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NO. COA12-253
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

STATE OF NORTH CAROLINA

v.

Iredell County
Nos. 08 CRS 56760
09 CRS 1889

BOBBY RAY SMITH

Appeal by Defendant from judgment entered 28 September 2011 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 30 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General Lauren D. Tally, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Bobby Ray Smith ("Defendant") appeals from judgments convicting him of failing to register as a sex offender and having attained the status of an habitual felon. Defendant argues that the trial court lacked subject matter jurisdiction because the indictment was fatally defective in failing to identify the offense charged. We agree.

I. Factual & Procedural Background

On 1 December 2008, Defendant was indicted for two counts of failing to register as a sex offender. The first of these indictments read as follows:

THE JURORS FOR THE STATE upon their oath present that on or about the 8th day of July, 2008, and in the county named above, the defendant named above unlawfully, willfully and feloniously did, as a person required by Article 27 A of Chapter 14 of the General Statutes to register, fail to register in that the defendant had been convicted of Sex Offense-Parental Role and Indecent Liberties with a Child, did move from Catawba County on June 20, 2008 to 156 Martin Lane, Statesville, North Carolina and failed to provide registered address to the Sheriff of Iredell County within 10 days as required, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

The second indictment read:

THE JURORS FOR THE STATE upon their oath present that on or about the 4th day of August, 2008, and in the county named above, the defendant named above unlawfully, willfully and feloniously did, as a person required by Article 27A of Chapter 14 of the General Statutes to register, fail to register in that the defendant had been convicted of Sex Offense-Parental Role and Indecent Liberties with a Child, did fail to provide a written change of address to the Sheriff of Iredell County within 10 days, of his release from the Iredell County Jail. The defendant was notified by Detective C.A. Nitzu, Iredell County Sheriff's Office, to register upon his release from the Iredell County Jail and failed to do so, contrary to

the form of the statute in such case made and provided and against the peace and dignity of the State.

On 9 March 2009, Defendant was indicted for obtaining habitual felon status. A trial was held at the 26 September 2011 session of Iredell County Superior Court, the Honorable Ted Royster presiding. Prior to the receipt of the State's evidence, Defendant stipulated that he was a person required by our General Statutes to register as a sex offender. The State's evidence at trial tended to show the following.

Defendant first registered as a sex offender in Catawba County on 27 March 2000. At the time Defendant first registered, the only statutory requirement imposed upon a convicted sex offender upon a change of address was to notify the sheriff of the county where the offender had last registered. In 2007, however, a requirement was added that if the person moved to another county, the registrant also had to provide notice to the sheriff of the new county within 10 days. See An Act to Clarify the Procedure for Satellite-Based Monitoring of Sex Offenders and to Make Other Changes to the Sex Offender Laws, sec. 9A, 2007 Sess. Laws 213.

On 27 June 2008, Defendant reported to the Catawba County Sheriff's Office that he had moved to Iredell County on 20 June 2008. At that time, Catawba County's computer system

automatically sent a message to Iredell County informing them that Defendant had moved to Iredell County.

When Defendant did not report to the Iredell County Sherriff's Office within 10 days of 20 June 2008, a detective sergeant from that office issued a warrant for Defendant's arrest, and Defendant was arrested on 23 July 2008. The detective sergeant explained to Defendant after his arrest that when Defendant was released from custody, he would still be required to register with the Iredell County sheriff.

Defendant was released from custody on 25 July 2008. When Defendant failed to register within 10 days of his release, a second warrant was issued for his arrest, and Defendant was again arrested on 8 August 2008. Defendant registered with Iredell County on 11 August 2008. The offense dates listed on the indictments were 8 July 2008 (08 CRS 56310), following Defendant's original change of address, and 4 August 2008 (08 CRS 56760), following Defendant's first release from incarceration.

At trial, the trial court instructed the jury as follows:

All right, the defendant - this charge is going to apply to both counts. The defendant is charged with two counts of failing to comply with the sex offender registration law, and they were on two different dates. So the law I am going to give you now will apply to those charges.

The defendant has been charged with failing to comply with the sex offender registration law on two separate occasions. For you to find the defendant guilty of either one or both of those offenses, the State must prove three things beyond a reasonable doubt.

First, that the defendant was a resident of, or had established a residence in this state.

Second, that the defendant had previously been convicted of a reportable offense for which he must register. The defendant has stipulated to the fact that he has been convicted of the reportable offense for which he must register.

