



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DYSHEE PIERRE)
Defendant-Below,)
Appellant,)
)
v.)
)
STATE OF DELAWARE)
)
Plaintiff-Below,)
Appellee.)

No. 254, 2019

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

In June 2005, Dyshee Pierre was convicted of the misdemeanor offense of Unlawful Sexual Contact Third and he was ordered to register as a low risk, Tier 1 Sex Offender.¹ As part of his registration requirements, he is to register one time each year and each time there is a change to his registry information such as his place of employment.² Just over 13 years later, on February 4, 2019, the State indicted Pierre on the felony of Failure to Properly Report as a Registered Sex Offender for purportedly “failing to provide adequate verification of his place of employment” within 3 days of changing his “place of employment.”³ According to the State, when he went to the State Bureau of Investigation to report various changes in October 2018, he provided incorrect information about his place of employment.

Pierre had a bench trial in May 2019 and the judge found him guilty.⁴ She later sentenced him to 1 year in prison suspended for probation.⁵ Pierre filed a timely Notice of Appeal. This is his Opening Brief in support of that appeal.

¹ A56.

² 11 *Del.C.* §§4120 (f) (1) & (g) (3).

³ A5.

⁴ A29-30.

⁵ *See* May 16, 2019 Sentence Order, attached as Exhibit A.

SUMMARY OF THE ARGUMENT

1. Pierre's conviction was based on the State's allegation in the indictment that he knowingly or recklessly failed "to provide adequate verification of his place of employment... within 3 days of the change of [his]...place of employment[.]" However, Delaware's sex offender registration statute, 11 *Del.C.* §4120, creates no duty to provide adequate verification of place of employment when registering due to a change in place of employment. Thus, the indictment "is fatally defective because it does not allege a criminal offense"⁶ and Pierre's criminal conviction is void.

2. Assuming, *arguendo*, Pierre was required to provide "adequate verification" of his place of employment, the State failed to present sufficient evidence to warrant his conviction of Failure to Properly Report as a Registered Sex Offender. The State failed to contradict the evidence in the record that, on the alleged dates, Pierre's place of employment was as he represented on his registration forms. Nor did the State present evidence that this registration was done more than three business days after he changed his place of employment. Further, the State made no argument that when Pierre performed his duty to register, pursuant to § 4120 (f) (1), that he either knew his verification was inadequate or that he was reckless in regard to providing inadequate verification. Thus, his conviction must be reversed.

⁶ *People v. Kayer*, 988 N.E.2d 1097 (Il.App.3 Dist. 2013).

STATEMENT OF FACTS

From about April of 2016 until some point in January of 2018, Dyshee Pierre was a truck driver who made deliveries for Mawuli Logistics.⁷ Anthony Sorkpah, owner of Mawuli, testified at Pierre's bench trial, on behalf of the State, that the company's truck drivers all possess commercial driver's licenses and are independent contractors.⁸ There are no full-time drivers with set working schedules.⁹ Sorkpah explained that, to obtain work, the drivers call or text him. If there is a job available,¹⁰ Sorkpah assigns it to the driver¹¹ who then gets paid at the end of the week in which the job is performed so long as he returns the bill of lading that establishes the delivery has been made.¹²

Since Mawuli's drivers are independent contractors, they are not required to work every week. They are permitted to pick and choose when they want to contact Sorkpah for work. Of course, that means that the driver does not get a paycheck for a week he chooses not to work. Sorkpah's testimony confirmed that when Pierre drove for the company, he was, in fact, an independent contractor and that the process for Pierre to obtain work and get paid at Mawuli was as Sorkpah had

⁷ A15, 16, 60. There were a couple of breaks in his employment in this period of time. A17.

⁸ A14-16.

⁹ A17.

¹⁰ A17.

¹¹ A18.

¹² A17.

described. Sorkpah also explained that he verbally informed Pierre in January of 2018 the he no longer wanted him to drive for the company.¹³

According to both Pierre and Sorkpah, Pierre contacted Sorkpah several months later and asked if he could again drive for Mawuli.¹⁴ Sorkpah testified that he told Pierre, “okay, come into my office and we [sic] see what we can do.”¹⁵ Pierre testified that he and Sorkpah continued discussions until sometime near the end of September.¹⁶ He said that Sorkpah checked his “new MVR record” and his license and made sure he was “compliant to work.”¹⁷ Pierre also told the judge that Sorkpah assigned a truck to him from the company’s fleet which he then took for a test drive. Because he identified mechanical problems as a result, he had to wait before accepting any delivery jobs.¹⁸ Thus, it was Pierre’s understanding, at least by October 2, 2018, that he was again employed as an independent contractor to drive for Mawuli. The State presented no evidence at trial through Sorkpah or any other source that disputed Pierre’s testimony.

