Reverse and Remand; Opinion Filed February 26, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00146-CR

DADRIAN MONTREZ MCCLAIN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 354th Judicial District Court
Hunt County, Texas
Trial Court Cause No. 31862

MEMORANDUM OPINION

Before Justices Bridges, Partida-Kipness, and Pedersen, III
Opinion by Justice Pedersen, III

Appellant Dadrian Montrez McClain appeals the revocation of his community supervision. Appellant first asserts that the trial court abused its discretion in finding that he violated the terms of his community supervision by failing to comply with the sex offender registration requirement that he report a change of address on or about May 25, 2018. He also complains that because of the actions of the Greenville Police Department, his failure to register was involuntary. We reverse the trial court's judgment and remand for further proceedings in accordance with this opinion.

Background

Appellant pled guilty to aggravated sexual assault of a child. Pursuant to a plea agreement, the trial court deferred adjudication of guilt, placed appellant on ten years' community supervision, and assessed a $500 fine. The order of deferred adjudication mandated that appellant register as a

sex offender for life. He was also required to serve 180 days in jail. Appellant was released from the Hunt County jail on Saturday, May 19, 2018.

The following Monday, May 21, appellant reported to Derrick Bercher, a probation officer for the Hunt County Community Supervision and Correction Department, who instructed him to report to Lieutenant C.J. Crawford at the Greenville Police Department and register as a sex offender. Amber Madden, also a probation officer for the Hunt County Community Supervision and Correction Department, confirmed that appellant followed Bercher's instructions and reported to the Greenville Police Department to register the same day—Monday, May 21. When Madden called the Greenville Police Department to see if appellant had registered with Lieutenant Crawford, she spoke with Sergeant Huddleston. Sergeant Huddleston confirmed that appellant had attempted to register but was not allowed to do so because he did not have an appointment. The records clerk gave appellant one of Sergeant Huddleston's business cards and told appellant to call for an appointment. When Madden talked to Sergeant Huddleston on the telephone, he gave her an appointment date and time for appellant to register.

Probation officer Bercher told appellant to return the following day to meet with probation officer Madden. On Tuesday, May 22, appellant reported to Madden as instructed. Madden told appellant to report to Sergeant Huddleston at the Greenville Police Department to register as a sex offender. She also told him that Sergeant Huddleston would meet with him on Friday, May 25, between the hours of 1:00 and 4:00 p.m. Madden testified that appellant already had Sergeant Huddleston's business card so Madden wrote the appointment date and time on Sergeant Huddleston's card. She also gave appellant her own business card and wrote his next probation appointment on her card—June 1, 2018, at 10:00 a.m. She explained that she did this so appellant would not confuse his meeting with Sergeant Huddleston with his next meeting with her.

Glenda Osborne, records supervisor for the Greenville Police Department, testified that sex-offender registration for Greenville, Texas is handled by three Greenville Police Department officers—Lieutenant C.J. Crawford, Sergeant Aaron Huddleston, and Detective Russell Stillwagoner. If a person comes in to register without an appointment and one of the three officers is not available, records personnel give the registrant a business card with an officer's name and phone number and tell the registrant to call for an appointment. Ms. Osborne stated that they do not keep records of people who come in to try to meet with the officers without an appointment. However, she remembered that appellant came to the police department on two occasions. Each time, appellant was told to call and make an appointment. She testified that to her knowledge, he never called.

Sergeant Huddleston testified that appellant was given an appointment—Friday, May 25, 2018, between 1:00 and 4:00 p.m.—to come to the Greenville Police Department to register. He further testified that appellant did not show up for the appointment. Sergeant Huddleston confirmed that appellant had seven days, or until May 26, 2018, within which to register his address change. However, the 26th was a Saturday, and none of the registrar officers work on the weekend.

On cross examination, defense counsel asked Sergeant Huddleston if appellant had attempted to reach him prior to May 25. Sergeant Huddleston replied that there had been some voice mail messages. The record indicates that at some point after appellant's missed appointment on May 25, Sergeant Huddleston called appellant's mother and instructed her to have appellant come to the Greenville Police Department on June 1, 2018.

Appellant testified at the revocation hearing. He described going to the Greenville Police Department and attempting to register several times. He said the women at the records window told him not to come back without an appointment or unless he spoke to Sergeant Huddleston

directly. He testified that he called Sergeant Huddleston three or four times but Huddleston never answered his telephone.

The State filed an amended motion to revoke deferred adjudication community supervision, alleging in a single violation that appellant "on or about the 25th day of May, 2018 in the County of Hunt, State of Texas, did commit the offense of Fail to Comply with Sex Offender Registration." Appellant pled not true to the allegation. However, following a hearing, the trial court found that appellant had violated his probation, adjudicated him guilty of the underlying offense, and sentenced him to life in prison. Appellant now appeals.

