

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Charleston County
Hon. Thomas W. Cooper, Circuit Court Judge

The State,

Respondent,

v.

Zeb Eron Binnarr,

Petitioner.

Opinion No. 2010-UP-077 (S.C. Ct. App. filed February 2, 2010)

BRIEF OF RESPONDENT

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STATEMENT OF QUESTIONS PRESENTED

The Court of Appeals correctly concluded the amendment to section 23-3-460 of the South Carolina Code did not violate Petitioner's due process rights. The State presented ample evidence Petitioner knew or should have known of the amended registration requirements. Further, any argument is not preserved because the issue differs from the issue raised at trial.

STATEMENT OF THE CASE

Procedural History

In 2002, Petitioner was convicted of criminal sexual conduct in the third degree, which requires him to register as a sex offender. On August 18, 2006, the Charleston County Grand Jury indicted Petitioner for failing to register as a sex offender. The case proceeded to trial before a jury and the Honorable Thomas W. Cooper on October 2 and 3, 2007. The jury found Petitioner guilty as indicted and the court sentenced him to ninety days incarceration, which was deferred for nine days to allow Petitioner to seek an appeal bond.

The Court of Appeals affirmed his conviction and sentence. State v. Binnarr, Op. No. 2010-UP-077 (filed February 2, 2010). Petitioner filed a Petition for Rehearing and Rehearing *en banc*, which was denied March 18, 2010. Petitioner filed a Petition for Writ of Certiorari, which this Court granted.

Factual Background

Prior to trial, Petitioner stipulated to the fact he was required to register as a sex offender due to a 2002 conviction. (App.5-7). Additionally, he conceded he did not register in August 2006. (App. 64).

At trial, the State presented the testimony of Detective Denise Catlett, the detective in charge of the sex offender registry for the Charleston County Sheriff's Office. (App. 9). She stated she did not have a duty to notify offenders of the new bi-annual registration, but as a courtesy she sent out letters informing offenders of the new requirement. (App. 16). She testified Petitioner was sent a letter by regular mail to the last address listed with the sex offender registry. (App. 10; 13-14; 16-17). She testified that when he failed to register in August as required, she sent a letter by certified mail noting the new registration requirement.

(App. 17-18; 21-22). The letter was never picked up by Petitioner after three attempted deliveries by the Postal Service. (App. 18; 22). Despite the letters, Petitioner did not register until March 2007. (App. 20-21; 28).

After Catlett's testimony, Petitioner moved for a directed verdict arguing the State failed to prove he had notice of the new registration requirement. Petitioner maintained the State had to prove he had actual knowledge of the bi-annual registration requirement or the probability of knowledge prior to his failure to comply. (App. 35-43).

The State maintained there was no notification requirement in the statute and any notification attempt was a courtesy of the Sheriff's Office. The State argued the Sheriff's Office attempted notification through regular mail and certified mail. The State asserted Petitioner had knowledge or should have had knowledge of the new bi-annual registration requirement. (App. 44- 47).

The trial court denied the motion for a directed verdict. (App. 55). After Petitioner testified, he did not renew his directed verdict motion. (App. 69-83). The trial court charged the jury as anticipated based on the language in Lambert v. California, 355 U.S. 225 (1957). (App. 147-149). The jury found Petitioner guilty of failing to register as a sex offender, and the trial court sentenced Petitioner to the mandatory ninety days incarceration. (App. 160; 171-172).

ARGUMENT

The Court of Appeals correctly concluded the amendment to section 23-3-460 of the South Carolina Code did not violate Petitioner's due process rights. The State presented ample evidence Petitioner knew or should have known of the amended registration requirements. Further, any argument is not preserved because the issue differs from the issue raised at trial.

Petitioner contends the Court of Appeals erred in affirming his conviction and sentence because fundamental fairness dictates he receive actual notice of the new registration requirement before he could be convicted of failing to register. First, the issue is not preserved for review because he did not raise fundamental fairness or due process at trial. Additionally, the Court of Appeals correctly found the amended registration requirement did not violate Petitioner's due process rights. Finally, the Court of Appeals correctly held Petitioner had notice of the new registration requirements.

Preservation

At trial, Petitioner's counsel argued notice was required by Lambert v. California, 355 U.S. 225 (1957). Specifically, he maintained because it was a registration statute he was entitled to notice and the State had to "prove actual knowledge or the probability of knowledge." (App. 35-38). Petitioner raised a different theory based on due process before the Court of Appeals. He maintained the notice requirements of section 23-3-440 of the South Carolina Code should apply to 23-3-460 of the South Carolina Code. He further asserted the trial court erred in failing to find the failure to provide notice violated he due process rights.

