

**IN THE COURT OF APPEALS OF IOWA**

No. 9-436 / 08-1380  
Filed July 22, 2009

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**CRAIG STUART McCULLOUGH,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Linn County, Jane F. Spande,  
District Associate Judge.

Craig McCullough appeals from his conviction for failure to comply with  
the registration requirements for sex offenders. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant  
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney  
General, Harold Denton, County Attorney, and Jason Besler, Assistant County  
Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

**MANSFIELD, J.**

Craig McCullough appeals his conviction pursuant to Iowa Code section 692A.7 (2007) for failure to comply with Iowa's sex offender registration requirements. We affirm.

**I. Factual Background**

On December 20, 2007, McCullough was convicted of indecent exposure in violation of Iowa Code section 709.9. As a consequence, he was instructed to register as a sex offender within five days, pursuant to section 692A.3. McCullough was residing at a shelter at the time, but registered sex offenders were not allowed to stay there because women and children also were housed at the shelter. In order to remain at the shelter as long as he could, McCullough waited until the fifth day before attempting to register. The sheriff's office was closed on December 25, because of the Christmas holiday, and McCullough was unable to register that day. A man at the sheriff's office told him to "come back again," and "business hours are from eight to five and you can get registered then on the second floor with the detectives." McCullough said he would be back, but never returned.

Despite some attempts to find lodging, McCullough was unable to find a place to stay. He lived homeless on the street until he was picked up by police approximately a month and a half later. During that time he never registered. As he told the court,

I figured instead of going up to the second floor and the detective bureau and blatantly lying to them and saying, "Yeah, this is my address" when I knew that would be a lie and then I would have them all mad at me because I lied to them, I figured I'd take the lesser of two evils in my mind. . . . And that's the reason why I

didn't register, to put it bluntly, because I just didn't want to lie to the detective bureau.

Despite this explanation, McCullough was convicted of failing to register in violation of Iowa Code section 692A.7 and ordered to pay a fine of \$625. McCullough now appeals his conviction.

## **II. Analysis**

There is a dispute as to the correct standard of review to be applied in this case. McCullough characterizes his argument as one of statutory interpretation or "impossibility." That is, in his view, sex offender registration is not statutorily required—or is excused because it is impossible—for homeless persons. Statutory interpretation is reviewed for errors at law, and we are not bound by the trial court's interpretation of law. *State v. McCoy*, 618 N.W.2d 324, 325 (Iowa 2000); see also *State v. Booth*, 670 N.W.2d 209, 211 (Iowa 2003).

The State, on the other hand, contends McCullough is really arguing that the evidence was insufficient to convict him. The State maintains that any issues of statutory interpretation were not preserved for appeal.

We feel it is unnecessary to resolve this dispute. Regardless of how the arguments are characterized, we conclude that McCullough was required to register, his compliance with the statute was not excused, and the evidence sufficed to convict him.

The version of chapter 692A that was in effect during the relevant time period contains a broad definition of the term "residence."<sup>1</sup> A residence "means

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<sup>1</sup> During the 2009 legislative session, the General Assembly enacted a comprehensive revision of the sex offender registration law. See S.F. 340, 83rd G.A., 1st Sess. (Iowa 2009). This case predates that revision.

the place where a person sleeps, which may include more than one location, and may be mobile or transitory, including a shelter or group home.” Iowa Code § 692A.1(8). By its terms, this definition encompasses persons who are homeless, since they have a “place where [they] sleep,” even if that place is “transitory.” See *id.* Iowa Code section 692A.3(1) in turn provides that a convicted sex offender “shall register with the sheriff of the county of the person’s residence within five days . . . .” Accordingly, pursuant to sections 692A.1(8) and 692A.3(1), McCullough had a residence in Linn County and was required to register.

McCullough argues that it was “impossible” for him to comply with the statute because, while he may have had a “residence,” he did not have an “address.” See, e.g., Iowa Code § 692A.9 (providing that registration forms shall include the registrant’s “address”). Lacking an actual mailing address, McCullough maintains that he could not complete the entire registration form. However, we believe there are two flaws in this argument. First, as we read the version of chapter 692A that was then in effect, address and residence seem to be used virtually interchangeably. See, e.g., Iowa Code §§ 692A.3(2) (stating a person required to register shall “within five days of changing residence” notify the sheriff of the “change of address”), 692A.3(3) (stating a person “within five days of changing residence to a location outside the county” shall register in the new county and include the “change of address”). Because residence is defined, and address is not, we conclude the legislature likely intended address to have the same meaning as residence. Accordingly, McCullough could have completed a registration form, disclosing his “address” as the place where he

slept. We note that offenders on the sex offender registry have given various such addresses in the past, such as a rest area, car, bridge, or tent. Department of Pub. Safety—Iowa Sex Offender Registry, <http://www.iowasexoffender.com/search.php> (updated daily).

Moreover, even if address did not mean the same thing as residence, that would not obviate McCullough's duty to register. It would simply excuse him from providing some of the information required. True "impossibility" as a defense to a criminal prosecution is a rare thing. For example, in *State v. White*, 545 N.W.2d 552, 556 (Iowa 1996), the court rejected a proposed construction of the drug tax stamp law that would allow a dealer to affix the stamps a reasonable time after receiving the taxable substance. The court noted that it is not "impossible" to buy the stamps beforehand. *White*, 545 N.W.2d at 556. Similarly, we believe it is possible for someone who has no mailing address to register. Iowa Code section 692A.9 provides that the registration form shall include the sex offender's social security number. Does this mean that a convicted sex offender who lacks a social security number does not have to register? We think not.