About 13 years earlier, on June 29, 2005, Pierre was convicted of the misdemeanor offense of Unlawful Sexual Contact Third and was ordered to register

¹³ A20.

¹⁴ A17, 20.

¹⁵ A17.

¹⁶ A20.

¹⁷ A21.

¹⁸ A21.

as a low risk, Tier 1 Sex Offender.¹⁹ As part of his registration requirements, he is to register one time each year and each time there is a change to his registry information such as his residence, place of employment or any vehicles he is operating.²⁰ His most recent annual registration was completed on June 8, 2018 and accurately reflected that he was not driving for Mawuli at that time.²¹ However, based on changes to various registry information, Pierre went to one of Delaware's State Bureau of Investigation (SBI) offices in October 2018 to fulfill his duty pursuant to 11 *Del.C.* §4120 (f) (1) to reregister.

On October 2, 2018, Pierre reported various changes. He reported that his place of employment was Mawuli Logistics, the company for which he had previously worked. He also reported the information on Mawuli's fleet vehicle that he would be driving and he updated his address to 181 Holmes Street in Dover, Delaware.²²

On October 15, 2018, Pierre registered to report another change in his residence. This time, he identified two addresses in Wilmington where he would be residing. He made no other changes.²³ Yet, the registration information that the State kept on

¹⁹ A56.

²⁰ 11 *Del.C.* §§4120 (f) (1) & (g) (3).

²¹ A83. Pierre listed Stewart Moving & Storage as his employer.

²² A86.

²³ A90.

file as of November 9, 2018 was inaccurate as SBI had not properly updated the changes Pierre made to his residence.²⁴

²⁴ A55.

I. PIERRE’S CONVICTION IS VOID AS THE INDICTMENT IS FATALLY DEFECTIVE IN THAT IT CHARGES CONDUCT THAT IS OUTSIDE THE SWEEP OF THE CHARGING STATUTE.

Standard and Scope of Review

Even when there is no objection below, failure of an indictment to charge an offense may not be waived and this Court must address it on appeal.²⁵

Argument

Pierre’s conviction was based on the State’s allegation in the indictment that he violated his duty as a sex offender “to provide adequate verification of his place of employment... within 3 days of the change of [his]...place of employment[.]”²⁶ However, Delaware’s sex offender registration statute, 11 *Del.C.* §4120, creates no duty to provide adequate verification of place of employment when registering due to a change in place of employment. Thus, the indictment “is fatally defective because it does not allege a criminal offense.”²⁷ Accordingly, Pierre’s criminal conviction is void.

Pierre, a Tier I sex offender, was required, pursuant to 11 *Del.C.* § 4120 (g) (3), to report in person to SBI each June in order “to verify all registry information

²⁵ *State v. Deedon*, 189 A.2d 660 (Del. 1963); *Del.Super.Ct.Crim.R.* 12 (b) (2).

²⁶ A5.

²⁷ *People v. Kayer*, 988 N.E.2d 1097 (Il.App.3 Dist. 2013) (finding change in place of employment triggered sex offender duty to report so allegation that defendant failed to report change in employment when he lost his job did not allege a crime).

every 12 months.” Then, pursuant to 11 *Del.C.* § 4120 (f)(1), whenever he changes his

name, residence address or place of employment and/or study shall reregister with the Delaware State Police by appearing in person within 3 business days of the change. The sex offender shall be ***required to provide adequate verification of residence at the stated address.***²⁸

Read together, Pierre’s obligations are as follows: he must complete a verification process one time each year for all of his information; if any of that registry information changes within the course of that year, he must register within 3 business days; and the only adequate verification that is required at the time he registers due to a change (as opposed to the yearly verification) is of his “residence at the stated address.” “In the absence of any ambiguity, [this Court] must be guided by the plain meaning of the statutory language. Given the principle of statutory construction, *expressio unius est exclusio alterius*-the expression of one thing is the exclusion of another-” there is no requirement that Pierre provide “adequate verification of place of employment” as the State alleged in the indictment.²⁹ Further, any such verification would be required in “3 ***business*** days” and not “3 days” as alleged by the State.