Discussion

Appellant raises two issues on appeal. He first contends that the trial court abused its discretion in finding that he violated the terms of his community supervision by failing to comply with the sex-offender registration requirement. He argues that the State did not provide any evidence that appellant had a duty to take any further action with regard to Chapter 62 on or about May 25, 2018, as alleged in their motion to revoke deferred adjudication. He contends his address did not change so he had no duty to report an address change. He also urges that, even if he had a duty to report an address change, the seven-day deadline within which to report was not May 25, 2018. In his second issue, appellant contends that his failure to register was an involuntary omission because the Greenville Police Department "stonewalled and rebuffed" his efforts to register.

A. Standard of Review

We review a trial court's decision to revoke a defendant's community supervision for abuse of discretion. *Leonard v. State*, 385 S.W.3d 570, 576 (Tex. Crim. App. 2012). "[T]he trial court has discretion to revoke community supervision when a preponderance of the evidence supports one of the State's allegations that the defendant violated a condition of his community

supervision." *Id.*; *see also Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006). Defendants are not entitled to community supervision as a matter of right. However, once a defendant is assessed community supervision in lieu of other punishment, this conditional liberty "should not be arbitrarily withdrawn by the court." *Leonard*, 385 S.W.3d at 576. Accordingly, in considering appeals from a trial court's decision to revoke, appellate courts review the record only to ensure that the trial court did not abuse its discretion. *Id.*

Under the "preponderance of the evidence" standard, the State must prove that the greater weight of the credible evidence creates a reasonable belief that the defendant violated a condition of his community supervision. *See Hacker v. State*, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013) (quoting *Rickels*, 202 S.W.3d at 764). The trial court is the trier of fact and the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Id.*

A single violation of a probation condition is sufficient to support a trial court's decision revoking probation. *See Garcia v. State*, 387 S.W.3d 20, 26 (Tex. Crim. App. 2012). However, if the State fails to meet its burden of proof, the trial court abuses its discretion by revoking the community supervision. *Cardona v. State*, 665 S.W.2d 492, 493–94 (Tex. Crim. App. 1984).

B. Appellant's Duty to Register

The State's motion to revoke deferred adjudication community supervision alleges that McClain violated the conditions of his community supervision by failing to comply with sex offender registration on or about the 25th day of May, 2018. At the revocation hearing, the State urged that appellant failed to comply with registration requirements because he did not properly register a change of address within seven days of being discharged from the Hunt County jail.

Chapter 62 of the Texas Code of Criminal Procedure defines the scope of the sex offender registration program and delineates the legal duties of those who administer it, and of those who are subject to its requirements. *See generally* TEX. CODE CRIM. PROC. ANN. art. 62.001–.408. A

person commits the offense of failure to comply with registration requirements if the person (1) is required to register; and (2) fails to comply with any registration requirement of chapter 62. *Id*. art. 62.102(a); *Crabtree v. State*, 389 S.W.3d 820, 825 (Tex. Crim. App. 2012). When a person required to register changes his or her address, chapter 62 mandates:

> If a person required to register changes address, the person shall, not later than the later of the seventh day after changing the address or the first date the applicable local law enforcement authority by policy allows the person to report, report in person to the local law enforcement authority in the municipality or county in which the person's new residence is located and provide the authority with proof of identity and proof of residence.

TEX. CODE CRIM. PROC. ANN. art. 62.055(a).

Appellant does not dispute that he is required to register as a sex offender, and he does not dispute that he knew he had to register any change of address within seven days. Instead, he argues that because his address did not change, his failure to register a change of address with the Greenville Police Department did not violate the terms of his community supervision. He contends that his initial registration [while in jail] indicated that he was homeless.[1] Upon release from jail, he was unable to establish a residency in Greenville and thus, was still homeless when he was arrested on June 1, 2018. According to appellant, his initial registration was accurate, and he did not change his address; therefore, he had no duty to register a change of address.

The evidence in the record appears to support, for the most part, appellant's assertion that he was homeless. At the revocation hearing, Theresa Duckworth testified that she registers sex offenders for the Hunt County Sheriff's Office, Criminal Investigative Division. She explained that any sex offender living in Hunt County, but outside of city limits, is required to register with the county. Duckworth stated that she met with appellant while he was in the Hunt County jail, she explained his duty to register, and she helped him fill out the registration form. This was

[1] There are two boxes on the Sex Offender Registration Program Registration Form where a registrant is asked to provide the address or description of the geographical location where the person intends to reside. On McClain's form, the word "unknown" is handwritten in both boxes.

appellant's initial registration to get him into the sex offender registry system for the State of Texas. Once his registration form was completed, the information was submitted to Austin. Duckworth testified that when she asked appellant where he was going to reside after he was released from jail, he said he did not know. Accordingly, appellant's registration form reflects that his address is "unknown." Duckworth confirmed that appellant was notified that upon release, he had seven days to appear at a law enforcement agency and register his address. She also confirmed that upon being released from jail, appellant did not register a change of address with Hunt County.