McCullough argues that "address" connotes a place where mail can be received, because the Iowa Department of Public Safety is required annually to mail a verification of information form to the "last reported address," and the offender is required to fill out the form, sign it, and return it by mail. See Iowa Code § 692A.4(1). We recognize that there may be circumstances where it would be difficult for state officials to make a successful mailing, but this should not excuse the sex offender's duty to register in light of the clear statutory

definition of “residence.”<sup>2</sup> To succeed on his impossibility argument, McCullough would have to show that *his* compliance with the law was impossible.

In his appeal, McCullough relies heavily on two out-of-state cases, *State v. Iverson*, 664 N.W.2d 346 (Minn. 2003), and *Twine v. State*, 910 A.2d 1132 (Md. 2006). Both the Supreme Court of Minnesota and the Maryland Court of Appeals held that their state’s sex offender registration requirements could not be applied to certain homeless persons. Those cases are distinguishable, however, because the applicable state laws did not define “residence.” Therefore, when those courts found that “residence” and “address” were being used interchangeably, they equated “residence” to “address” rather than the other way around. *Iverson*, 664 N.W.2d at 351-53; *Twine*, 910 A.2d at 1138-39. Here, by contrast, we have an express legislative directive that the sex offender registry is to include even persons whose status is “transitory.” Iowa Code § 692A.1(8).

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<sup>2</sup> As part of its comprehensive revision of the sex offender registry, the legislature has rewritten the periodic verification requirements. The new provision, now Iowa Code section 692A.108 (2009), states:

The department shall mail notification of the required appearance to each reported *residence* of the sex offender. The department shall not be required to mail notification to any sex offender if the *residence* described or listed . . . is insufficient for the delivery of mail.

(Emphasis added.) While this clarifies the State’s duties, it does not affect our view that even under the prior law, persons who had a “residence” where mail could not be delivered were required to register.

The new law also in our view clarifies, but does not change, the meaning of residence:

“Residence” means each dwelling or other place where a sex offender resides, sleeps, or habitually lives, or will reside, sleep, or habitually live, including a shelter or group home. If a sex offender does not reside, sleep, or habitually live in a fixed place, “residence” means a description of the locations where the offender is stationed regularly, including any mobile or transitory living quarters. “Residence” shall be construed to refer to the places where a sex offender resides, sleeps, habitually lives, or is stationed with regularity, regardless of whether the offender declares or characterizes such place as the residence of the offender.

Iowa Code § 692A.101(24).

Our conclusion is consistent with that of several other jurisdictions. In a similar case from North Carolina, a sex offender was convicted of violation of the registration requirements after he was evicted from his apartment, and failed to provide a new address to the authorities. *State v. Worley*, \_\_\_ S.E.2d \_\_\_, \_\_\_ (N.C. Ct. App. 2009). Notably, the North Carolina statute requires the offender to notify the authorities when he or she “changes address,” unlike Iowa Code chapter 692A, which requires notification when the offender has a “change of residence.” Compare N.C. Gen. Stat. § 14-208.9, with Iowa Code § 692A.3(2). The defendant argued he had not obtained a new “address” because he was a “drifter” and had no permanent home. The North Carolina Court of Appeals disagreed and noted:

[W]e believe that the sex offender registration statutes operate on the basis of an assumption that everyone does, at all times, have an ‘address’ of some sort, even if it is a homeless shelter, a location under a bridge or some similar place.

*Worley*, \_\_\_ S.E.2d at \_\_\_. Accordingly, the court upheld the defendant’s conviction. *Id.*; see also *State v. Winer*, 963 A.2d 89, 93 (Conn. Ct. App. 2009) (rejecting a homeless sex offender’s argument that it was impossible to register and holding that “residence address” meant the offender’s dwelling place, no matter how temporary); *Tobar v. Commonwealth*, \_\_\_ S.W.3d \_\_\_, \_\_\_ (Ky. 2009) (holding that sex offender who became homeless was statutorily required to re-register, despite his claim that he lacked an address).

Finally, requiring both sex offenders who are homeless and those who have mailing addresses to register serves the purposes of the statute—to facilitate monitoring of those offenders by law enforcement and the public. We

seriously doubt the legislature intended to exempt a group of those offenders from the registration requirements.

McCullough also raises claims that his trial counsel was constitutionally ineffective. Specifically, he contends his trial counsel should have argued that the initial registration information had to be procured by the court, and that any failure by McCullough to provide that information should have been punished as a contempt, rather than a criminal law violation. See Iowa Code §§ 692A.3(5), 692A.5(2). Generally, when claims of ineffective assistance are made on direct appeal, they will be preserved for possible postconviction relief proceedings. *State v. Cromer*, 765 N.W.2d 1, 7 (Iowa 2009). We believe preservation is the better course of action here. We, therefore, affirm McCullough's conviction and preserve the ineffective assistance of counsel claim for possible postconviction proceedings.

### **III. Conclusion.**

For the foregoing reasons, we affirm the judgment below.

**AFFIRMED.**