evaluation and apply the included-offense statutes to determine statutory intent. *Wadle*, 151 N.E.3d at 248. Indiana Code section 35-38-1-6 (1983) prohibits entry of conviction and sentence for both an offense and an included offense. In Section 35-31.5-2-168 (2012), our legislature has defined an “included offense,” in relevant part, as an offense “established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged[.]” Our Supreme Court recently clarified that “courts must confine their Step 2 analysis to (1) the included-offense statute (whether the offenses are ‘inherently’ included), and (2) the face of the charging instrument (whether the offenses ‘as charged’ are factually included).” *A.W. v. State*, No. 23S-JV-40, at *12 (Ind. March 12, 2024). Stated even more succinctly, “Step 2 does **not** allow courts to examine evidence adduced at trial[.]” *Id.* at *13.

[7] Hutchison was convicted of offenses under both Sub-section 11-8-8-17(a)(1) for failing to register and Sub-section 11-8-8-17(a)(4) for failing to register in person. An offense under Sub-section (a)(1) is established by proof of less than all the material elements required to establish an offense under Sub-section (a)(4). In addition, the State alleged in the charging information for Count I that Hutchison knowingly or intentionally failed to register as a sex offender when he was required to do so and for Count II that he knowingly or intentionally failed to register in person as a sex offender when he was required to do so. Appellant’s App. Vol. II, p. 52. The charges seek to punish the same

conduct as both offenses occurred during the same required registration period in late May/early June of 2022. *See id.* Therefore, we conclude that in this case an offense under Sub-section (a)(1) (i.e., Count I) is both inherently and factually included in Sub-section (a)(4) (i.e., Count II).

[8] Having determined that Hutchison was convicted of both an offense and an included offense, we move to the third step of the evaluation to determine whether the offenses are the same. *See Wadle*, 151 N.E.3d at 248. We do this by examining the facts underlying the offenses, as presented in the charging instrument and at trial. *Id.* at 249. If the facts demonstrate two distinct crimes, there is no violation of substantive double jeopardy. *Id.* This is true even if one offense is, by definition, “included” in the other. *Id.* If, however, the facts demonstrate “the defendant’s actions were ‘so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction,’” conviction and punishment on both offenses violates substantive double jeopardy. *Id.* at 249 (quoting *Walker v. State*, 932 N.E.2d 733, 735 (Ind. Ct. App. 2010)).

[9] The facts in the charging information and the facts adduced at trial indicate a singular failure to register such that there was but a single criminal act.

[10] Thus, Hutchison’s conviction and punishment on both offenses violates substantive double jeopardy. Accordingly, his conviction on both offenses cannot stand. To remedy this issue, we affirm Hutchison’s conviction on

Count I and reverse and remand with instructions to vacate the conviction on Count II.

II. Sufficiency of the Evidence

- [11] Hutchison contends the State’s evidence is insufficient to sustain his conviction of the remaining count of failure to register as a sex offender. In reviewing such a claim, we neither reweigh the evidence nor judge the credibility of witnesses. *Sandleben v. State*, 29 N.E.3d 126, 131 (Ind. Ct. App. 2015), *trans. denied*. Instead, we consider only the evidence most favorable to the judgment and any reasonable inferences drawn therefrom. *Id.* If there is substantial evidence of probative value from which a reasonable factfinder could have found the defendant guilty beyond a reasonable doubt, the judgment will not be disturbed. *Labarr v. State*, 36 N.E.3d 501, 502 (Ind. Ct. App. 2015).
- [12] To convict Hutchison of failure to register as a sex offender, the State must have proved beyond a reasonable doubt that (1) Hutchison (2) a sex offender (3) knowingly or intentionally (4) failed to register (5) when required to do so. *See* Appellant’s App. Vol. II, p. 50; *see also* Ind. Code § 11-8-8-17(a)(1). Here, Hutchison challenges the State’s evidence that his failure was knowing or intentional.
- [13] A person engages in conduct “intentionally” if, when he engages in the conduct, it is his conscious objective to do so. Ind. Code § 35-41-2-2(a) (1977). Further, a person engages in conduct “knowingly” if, when he engages in the conduct, he is aware of a high probability that he is doing so. Ind. Code § 35-

41-2-2(b). The trier of fact may infer that conduct was knowing or intentional from the surrounding circumstances. *Wells v. State*, 555 N.E.2d 1366, 1371 (Ind. Ct. App. 1990).

