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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001282-MR

NORMAN A. CANADA APPELLANT

v.

APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE PAUL K. WINCHESTER, JUDGE
ACTION NO. 10-CR-00097

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: COMBS, MOORE, AND TAYLOR, JUDGES.

COMBS, JUDGE: Norman Canada appeals from his conviction in the McCreary Circuit Court of failure to register as a sex offender. After our review, we reverse the conviction.

In 2010, Canada lived on Mose Tucker Road in McCreary County in a house that belonged to his aunt. He was a compliant sex offender registrant. In August

2010, Canada informed his parole officer, Cheryl Sampson, that he would need to move due to his aunt's sale of the property. Canada repeated the information to Sampson again at their meeting in September; he did not know what the new address would be. Sampson told Canada that before he registered his change of address, she would need to approve the new address. Otherwise, he would violate his terms of supervision. Sampson instructed Canada to call her prior to registering the new address.

Some time in September, Canada secured a house to rent on Bob Musgrove Road in McCreary County. He began trying to contact Sampson on her state-issued cell phone but was unable to reach her. She did not answer, and the voice mailbox was full. On the 17th, Canada paid the utility deposits on the rental house. The exact date of when he moved is disputed, but it appears to have been between the 15th and 22nd. On Friday the 24th, Canada called Sampson's office in London and was told to report to the Williamsburg Probation and Parole Office on Monday the 27th in order to change his registration.

Canada went to the Williamsburg office on September 27, 2010, and registered the Bob Musgrove Road address. The on-duty officer informed Canada that there was a warrant for his arrest and that he needed to report to the McCreary County Sheriff. Canada promptly went to the sheriff's office, but no one was on duty who had the authority to arrest him. Canada left to eat lunch and returned to the sheriff's office where he was arrested for failure to register.

A jury trial was held in McCreary Circuit Court on June 7, 2012. Sampson testified that she had told Canada to call her with his new address. The call records for her state-issued work cell phone were introduced. Between August 30 and September 7, the records show that numerous phone calls were made and received on non-holiday weekdays. Then, according to the log, activity ceased altogether. On September 28, Sampson's phone activity resumed; again, it consisted of numerous daily calls on non-holiday weekdays. Sampson had no explanation for why the phone did not have any activity for three weeks, which inactivity coincided with the time period during which Canada attempted to reach her.

Canada testified that when he had updated his registration in the past, his parole officer had provided the forms. He testified that Sampson had not provided any instructions beyond calling her before he moved. Canada also testified that the buyer of his aunt's property forced him to move out even though he had not been able to reach Sampson. Several witnesses from Canada's family testified that he had unsuccessfully tried to call Sampson numerous times during the moving process. Nevertheless, the jury found Canada guilty of failure to register as a sex offender, and he received a sentence of two-years' incarceration. This appeal follows.

Canada first argues that the trial court erred when it denied his motion for a directed verdict following the Commonwealth's presentation of evidence, a motion which he renewed at the close of all evidence. We agree.

A directed verdict precludes a jury's consideration of an issue.

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). In criminal cases, unless the Commonwealth proves "each element of a charged crime, . . . a motion for a directed verdict by the defendant ***must*** be properly entertained." *Williams v. Commonwealth*, 721 S.W.2d 710, 712 (Ky. 1986). (Emphasis added).

On appeal, our standard of review is:

> if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal. . . . [T]here must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the
>
> defendant if the prosecution produces no more than a mere scintilla of evidence.

Commonwealth v. Benham, 816 S.W.2d at 187-88.

In the case before us, we are not persuaded that the Commonwealth proved every element of Canada's charged crime – especially the all-critical element of intent to violate the statute. Canada was charged pursuant to Kentucky Revised Statute[s] (KRS) 17.510, which sets forth as follows:

> (10)(a) If the residence address of any registrant changes, but the registrant remains in the same county, the person shall register, on or before the date of the

> change of address, with the appropriate local probation and parole office in the county in which he or she resides.
> (b)(1) If the registrant changes his or her residence to a new county, the person shall notify his or her current local probation and parole office of the new residence address on or before the date of the change of address.
> (11) Any person required to register under this section who ***knowingly*** violates any of the provisions of this section or prior law is guilty of a Class D felony for the first offense and a Class C felony for each subsequent offense. (Emphasis added.)

