An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA08-479

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2009

STATE OF NORTH CAROLINA

v. Wake County
No. 07 CRS 31811

JOHN C. McLEAN,

Defendant.

Court of Appeals

Appeal by defendant from judgment entered 12 December 2007 by Judge R. Allen Baddour, Jr., in Wake County Superior Court. Heard in the Court of Appeals 22 October 2008.

Slip Opinion

Robert W. Ewing for defendant.

Attorney General Roy Cooper, by Assistant Attorney General J. Joy Strickland, for the State.

ELMORE, Judge.

John C. McLean (defendant) appeals his conviction for failure to register as a sex offender. For the reasons below, we find no error at trial, but remand for resentencing.

I.

Defendant is a sex offender required by statute to register his address with the Sheriff's Office in the county in which he resides. In early 2007, defendant's registered address was at 1501 Battery Drive; Franz Noble, who owned the house, lived upstairs, while his nephew and defendant lived in a separate apartment

downstairs. Noble found out in March or April 2007 that defendant was a convicted sex offender and that he had given the Battery Drive address as his home address. He then called the Wake County Sheriff's Department to have the address removed from defendant's record, as defendant had not lived there in two or three months.

Between 24 February and 12 April 2007, defendant spent thirty-five nights in a homeless shelter in Wake County. In May 2007, he spent at least two consecutive nights trespassing in the press box of the North Carolina State University soccer stadium, for which he was arrested. Defendant testified that during this time his belongings remained at the house on Battery Drive, but he did not spend nights there because he knew Noble did not want him in the house.

When a verification of address letter sent to the Battery Drive address was returned, an officer from the Wake County Sheriff's Office went to the address to investigate. Noble told him defendant did not live there. The officer waited ten days to see whether defendant would appear to register a change of address; when he did not, a warrant for his arrest was issued on 7 May 2007. Defendant was subsequently arrested and convicted by a jury for failure to register as a sex offender. Defendant was sentenced to fifteen to eighteen months' imprisonment. Defendant appeals his conviction and sentence.

II.

A.

Defendant first argues that the trial court erred in denying his motion to dismiss on the grounds of insufficient evidence. We disagree.

To survive a motion to dismiss, the State must have presented substantial evidence to prove each element of the crime charged.

> In considering a motion to dismiss, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. The test of whether the evidence is sufficient to withstand a motion to dismiss is whether a reasonable inference of defendant's guilt may be drawn therefrom, and the test is the same whether the evidence is direct or circumstantial.

State v. Gainey, 343 N.C. 79, 85, 468 S.E.2d 227, 231 (1996) (citation omitted). When a trial court

> consider[s] a motion to dismiss, "[i]f the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence."

State v. Alexander, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994) (quoting *State v. Smith*, 40 N.C. App. 72, 79, 252 S.E.2d 535, 540 (1979); alteration in original; emphasis omitted).

The statute defendant was charged with violating states: "If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the tenth day after the change to the sheriff of the county with whom the person had last registered." N.C. Gen. Stat. § 14-208.9(a) (2007). A person so required who fails to register

a change of address is guilty of a Class F felony. N.C. Gen. Stat. § 14-208.11(a)(2) (2007).

Despite defendant's framing of the issue as lack of substantial evidence of each element of the charge, this is not the argument he in fact made to this Court. Instead, in his brief, he argues solely that he falls under the exception to this statute outlined in N.C. Gen. Stat. § 14-208.11(c) (2007), which states:

> (c) A person who is unable to meet the registration or verification requirements of this Article shall be deemed to have complied with its requirements if:
>
> (1) The person is incarcerated in, or is in the custody of, a local, State, private, or federal correctional facility,
>
> (2) The person notifies the official in charge of the facility of their status as a person with a legal obligation or requirement under this Article and
>
> (3) The person meets the registration or verification requirements of this Article no later than 10 days after release from confinement or custody.

We disagree.

While it is true that defendant was incarcerated on the date alleged in the indictment, defendant in his brief only argues that he has fulfilled the first of these three requirements. Defendant testified at trial that he had written a letter regarding his status, but presented no evidence that sufficient notification was given to satisfy the statute. As such, we overrule this assignment of error.

B.

Next, defendant argues that the trial court erred in its instructions by failing to instruct on the offense date because the omission violated his right to due process and his right to a unanimous verdict. This argument is without merit.

Because defendant did not raise these constitutional arguments at trial, this Court cannot consider them for the first time on appeal. *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) ("It is well settled that constitutional matters that are not 'raised and passed upon' at trial will not be reviewed for the first time on appeal.").

Even were we to consider the merits of defendant's argument, however, we would find that any error that might have occurred was harmless beyond a reasonable doubt. Defendant argues that the lack of an offense date in the jury instructions violated the constitutional rights named above because the offense specifies a ten-day time limit, and thus the date from which that time begins to run must be given. Because no such date was given, he argues, the jury might have found him guilty of violating the ten-day limit at any point during the five month period discussed at trial. However, defendant admitted at trial that he spent more than fourteen days at the homeless shelter and knew that he therefore should have registered a change of address with the Sheriff's Office. As such, he in essence admitted to violating the statute at trial.

Because defendant did not properly preserve the constitutional issues for review, we dismiss these assignments of error.

C.

Finally, defendant argues that the trial court erred in its classification of defendant's prior out-of-state conviction. We agree and remand for resentencing.

Defendant's sentencing worksheet reflected a conviction in New Jersey for the crime of Possession of Drug Paraphernalia. The State argued that this conviction was substantially similar to a conviction for the crime of the same name in this state, but no evidence was presented as to that fact. Without making a finding of "substantial similarity" per N.C. Gen. Stat. § 15A-1340.14(e) (2007), the trial court found the conviction to be a Class 1 misdemeanor, counting for one point; this gave defendant a total of nine points, giving him a prior record level of four. Defendant did not object to the worksheet, and in fact stipulated to defendant's prior record level of four.

However, this Court has expressly held that such a stipulation is ineffective, as "whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law[.]" *State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006). The State concedes that this error warrants a new sentencing hearing, and we agree. We therefore remand solely for resentencing.

No trial error; remand for resentencing.

Judges HUNTER, Robert C., and GEER concur.

Report per Rule 30(e).