

[Cite as *State v. Lowry*, 2011-Ohio-2850.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-12-036
- vs -	:	<u>OPINION</u>
	:	6/13/2011
HARVEY LOWRY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 10CRI00191

David B. Bender, Fayette County Prosecuting Attorney, Kristina Rooker, 1st Floor Courthouse, 110 East Court Street, Washington C.H., Ohio 43160, for plaintiff-appellee

Susan R. Wollscheid, P.O. Box 176, Washington C.H., Ohio 43160, for defendant-appellant

HUTZEL, J.

{¶1} Defendant-appellant, Harvey Lowry, a Tier II sex offender, appeals his conviction in the Fayette County Court of Common Pleas for failure to register a change of address in violation of R.C. 2950.05(F)(1).

{¶2} Appellant was convicted in 2004 of unlawful sexual conduct with a

minor and was sentenced to prison. Upon his release from prison, appellant failed to register as a sex offender. As a result, he was convicted in 2009 of failure to register as a sex offender and was sentenced to eight months in prison. Appellant was released from prison on August 29, 2010. On August 31, appellant registered as a sex offender with the Fayette County Sheriff's Office. He registered his address as that of the Knight's Inn (nka Jigam Inn) in Washington Court House. Two days later, on September 2, appellant went back to the sheriff's office and advised he was staying in Room 233 at the Knight's Inn.

{¶3} Both times, appellant registered his address with Deputy Sheriff Robert Russell. Deputy Russell is the deputy in charge of registering sex offenders at the sheriff's office. He works on Tuesdays and Thursdays from 8 a.m. to 4 p.m. Sex offenders are informed orally of Deputy Russell's work schedule. Registration forms given to sex offenders include Deputy Russell's work schedule. The forms also detail what is required of sex offenders regarding their registration duties. Both times, appellant signed and received a registration form.

{¶4} On September 10, Deputy Sheriff Jeff Holbrook went to the Knight's Inn to verify appellant's address. The deputy discovered that appellant was not registered there and that Room 233 was vacant. An investigation revealed that appellant had moved to the Country Hearth Inn in Washington Court House on September 5 with two individuals, Bret Knisley and Larry Mongold. However, appellant was no longer living there. On September 11, Sergeant David Bivens talked to appellant on the phone and inquired about his address. Appellant told Sergeant Bivens conflicting stories, to wit: (1) he had told his parole officer he was moving, (2) he was homeless, and (3) he was, in fact, residing at the Country Hearth

Inn with Knisley and Mongold.

{¶15} Appellant was arrested on September 13. He was subsequently indicted on one count of failure to register a change of address in violation of R.C. 2950.05(F)(1), a felony of the third degree. The indictment also included two specifications relating to his 2004 and 2009 convictions.

{¶16} At a jury trial, appellant testified that he, Knisley, and Mongold were evicted from the Knight's Inn on September 5 (a Sunday) for failure to pay their rent. The three men moved to The Country Hearth Inn the same day. Appellant testified he subsequently tried to report his change of address to Deputy Russell on two separate occasions, once on September 7 (a Tuesday) "in the evening time," and once on September 9 (a Thursday) "in the evening time again." Appellant asserted he went to the sheriff's office both days before the 4 p.m. deadline. However, Deputy Russell was not in his office on either day. Appellant testified that on both days he talked to other deputies about his situation and was told to come back. On September 10, Mongold told appellant to leave the Country Hearth Inn.

{¶17} Deputy Russell testified that in the event he is not working or in his office when a sex offender comes in, other employees will leave him a note letting him know that a sex offender came in. The staff will also advise the sex offender to come back either later that day (if Deputy Russell works that day) or another day. To Deputy Russell's knowledge, appellant did not come to the sheriff's office the week of September 7 to advise he had a new residence. Corporal J. Phillip Brown and Lieutenant Larry Walker both have an office located behind Deputy Russell's desk. Both testified that in the event a sex offender comes in when Deputy Russell is not in, they leave a note to the deputy letting him know the sex offender came in. They also

tell the sex offender to come back. Neither officer recalled appellant coming to the sheriff's office the week of September 7.

{¶8} On November 23, 2010, the jury found appellant guilty as charged. He was subsequently sentenced to four years in prison. Appellant appeals, raising one assignment of error:

{¶9} "THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY WHEN IT WAS IMPOSSIBLE FOR HIM TO COMPLY WITH THE REQUIREMENTS OF OHIO REVISED CODE §2950.05."

{¶10} Appellant was convicted of violating R.C. 2950.05(F)(1) which states, in relevant part, that "[n]o person who is required to notify a sheriff of a change of address pursuant to division (A) of this section * * * shall fail to notify the appropriate sheriff in accordance with that division."

{¶11} R.C. 2950.05(A), in turn, requires any sex offender required to register to "provide notice of any change of residence * * * to the sheriff with whom the offender most recently registered the address." The offender is required to "provide the written notice at least twenty days prior to changing the address of the residence[.] * * * If a residence address is not to a fixed address, the offender * * * shall include in that notice a detailed description of the place or places at which the offender * * * intends to stay and, not later than the end of the first business day immediately following the day on which the person obtains a fixed residence address, shall provide that sheriff written notice of that fixed residence address." R.C. 2950.05(A).