Now, Petitioner argues "the doctrines of Due Process and Equal Protection" require his conviction be reversed. Petitioner has raised different, though admittedly similar,

arguments at each stage, and as a result, the issue is not preserved for review. See State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (issue not preserved if defendant argues one ground for objection at trial and a different ground on appeal). Further, any consideration of a violation of equal protection is clearly not preserved as this issue has never before been raised.

Merits

Petitioner's argument at trial was the State had to prove "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply" before a conviction under a general criminal registration act can stand. Lambert v. California, 355 U.S. 225, 229 (1957). The trial court in this case charged the jury with that exact requirement. (App.147-148). As a result, the trial court did not err in failing to require notice or knowledge because the trial court specifically placed the burden of proof upon the State to show Petitioner had knowledge or the probability of knowledge as required by the United States Supreme Court in Lambert.

Further, if the court considers the due process argument, the issue is also without merit. "A criminal conviction violates due process if, at the time of the conduct which forms the basis of the conviction, the defendant did not have fair notice that the conduct was criminal." State v. Edwards, 302 S.C. 492, 494, 397 S.E.2d 88, 89 (1990). In Edwards, the South Carolina Supreme Court considered whether a 1988 amendment to the DUI laws, which extended from five to ten years the time period in which prior DUI convictions may be considered in determining the penalty for a subsequent DUI conviction, violated Edwards' due process rights because he did not have notice. Id. at 493-494, 397 S.E.2d at 89. The court concluded: "Because the current offense took place after the effective date of the

amendment, appellant clearly had notice that his 1983 conviction would be considered in determining his punishment for the current offense. Therefore, appellant's due process rights have not been violated." Id. at 494, 397 S.E.2d at 89-90.

As in Edwards, Petitioner's conduct in the instant case took place in August after the amendment to section 23-3-460 became effective in July. Petitioner, therefore, clearly had notice of the bi-annual requirement and his due process rights were not violated. The Court of Appeals correctly relied on the precedent of Edwards, and this Court should affirm the opinion.

Finally, even if notification was required, the evidence presented at the trial amply supported the jury's finding Petitioner had actual knowledge, or the probability of actual knowledge, as required by Lambert. Further, the notice he received was sufficient to ensure the fundamental fairness of Petitioner's conviction. Petitioner's Brief maintains he should have been "given a reasonable time to learn of the change in the law" and "[i]f [registration] were important enough to see petitioner earlier than the anniversary of his written notice, the Sheriff's Department could have phoned or otherwise contacted Petitioner." Petitioner conveniently omits the fact the Sheriff's Department went above and beyond the requirements of the law and sent notices, including by certified mail, to Petitioner's last known address--the address he had on file with the sex offender registry and was required to keep current under section 23-3-460(B) (Supp. 2007).

At trial, Denise Catlett, the detective responsible for the sex offender registry for the Charleston County Sheriff's Office, testified regarding the attempts to provide a courtesy notification to Petitioner. She stated she mailed a letter by regular mail to Petitioner indicating the new requirement of bi-annual registration, including the fact he was required

to register in August under the new law. She testified the letter was sent to his last known address on file with the sex offender registry and was never returned.¹ (App.16-17).

Additionally, Catlett mailed a certified letter to Petitioner's last known address as listed with the sex offender registry. The postal service attempted delivery on three different occasions and the certified letter was never picked up by Petitioner from the post office. (App. 17-18; 21-22). Catlett also indicated she did not sign a warrant against Petitioner for failing to register until January 2007, even though he was required to register in August 2006. (App. 21). Petitioner did not attempt to register until March 2007. (App. 28).

Accordingly, even if notice to Petitioner was required, the Sheriff's office complied with the notification requirements of Lambert, the State properly proved Petitioner either had actual knowledge or the probability of actual knowledge of the registration requirement due to the letters mailed to the address on record with the sex offender registry, and the fundamental fairness of Petitioner's trial and conviction was guaranteed. Therefore, the Court of Appeals correctly found Petitioner had the required notice and his due process rights were not violated.

¹Again, the State notes it is Petitioner's responsibility to ensure a current address is on record with the sex offender registry. See S.C. Code Ann. § 23-3-460(B) (Supp. 2007).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be affirmed.

Respectfully submitted,

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September 22, 2011

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PROOF OF SERVICE

I, ELLEN DuBOIS, certify that I have served the within Brief of Respondent on Petitioner by depositing three copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 22nd day of September, 2011.



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