²⁸ (emphasis added).

²⁹ *Priest v. State*, 879 A.2d 575, 584 (Del. 2005).

While the statute does not provide a clear definition as to what is considered “adequate verification,” the plain language of § 4120 (f)(1) requires a conclusion that such verification is a requirement that applies only when an offender is reporting a change of residence and is a requirement beyond simply reporting the change. The first sentence of the subsection directs reregistration whenever one or more of the pieces of listed registry information changes. However, the next and separate sentence singles out information regarding the address of the residence. It requires something more than the sex offender stating the address of his residence, he must provide adequate verification. No such requirement is set forth for place of employment or any of the other registry information. If the Legislature wanted to require adequate verification for all registry information when a change is made, it would have said so.³⁰ For example, the yearly verification requires the Tier 1 offender “to verify all registry information[.]”³¹

Because the statute does not require Pierre to provide adequate verification of his place of employment within three days of changing his place of employment when he registered on the dates alleged by the State, the specific conduct charged in his indictment “was outside the sweep of the charging statute[.]”³² In other words, assuming all of the State’s allegations are true, Pierre is not guilty of the offense

³⁰ See *Kayer*, 988 N.E.2d at 1101.

³¹ § 4120 (g) (3).

³² *United States v. Peter*, 310 F.3d 709, 714 (11th Cir. 2002).

charged.³³ As a result, the indictment is fatally defective³⁴ and his conviction is void.³⁵

³³ *State v. Hurd*, 316 P.3d 696 (Kan. 2013) (holding that complaint was jurisdictionally defective where it incorrectly identified the factual circumstance requiring offender to notify the sheriff's office of "any change of address" instead of "coming into any county," even though the incorrect language originated from another section of the registration statute, which required an offender to register within 10 days after the offender "changed the address of the person's residence"); *Nikolaev v. State*, 474 S.W.3d 711 (Tex.App.Eastland 2014) (holding since indictment alleged that defendant committed the offense of failure to comply with the sex offender registration requirements by failing to update or correct his current place of residence, the State was limited to the manner specified in the indictment).

³⁴ *Mejak v. Granville*, 136 P.3d 874, 875 (2006) ("If a defendant can admit to all the allegations charged in the indictment and still not have committed a crime, then the indictment is insufficient as a matter of law.").

³⁵ *Peter*, 310 F.3d at 715 ("innocence of the charged offense appears from the very allegations made in the [indictment], not from the omission of an allegation requisite to liability[]" or lack of evidence at trial).

II. ASSUMING, ARGUENDO, PIERRE WAS REQUIRED TO PROVIDE ADEQUATE VERIFICATION OF HIS PLACE OF EMPLOYMENT WITHIN 3 BUSINESS DAYS OF A CHANGE IN HIS PLACE OF EMPLOYMENT, NO RATIONAL TRIER OF FACT, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, COULD FIND BEYOND REASONABLE DOUBT THAT HE FAILED TO PROPERLY REPORT AS A REGISTERED SEX OFFENDER.

Question Presented

Whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find Pierre guilty beyond reasonable doubt of failing to properly report as a registered sex offender pursuant to 11 *Del.C.* §4120 when the State failed to present sufficient evidence that he knowingly or recklessly failed to provide adequate verification of his place of employment within 3 business days of his change of his place of employment.³⁶

Standard and Scope of Review

This Court holds “that where the defendant has entered a plea of ‘not guilty’ but fails to formally move for a judgment of acquittal in a bench trial, the issue of the sufficiency of the evidence will be reviewed the same as if there had been a formal motion for a judgment of acquittal.”³⁷

³⁶ *Williamson v. State*, 113 A.3d 155, 158 (Del. 2015).

³⁷ *Id.*

Argument

Assuming, *arguendo*, Pierre was required to provide “adequate verification” of his place of employment on October 2, 2018 and October 15, 2018, the State failed to present sufficient evidence to warrant his conviction of Failure to Properly Report as a Registered Sex Offender. The State failed to contradict the evidence in the record that, on the alleged dates, Pierre’s place of employment was as he represented on his registration forms. Nor did the State present evidence that this registration was done more than three business days after he changed his place of employment to Mawuli. Further, the State made no argument that when Pierre performed his duty to register, pursuant to § 4120 (f) (1), that he either knew his verification was inadequate or that he was reckless in regard to providing inadequate verification. Thus, his conviction must be reversed.