[14] At trial, the court admitted Hutchison's 2016 sex offender registration paperwork that he initialed, signed, fingerprinted, and dated, acknowledging all of his duties and responsibilities under the sex offender registry. As a sex offender, Hutchison is classified as a sexually violent predator. Tr. Vol. I, pp. 89-90, 118, 128. As such, he is required to register his principal address with the Sheriff's Department in the county in which he will be residing within three days of his release from custody. Ex. Vol. I, Ex. 2, p. 8 (Sex Off. Reg'n Form ¶ 2); *see also* Ind. Code § 11-8-8-7(h)(1) (2013) (mandating sexually violent predators to register "not more than seventy-two (72) hours after" release from a penal facility).

[15] The evidence at trial indicated that after being released on May 23 in Madison County, Hutchison ended up in Marion County. State's witness Morgan Hartig, a DOC officer in Marion County, testified that Hutchison came into the lobby at her office on May 27 and asked to use the phone. She testified that she looked up his offender record and saw that he was released in Madison County on May 23, which meant he was in violation of his registration requirements at that point in time. Hutchison stated that he needed to register but had not done so.

[16] Kathleen Short, the Sex Offender Registry Administrator for the Madison County Sheriff's Department, also testified on behalf of the State. She stated that Hutchison called her on June 2. During that conversation, she explained that he was required to register in Madison County and obtain a transfer form before he would be allowed to go to Marion County and register. However, she told him that because he was already in Marion County, she would waive the transfer form requirement if he registered in Marion County. Hutchison called Short again the same day demanding that she contact Hartig to let her know he was checking himself into a clinic in Marion County. Short informed Hartig of this as Hutchison requested.

[17] Hutchison testified in his own defense. He admitted that in 2016 he was given the opportunity to read the sex offender registration paperwork but that he did not do so. He also acknowledged that the initials at the bottom of each page were his and that he received a copy of the paperwork.

[18] Hutchison then testified to what the trial court aptly termed a "series of unfortunate circumstances." Tr. Vol. I, p. 180. These circumstances included, according to Hutchison, him wandering around Anderson, stopping in at the library and the fire department, being taken by ambulance to several hospitals numerous times, and "browsing for attorneys." *Id.* at 160. He also testified that he went to the Sheriff's Department to register with Short the morning after his release, but it was 6:30 a.m. and Short had not yet arrived to work.

[19] In addition, Hutchison testified that his grandmother picked him up from one of the hospitals and offered to take him anywhere he wanted to go. He told her he wanted to go to California, but he “absolutely” had to stay in Anderson because he had “to take care of this legal requirement.” *Id.* at 163. Hutchison testified to additional circumstances that resulted in him being transported by ambulance to Indianapolis. He further testified that he called Short fifteen to twenty times, and he admitted that she advised him to register either with her or with the registry administrator in Marion County.

[20] The evidence is sufficient to establish Hutchison’s knowing or intentional failure to register. During his testimony, Hutchison told the court that he had received high scores for both his long and short-term memory. And even in the midst of all the turmoil to which Hutchison testified, he was aware of his requirement to register. He indicated his awareness of this obligation to his grandmother, and he even went to Short’s office to register. However, instead of waiting for Short to arrive as he was instructed to do by staff, he chose to leave. Again in Marion County, Hutchison admitted that he needed to register but had not done so. And, again, when Hutchison called Short, she advised him of his immediate need to register and even offered to waive the red tape for him to be able to register in Marion County. Yet, Hutchison still did not register. Thus, the State met its burden to prove beyond a reasonable doubt that Hutchison knowingly or intentionally failed to register as a sex offender when he was required to do so.

Conclusion

[21] We conclude Hutchison's convictions of two counts of failure to register as a sex offender violate double jeopardy, and one must be vacated. We also conclude there was sufficient evidence to sustain Hutchison's remaining conviction. Accordingly, we reverse in part and remand to the trial court with instructions to vacate Hutchison's conviction on Count II, and we affirm his conviction on Count I.

[22] Affirmed in part, reversed in part, and remanded with instructions.

Altice, C.J., and Kenworthy, J., concur.

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