Canada does not dispute that he did not update his registered address until after he had moved. However, he contends that the Commonwealth did not prove a necessary element of the crime – that he had knowingly violated the statute. The instructions to the jury included the definition of *knowingly* that is included in the Penal Code: "A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of that nature or that the circumstance exists." KRS 501.020; *see also Saxton v. Commonwealth*, 315 S.W.3d 293, 298 (Ky. 2010).

Our Supreme Court emphasized the gravity of proof of *mens rea* in *Young v. Commonwealth*, 50 S.W.3d 148 (Ky. 2001). *Young* was a death penalty case in which Young had hired a triggerman to kill the victim. The triggerman was eligible for the death penalty because he received monetary gain for committing the murder. However, the Court held that Young was not eligible for the death penalty because his motive had been revenge, and revenge is not one of the aggravating factors that entails the death penalty. Even though Young and the triggerman were both culpable for the murder of the same victim, only one was

eligible for the death penalty because of the difference in their separate *mens rea*. *Id*. at 163.

The element of *mens rea* is central to this case. The General Assembly made a conscious decision to include the necessary *mens rea* in KRS 17.510. In a case that the Commonwealth itself cites in its brief, our Supreme Court discussed KRS 17.510 as it existed in 2001. *Commonwealth v. McBride*, 281 S.W.3d 799 (Ky. 2009). In 2001, 17.510(11) sweepingly made culpable "any person required to register . . . who violates any of the provisions of this section"; therefore, in *McBride*, the Court held it was unnecessary to consider the errant registrant's *mens rea*. However, in 2006, the General Assembly specifically amended KRS 17.510(11) to include the element of *knowingly violating the registration requirements*. HB 3, Reg. Sess. (Ky. 2006).

At trial, Canada testified that he had relied on the instructions of his parole officer, Sampson. Sampson's testimony corroborated that of Canada. She told him to call her before changing his registration. Sampson then failed to provide any explanation for the lack of activity on her work-issued cell phone for a period of three weeks. KRS 439.480 defines the duties of probation and parole officers. In pertinent part, it requires them to:

> (3) Keep informed concerning the conduct and conditions of each person under their supervision and use ***all suitable methods*** to aid and encourage them to bring about improvement in their conduct and condition;
> (4) Keep detailed records of their work[.]

(Emphasis added).

It appears that Sampson failed to fulfill her duty to keep informed of all of Canada's conduct and condition – especially when she knew that he had a move pending – and that she did not make herself available to him. Furthermore, she had no records to indicate why her cell phone was unavailable for three weeks. Additionally, during her testimony, Sampson disclosed that she is married to the prosecuting law enforcement officer in Canada's case. In fact, her husband sat at the Commonwealth's table throughout the trial. In light of the curious and tenuous facts of the case, this potential conflict of interest has clearly cast aspersions on the probity of the entire proceeding.

At trial and in its brief, the Commonwealth focused on conflicting testimony concerning the actual date of Canada's move. However, the actual date is irrelevant because the Commonwealth did not prove that Canada ***knowingly failed*** to register. There was no evidence that Canada knew how much time he had to change his registration. Although Canada had always registered in the past, he testified that Sampson had consistently provided him with the forms and had assisted him. Sampson testified that if Canada had not contacted her first, he would have been in violation of his terms of supervision. Canada was caught in a Catch-22 situation. He was forced to move, could not reach his parole officer in order to comply with his terms of supervision, and then was arrested when he followed the instructions of the co-workers of his parole officer by registering without pre-approval. Ironically, when he initially presented himself for arrest,

again no one was available to execute the arrest. Instead of fleeing, he went to lunch and came back to submit to arrest.

We are not persuaded that this is the outcome intended by the Legislature when it enacted the sex offender registration law. Case after case demonstrate its use against sex offenders who flagrantly failed to provide their addresses for weeks, months, and years at a time. *See Couch v. Commonwealth*, 256 S.W.3d 7 (Ky. 2008); *Peterson v. Shake*, 120 S.W.3d 707 (Ky. 2003); *France v. Commonwealth*, 320 S.W.3d 60 (Ky. 2010).

In this case, Canada was placed in a nearly impossible situation due to the unexplained unavailability of his parole officer. He consistently attempted to comply with what he testified he knew to be the law. We conclude that the Commonwealth has failed to prove the necessary *mens rea* element of the offense and that trial court erred in denying his motion for directed verdict. Because we are vacating the conviction, all arguments concerning the date of Canada's move are moot, and it is unnecessary for us to address them.

In summary, because Canada was entitled to a directed verdict, we reverse the conviction and judgment of the McCreary Circuit Court.

TAYLOR, JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS.

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