The State argued that when Pierre made changes to his registration information in October of 2018, Mawuli Logistics was not his place of employment because he was not actively driving for or earning a paycheck from the company at that time.³⁸ This argument ignores the totality of the record, ignores the definition of “employment” provided to registering offenders by SBI and reflects a misunderstanding of the registration requirements.

³⁸ A22.

Pierre actively drove for Mawuli as an independent contractor from April 2016 until some point in January 2018. It is true that, at that point, Pierre stopped driving for Mawuli for a period of time.³⁹ In fact, Pierre's June 2018 annual sex offender registration reflects that he was employed elsewhere at the time.⁴⁰ However, the record does not end there.

According to both Pierre and Sorkpah, Pierre contacted Sorkpah later in 2018 and asked if he could again drive for Mawuli.⁴¹ Sorkpah testified that he told Pierre, "okay, come into my office and we [sic] see what we can do."⁴² Pierre testified that he and Sorkpah continued discussions until sometime near the end of September.⁴³ He said that Sorkpah checked his "new MVR record" and his license and made sure he was "compliant to work."⁴⁴ Pierre also told the judge that Sorkpah assigned a truck to him which he then took for a test drive. Because he identified mechanical problems as a result of the test drive, he had to wait before accepting any delivery jobs.⁴⁵ Thus, it was Pierre's understanding, at least by October 2, 2018, that he was again employed as an independent contractor to drive for Mawuli. The State

³⁹ A20.

⁴⁰ A83. He reported that he worked for Stewart Moving & Storage.

⁴¹ A17, 20.

⁴² A17.

⁴³ A20.

⁴⁴ A21.

⁴⁵ A21.

presented no evidence at trial through Sorkpah or any other source that disputed Pierre's testimony.

While sex offenders are required to register within 3 business days of a change in "place of employment," the term "place of employment" is not defined in the Sex Offenders Registration subchapter of the Delaware Code.⁴⁶ However, at trial, the prosecutor argued that the "intention of the statute when it comes to individuals like day laborers or truck drivers who are occasional employees" required the judge to find Pierre guilty because, as of the relevant dates, he had "never engaged in actual work and he certainly didn't do so on a regular basis or in such a way that the Court could find that he was employed."⁴⁷

This argument completely ignores the definition of "employment" set forth in the SBI Sex Offender Registration/Verification form Pierre filled out on October 2, 2018 and October 15, 2018 which includes those who are "self-employed, volunteers, interns, those employed by another individual or entity whether compensated or not; this includes temporary and day-laborers."⁴⁸ This definition is incorporated from the Adam Walsh Child Protection and Safety Act of 2006.⁴⁹

⁴⁶ 11 *Del.C.* §§ 4120-4122.

⁴⁷ A24.

⁴⁸ A50.

⁴⁹ A50 (*citing* SORNA Title 1, section 114 (a) (4)).

The prosecutor referred to Pierre as an “occasional” employee or “day laborer.” Sorkpah informed the judge that Mawuli’s drivers were independent contractors/“1099 employees.”⁵⁰ Filling out a 1099 tax form indicates that one is self-employed.⁵¹ Whether Pierre is considered an “occasional employee,” a “day laborer” or “self-employed” what he does falls within the definition of “employment” provided to Pierre by SBI on the sex offender registration form. Of course, where Pierre performed his work and received his pay was the place of his employment.

The prosecutor’s argument also reflects a misunderstanding of the registration requirement. The statute requires the offender to report a change in his “place of employment,” it does not require him to wait to report a change in employment until he is actively working for or earning a paycheck from a new employer or company.⁵²

⁵⁰ <https://www.merriam-webster.com/dictionary/independent%20contractor> (last visited 8/20/19). As this Court explained when it addressed the lack of definition of the term “residence” in the sex offender registration statutory scheme, “[u]ndefined words in the criminal code are to be given their “commonly accepted meaning, unless they are specifically defined elsewhere in Title 11.” *Andrews v. State*, 34 A.3d 1061, 1063 (Del. 2011) (quoting *Duncan v. State*, 2002 WL 243377 at *1 (Del. 2002)). See 11 *Del.C.* §221 (c).