Third, the State must prove that the defendant willfully moved to a new county and failed to report in person to the sheriff of the new county and provide written notice of his address no later than the tenth day after the change of address.

After a request from Defendant, the trial court repeated this charge, changing the wording in the second sentence to reflect that Defendant was charged with "*willfully* failing to comply with the sex offender registration law." (Emphasis added.) After the jury requested a list of the specifics of the registration charges, the trial court again read the above instruction, including the word "willfully" as it had in the second reading.

On 28 September 2011, the jury found Defendant not guilty of failing to comply with sex offender registration laws on 8

July 2008 (08 CRS 56310). The jury found Defendant guilty, however, of failing to comply with sex offender registration laws on 4 August 2008 (08 CRS 56760). Defendant pled guilty to habitual felon status and was sentenced to 107-138 months imprisonment. Defendant gave oral notice of appeal at trial.

II. Jurisdiction & Standard of Review

As Defendant appeals from the final judgment of a superior court, an appeal lies of right with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

"[W]hen an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court." *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208 (2001). "[A]n indictment is fatally defective when the indictment fails on the face of the record to charge an essential element of the offense." *State v. Bartley*, 156 N.C. App. 490, 499, 577 S.E.2d 319, 324 (2003). "The sufficiency of an indictment is reviewed *de novo*." *State v. Griffin*, ___ N.C. App. ___, ___, 713 S.E.2d 185, 188 (2011).

III. Analysis

A. Validity of Indictment

Defendant argues that the indictment on the charge for which he was found guilty does not allege the statutorily

required elements of the offense charged, and thus the trial court lacked subject matter jurisdiction. We agree.

An indictment must include "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2011). "The purpose of an indictment is to provide 'sufficient detail to put the defendant on notice as to the nature of the crime charged and to bar subsequent prosecution for the same offense in violation of the prohibitions against double jeopardy.'" *State v. Ellis*, 168 N.C. App. 651, 655, 608 S.E.2d 803, 806 (2005) (citation omitted).

An indictment "must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953). "It must include all the facts necessary to meet the elements of the offense. If it does not, the trial court lacks jurisdiction over the defendant and subsequent judgments are void and must be vacated." *Ellis*, 168 N.C. App. at 655, 608 S.E.2d at 806 (internal citation omitted).

The indictment in 08 CRS 56760 lists "failing to register as a sex offender" in violation of N.C. Gen. Stat. § 14-208.11 as the offense. Defendant asserts that the indictment could implicate him under multiple subsections of N.C. Gen. Stat. § 14-208.11 and that the indictment does not clearly identify the offense.

It is clear from the transcript that the trial court instructed the jury on subsection 14-208.11(a)(7), which makes it an offense to "[f]ail[] to report in person to the sheriff's office as required by G.S. . . . 14-208.9[.]" N.C. Gen. Stat. § 14-208.11(a)(7) (2011). Section 14-208.9 requires a person who moves counties to provide written notice of a change of address to the sheriff of the new county within 10 days of the change of address. N.C. Gen. Stat. § 14-208.9(a) (2011). The issue is whether the indictment clearly charged that offense and alleged the elements necessary for guilt of that offense.

The elements of the offense are: (1) the defendant is required to register; (2) the defendant "moves to another county;" and (3) the defendant fails to report to the sheriff of the new county within 10 days of the change of address. N.C. Gen. Stat. §§ 14-208.11(a)(7) & 14-208.9(a). The indictment in the present case read as follows:

THE JURORS FOR THE STATE upon their oath present that on or about the 4th day of August, 2008, and in the county named above, the defendant named above unlawfully, willfully and feloniously did, as a person required by Article 27A of Chapter 14 of the General Statutes to register, fail to register in that the defendant had been convicted of Sex Offense-Parental Role and Indecent Liberties with a Child, did fail to provide a written change of address to the Sheriff of Iredell County within 10 days, of his release from the Iredell County Jail. The defendant was notified by Detective C.A. Nitzu, Iredell County Sheriff's Office, to register upon his release from the Iredell County Jail and failed to do so. . . .

The indictment clearly states that Defendant was required to register and that he failed to provide a written change of address to the Sheriff of Iredell County. However, the indictment does not state that Defendant had moved to another county and only states that he failed to register within 10 days of his release from jail, not that he failed to register within 10 days of his change of address. The indictment failed to allege sufficient facts necessary to establish the second and third elements of the offense.