Probation officer Madden also participated in the meeting at the Hunt County jail. Madden testified that appellant told her that upon release from jail, he planned to live at an address on Industrial Boulevard in Greenville, Texas. Madden informed appellant that he was not allowed to live at the Industrial Boulevard address upon his release from jail. She explained that the complainant lived at the Industrial Boulevard address and, as a condition of his probation, appellant was prohibited from being anywhere near the complainant.

Appellant was released from jail on Saturday, May 19. Two days later, on Monday, May 21, he met with probation officer Bercher. Bercher testified that appellant told him that he lived at his stepfather's residence on Washington Street in Greenville, Texas. On cross examination, Bercher stated that he did not know whether appellant was actually able to establish residency in Greenville, Texas. Bercher also stated that the following day, appellant came back to his office and reported a possible residence in Tarrant County.

On Tuesday, May 22, appellant met again with Madden. Appellant told Madden that none of his family members would allow him to live with them. She testified that it was her understanding that appellant was homeless. Indeed, when appellant was arrested on June 1, 2018, the Warrant Advice Form listed him as homeless.

The record reflects that appellant was notified by several people that he had to register a change of address within seven days. However, none of the witnesses testified that they explained to appellant that merely being released from jail meant that his address had changed. When Duckworth and Madden assisted appellant with his initial registration form, his address was listed as "unknown." None of the witnesses testified that they told appellant that he had to register an address change if his address remained "unknown." There is no evidence that appellant was instructed that he had to register within seven days if he was homeless and had not established a residency. During the revocation hearing, several of the witnesses suggested that there is a procedure for registering homeless sex offenders. However, none of the witnesses testified that appellant was informed of this procedure.

Article 62.102(a) is silent with respect to a culpable mental state. *See* TEX. CODE CRIM. PROC. ANN. art. 62.102(a). However, "[i]f the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element." TEX. PENAL CODE ANN. § 6.02(b). Because article 62.102(a) does not contain a culpable mental state and does not clearly dispense with one, section 6.02(c) requires that article 62.102(a) be read to require intent, knowledge, or recklessness to establish criminal responsibility. *Id*. § 6.02(c). The court of criminal appeals has concluded that the offense of failing to comply with chapter 62 registration requirements is a "circumstances-of-conduct" type of offense, and the gravamen of the offense is the duty to register. *Robinson v. State*, 466 S.W.3d 166, 170–71 (Tex. Crim. App. 2015). "The 'circumstance' at issue is the duty to register and the culpable mental state of 'knowledge and recklessness' applies only to the duty-to-register element, rather than the failure-to-comply element." *Febus v. State*, 542 S.W.3d 568, 573 (Tex. Crim. App. 2018) (citing *Robinson*, 466 S.W.3d at 172).

In a prosecution for failure to register as a sex offender, it is sufficient if the State proves the defendant's awareness of the registration requirements, and they need not prove an additional culpable mental state regarding his failure to comply. *Id*. Here, based on our review of the record, we are not convinced that the State met its burden of proving that appellant knew he had a duty to register. The address on appellant's initial registration had not changed—he was still homeless and his address was still "unknown." If the State did not prove that appellant knew he had a duty to register, we must conclude that the trial court abused its discretion by revoking appellant's community supervision. *See Cardona*, 665 S.W.2d at 493–94. Accordingly, we sustain appellant's first issue.

B. Appellant's Attempts to Register

Even if appellant knew he had a duty to register, his failure to do so must be voluntary. TEX. PENAL CODE § 6.01(a) ("A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession."). In his second issue, appellant asserts that if he had a duty to report a change of address to the Greenville Police Department, he was "stonewalled and rebuffed" to such a degree that he was unable to register within seven days. He acknowledges that "failure to comply" can be characterized as a strict liability crime. However, citing *Robinson v. State*, 466 S.W.3d 166 (Tex. Crim. App. 2015) and *Febus v. State*, 542 S.W.3d 568 (Tex. Crim. App. 2018), appellant contends there is still a requirement that the State prove that the failure to comply was a voluntary omission. In *Febus*, the Texas Court of Criminal Appeals stated: "when authorities rebuff attempts to register, the sex offender may not be criminally liable on the basis that his failure to register was involuntary." *Febus*, 542 S.W.3d at 573 (citing *Robinson*, 466 S.W.3d at 174 (Keller, P.J., concurring)). The *Febus* court noted: "[t]hough this rationale was not explicitly incorporated into the majority opinion in *Robinson*, we find the reasoning persuasive and incorporate it into the holding in this case." *Id*.