⁵¹ “A form 1099–MISC is used to report payments made in the course of a trade or business to another person or business who is not an employee.” *Falconi v. Coombs & Coombs, Inc.*, 902 A.2d 1094, 1097 (Del. 2006) (quoting *12.2 Small Business/Self–Employed/Other Business: Form 1099-MISC & Independent Contractors*, at <http://www.irs.gov/faqs/faq12-2.html> (emphasis added)).

⁵² *Andrews*, 34 A.3d at 1063–64.

In other words, an offender who is hired by a company has a new place of employment even though he may not be scheduled to start working for two weeks. It would be inconsistent with the purpose of the community notification statute and produce an absurd result to felonize an offender who reports a change in his place of employment because he has not yet worked his first shift or received a paycheck. Notification of an offender's place of employment allows the community to know where the offender is located. If the offender must wait until after he has worked a shift or received a paycheck, he has been at a place of employment in a community that has not been notified for some period of time.

Even assuming, *arguendo*, Pierre was required but failed to provide adequate verification of his place of employment, his conviction still cannot stand as the State was required to prove that he acted knowingly or recklessly in his failure. However, the prosecutor's closing argument illustrates an erroneous reliance on a strict liability theory.

And even if he was laboring under some misapprehension, he then provided an update which, again, this is state's Exhibit 3 dated October 15th, 2018, he's admitted that's his signature, and the document is just a change of address.⁵³

⁵³ A22-23.

To the contrary, when a defendant makes a mistake in fact, it raises reasonable doubt when the *mens rae* is knowing or reckless.⁵⁴ While defense counsel did not make a specific “mistake of fact” defense, she argued the facts and that due to those facts, Pierre had an understanding that he was employed by Mawuli when he registered in October of 2018. The prosecutor’s argument that a misapprehension of the facts was essentially irrelevant amounted to an improper statement of the law and the State’s burden of proof.

In addition to the undisputed record regarding Pierre’s discussions with Sorkpah about Pierre’s return to Mawuli, Pierre’s actions with respect to performing his registration duties in October 2018 undercut any argument that he was aware that he was failing to provide adequate verification (i.e. knowingly)⁵⁵ or that he was “aware of and consciously disregard[ed] a substantial and unjustifiable risk that” he was failing to provide adequate information (i.e. recklessly).⁵⁶

Typical cases involving failure to register involve an offender who does not report to SBI at all and does not provide notification of a change of residence. This

⁵⁴ 11 *Del.C.* §303 (c); 11 *Del.C.* §441(1).

⁵⁵ 11 *Del.C.* § 231 (c).

⁵⁶ 11 *Del.C.* § 231 (e), “The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.”

frustrates the purpose of tracking the offender in order to protect the community.⁵⁷ Here, however, Pierre actively went to SBI to register various changes in his registry information, only one change was his place of employment. On October 2, 2018, he also reported a change in his residence and added the vehicle he would be operating for Mawuli. About two weeks later, he changed his address again. In fact, because he was going to be staying at two locations, he made sure that he provided information regarding both residences. The State never alleged that any of the changes other than the place of employment was inadequate.

Pierre's conduct reveals his desire to comply with the purpose of the law which is to protect the public through notification as to his whereabouts. It appears that each time his duty to register was triggered, he complied. He provided correct information regarding the motor vehicle, which is transient, and his home, which is where he spends the majority of his time. He even went so far as providing SBI with both places where he would be staying in Wilmington. Thus, the record does not support a conclusion that any purported inadequate verification was provided "knowingly or recklessly." As Detective Reif, who works with the sex offender

⁵⁷ "The purpose of the sex offender registration and notification statutes is to protect the public from the danger and propensity for recidivism of convicted sex offenders." *Helman v. State*, 784 A.2d 1058, 1075 (Del. 2001).

registration for SBI, testified, when an offender fills out a form, even when an SBI employee reviews it, “sometimes there’s gonna be mistakes.”⁵⁸

Because the State failed to present any evidence to establish that, on or about the alleged dates, Pierre knowingly or recklessly failed to provide adequate verification of his place of employment, his conviction must be reversed.

⁵⁸ A12.

CONCLUSION

For the reasons and upon the authorities cited herein, Pierre's conviction and sentence should be reversed.

Respectfully submitted

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