The State claims that *State v. Harrison*, 165 N.C. App. 332, 598 S.E.2d 261 (2004) "expressly rejected" Defendant's argument. The indictment in *Harrison* read as follows:

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 20th day of March, 2002, in Mecklenburg County,

[defendant] did unlawfully, willfully and feloniously as a person required . . . to register as a sexual offender, knowingly and with the intent to violate the provisions of said Article, fail to register as a sexual offender in that *said defendant, a Mecklenburg County, North Carolina resident, changed his address and failed to provide written notice of his new address no later than ten (10) days after the change to the Sheriff's Office in the county with whom he had last registered.*

Id. at 336, 598 S.E.2d at 263 (emphasis added). The defendant argued that because the indictment did not specify his new address or the specific dates he moved, it was invalid. *Id.* at 335, 598 S.E.2d at 262. Our Court rejected that argument, finding that the indictment clearly stated the elements of the offense. *Id.* at 336, 598 S.E.2d at 263.

Harrison is easily distinguishable from the case at hand. In *Harrison*, the indictment included facts necessary to establish the three elements of the offense the defendant was charged with: (1) the defendant was required to register; (2) the defendant changed his address; and (3) the defendant failed to provide written notice within 10 days after his change of address to the last registering sheriff. *Id.* at 336, 598 S.E.2d at 263. The specific dates and address were not necessary to charge the elements.

In the present case, however, there is no language whatsoever regarding Defendant changing addresses and moving from one county to another as required for guilt of the particular offense instructed on in the present case. In addition, there is no allegation that Defendant failed to provide written notice within 10 days of the change of address, only that he did not provide written notice within 10 days of his release from incarceration. As the indictment did not allege facts necessary to establish each element of the offense, the trial court lacked jurisdiction and the judgment must be vacated.

B. Habitual Felon Conviction

As a result, we must also vacate Defendant's habitual felon conviction, as a charge for attaining habitual felon status cannot be brought on its own. The fact that a "defendant is an habitual felon is necessarily ancillary to a pending prosecution for the 'principal,' or substantive, felony. The act does not authorize a proceeding independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant's status as an habitual felon." *State v. Allen*, 292 N.C. 431, 434, 233 S.E.2d 585, 587 (1977).

Accordingly, our Courts have established that a conviction for attaining habitual felon status should be dismissed upon the

dismissal of a felony conviction to which the habitual felon status charge was attached. *See, e.g., State v. Kasheen*, ___ N.C. App. ___, ___, 729 S.E.2d 129, 129 (2012) ("Additionally, because there is no felony conviction to which the habitual felon indictment can attach, that indictment is dismissed and defendant's conviction for attaining the status of an habitual felon is also vacated."); *State v. Stevens*, 151 N.C. App. 561, 564, 566 S.E.2d 149, 151 (2002) ("[D]efendant was improperly indicted for felonious possession of drug paraphernalia and . . . his conviction should be vacated. We therefore vacate defendant's conviction for felonious possession of drug paraphernalia in 00CRS057820. There being no felony conviction to which the habitual felon indictment attaches, defendant's habitual felon conviction in 01CRS000062 is vacated."); *State v. Barnes*, 121 N.C. App. 503, 506, 466 S.E.2d 294, 296 (1996) ("[W]e vacate the felony judgment and remand the matter for entry of judgment upon a conviction of misdemeanor larceny. There being no felony conviction to which the habitual felon indictment attaches, that indictment is dismissed and the conviction vacated.").

The State claims Defendant "provides no evidence or legal authority to support his argument" that the habitual felon sentence must be vacated, and contends this argument should be

dismissed. However, Defendant quotes *State v. Allen* for the proposition that “[b]eing an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment[,]” and that therefore habitual felon status “standing alone, will not support a criminal sentence.” *Allen*, 292 N.C. at 435, 233 S.E.2d at 588. While Defendant’s argument with respect to this issue may not be extensive, it is certainly sufficient. Moreover, it “does not prevent this Court or the litigants from a full understanding of the issues at hand, nor does it obstruct the process of this appeal.” *State v. Burke*, 185 N.C. App. 115, 118, 648 S.E.2d 256, 258 (2007). Accordingly, the State’s argument that Defendant has failed to adequately raise this issue on appeal is overruled.

IV. Conclusion

For the foregoing reasons, we

VACATE.

Judges ERVIN and MCCULLOUGH concur.

Report per Rule 30(e).