As discussed above, appellant was released from jail on Saturday, May 19, 2018. Over a five day period, appellant reported to two different probation officers who told him to report to two different police officers. Appellant reported to the Greenville Police Department on two different occasions, attempting to follow the instructions he was given by the probation officers. However, police department records personnel told appellant that he could not register without an appointment. They gave him Sergeant Huddleston's business card and told him to call for an appointment. Appellant called Sergeant Huddleston three or four times and left voice mail messages but Sergeant Huddleston never answered his phone and never called him back.

It is undisputed that appellant did not meet with Sergeant Huddleston on Friday, May 25, 2018, between the hours of 1 p.m. and 4 p.m. Appellant testified that he tried to register on May 25th but was told that Sergeant Huddleston was not available. However, appellant did not testify, and we cannot determine from the record, whether appellant made this registration attempt at the appointment time he had been given.

The three officers who handle registration do not work on the weekends so appellant could not register on Saturday, May 26 or Sunday, May 27.[2] The State points out that appellant did not attempt to register on May 28, 29, 30, or 31. However, at some point after the missed appointment on May 25, Sergeant Huddleston called appellant's mother and told her that appellant should come to the police department on June 1. During his testimony, Sergeant Huddleston did not reveal the reason he gave to appellant's mother for requesting that appellant come to the Greenville Police Department on June 1. On cross-examination, he stated:

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[2] Appellant also argues that the fact that he did not register an address change on or about May 25, 2018—as set forth in the State's motion to revoke—was not evidence that he had violated a condition of his community supervision because the seven-day registration deadline did not expire until Saturday, May 26, 2018. Appellant argues that because the State failed to prove by a preponderance of the evidence that he was not in compliance with Chapter 62 on May 25, 2018, any finding to the contrary is an abuse of discretion. However, the defective date in the State's motion to revoke was not fatal error. The record contains the State's original motion to revoke in which the State alleged that appellant committed the offense of failure to comply with sex offender registration requirements on or about June 1, 2018. The record also contains the State's amended motion to revoke, alleging that appellant committed the offense of failure to comply with sex offender registration requirements on or about May 25, 2018. Although neither of the State's motions stated the correct date by which appellant was to register an address change, we conclude that the defective date in the motion and the resulting proof variance did not mislead or surprise appellant as he prepared and presented his defense. *See Pierce v. State*, 113 S.W.3d 431, 438 (Tex. App.—Texarkana 2003, pet. ref'd). Appellant had sufficient notice of the condition of his probation that he was alleged to have violated. *Id*.

Defense Counsel: Okay. But you told his mom to have him come, so he could register, correct?

Sergeant Huddleston: I can't recall exact wording, but I told his mother to have him come in. Yes.

Defense Counsel: Okay. And you didn't make any attempt to register him with the Greenville Police Department on June 1st , did you?

Sergeant Huddleston: No.

Appellant seemed to think that his registration appointment had been changed by Sergeant Huddleston. He testified that he went to the Greenville Police Department on June 1st to register. However, when appellant complied with Sergeant Huddleston's instructions and appeared at the Greenville Police Department on June 1, he was arrested for failing to register as a sex offender.

It is clear from the record that appellant made several attempts to register in accordance with conflicting instructions given to him by probation officers and police department personnel. It is also clear from the record that appellant's attempts to register were frustrated by the Greenville Police Department personnel. "If authorities rebuff a sex-offender's repeated attempts to register, the sex offender may be able to claim an exemption from or defense to criminal liability on the basis that his failure to act was involuntary. The Penal Code provides that an omission that gives rise to criminal liability must be voluntary." *Robinson*, 466 S.W.3d at 174 (Keller, P.J., concurring) (citing TEX. PENAL CODE § 6.01(a)). Based on this record, we conclude that appellant's failure to register was involuntary. We sustain appellant's second issue.

CONCLUSION

Having sustained both of appellant's issues, we conclude that the trial court abused its discretion by revoking appellant's community supervision. The trial court's judgment adjudicating guilt and revoking community supervision is reversed. This case is remanded to the trial court for further proceedings consistent with this opinion.

/Bill Pedersen, III//

BILL PEDERSEN, III
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DADRIAN MONTREZ MCCLAIN, Appellant No. 05-19-00146-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the 354th Judicial District Court, Hunt County, Texas Trial Court Cause No. 31862. Opinion delivered by Justice Pedersen, III. Justices Bridges and Partida-Kipness participating.

Based on the Court's opinion of this date, the judgment of the trial court is **REVERSED** and the cause **REMANDED** for further proceedings consistent with this opinion.

Judgment entered this 26th day of February, 2020.