{¶12} Appellant argues he was improperly convicted of violating a statute with which it was impossible for him to comply. Appellant asserts it was impossible for

him to provide a 20-day notice prior to his change of address as required under R.C. 2950.05(A) as he had been evicted from the Knight's Inn. Further, he was in effect homeless as he had no permanent residence. Finally, he was unable to comply with R.C. 2950.05 due to Deputy Russell's failure to be in his office the two times appellant went to the sheriff's office.

{¶13} Although he has not couched it in the exact terms, we address appellant's assignment of error as a challenge to the manifest weight of the evidence.

{¶14} "In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 389, 1997-Ohio-52. An appellate court will not reverse a judgment against the manifest weight of the evidence in a jury trial unless it unanimously disagrees with the jury's resolution of any conflicting testimony. *Id*; *State v. Bailey*, Butler App. No. CA2002-03-057, 2003-Ohio-5280, ¶22.

{¶15} We first address appellant's argument he could not comply with R.C. 2950.05 as he became homeless following his evictions from the Knight's Inn and the Country Hearth Inn.

{¶16} The argument that homelessness is a defense to failing to notify a change of address under R.C. 2950.05 has been rejected by three Ohio appellate districts. In *State v. Beasley* (Sept. 27, 2001), Cuyahoga App. No. 77761, 2001 WL 1152871, the Eighth Appellate District rejected the argument that under R.C.

2950.05, an address change occurs only when a sex offender takes a fixed new address. The appellate court called the argument "sophistry" and held that "[a]n address 'changes' when one no longer lives at that address." *Id.* at *2. The court found that "a violation of the duty to notify authorities of a change of address arises when the previous address changes. Once defendant became homeless, his address changed and he was required to report that change." *Id.*

{¶17} In *State v. Parrish* (Dec. 18, 2000), Licking App. No. 00-CA-0070, 2000 WL 1862821, the Fifth Appellate District held that the purpose of R.C. 2950.05 is to permit the sheriff to locate and keep track of sex offenders. "[T]o allow a homeless defense to the registration provision would frustrate the legislative purpose." *Id.* at *1. See, also, *State v. Ohmer*, Hamilton App. No. C-040871, 2005-Ohio-3487 (applying both *Parrish* and *Beasley* and finding that a sex offender's homelessness did not excuse him from the registration requirements under R.C. 2950.05).

{¶18} In addition, we note that R.C. 2950.05(A) specifically describes a sex offender's registration responsibilities when he is not moving to a fixed address. In such a case, the offender must include in his written notice "a detailed description of the place or places at which the offender * * * intends to stay and, not later than the end of the first business day immediately following the day on which the person obtains a fixed residence address, shall provide that sheriff written notice of that fixed residence address." Thus, a sex offender can register as homeless under R.C. 2950.05.

{¶19} A sex offender's homelessness, therefore, does not excuse the offender from the registration requirements under R.C. 2950.05, nor does homelessness make it impossible to comply with R.C. 2950.05. *Ohmer*, 2005-Ohio-

3487 at ¶20-21.

{¶20} Appellant also argues it was impossible for him to provide a 20-day notice prior to his change of address, and thus to comply with R.C. 2950.05(A), as he had been evicted from the Knight's Inn. Appellant cites *State v. Ascione*, Stark App. No. 2003CA00001, 2003-Ohio-4145, in support of his argument. Appellant also argues he was unable to comply with R.C. 2950.05 due to Deputy Russell's failure to be in his office the two times appellant went to the sheriff's office following his eviction from the Knight's Inn.

{¶21} In *Ascione*, the defendant was forced by his in-laws to leave their home where he had been staying. He did not notify the sheriff's office he no longer lived at that residence until two months later. The trial court found that because the defendant had been evicted by his in-laws, it was impossible for him to provide the 20-day advance notice as required under R.C. 2950.05(A). The trial court nevertheless found the defendant guilty of violating R.C. 2950.05 based on his failure to notify the sheriff's office about his change of address for two months.

{¶22} The Fifth Appellate District reversed the defendant's conviction. The appellate court found that because the defendant could not provide the 20-day advance notice due to his eviction, and thus could not be found in violation of R.C. 2950.05(A), it was impossible for him to notify the sheriff's office as required by R.C. 2950.05(A), and thus, he could not be found in violation of then R.C. 2950.05(E)(1) (now known as R.C. 2950.05[F][1]). *Ascione*, 2003-Ohio-4145 at ¶17, 20. The appellate court "urge[d] the legislature to address the loophole created by [R.C. 2950.05] by specifically requiring the registrant to provide notice of change of address within a prescribed amount of time after the change occurs when compliance

with [R.C. 2950.05(A)] is impossible." Id. at ¶22.

{¶23} R.C. 2950.05 was subsequently amended to provide for an affirmative defense of impossibility. Pursuant to R.C. 2950.05(G)(1), to prove it was impossible to provide the written notice as required under R.C. 2950.05(A), a sex offender "must show that (1) he did not know of the address change on the date specified for the provision of the written notice, and (2) he had provided notice of the address change, by telephone or in writing, 'as soon as possible, but not later than the end of the first business day, after learning of the address change.'" *State v. Mitchell*, Hamilton App. No. C-080340, 2009-Ohio-1264, ¶10. "The offender must prove the affirmative defense by a preponderance of the evidence." Id.

{¶24} Upon reviewing the record, we find that appellant failed to prove it was impossible for him to comply with R.C. 2950.05. Under R.C. 2950.05, the burden is on a sex offender to either report a change of address to a sheriff's office or prove it was impossible for the offender to do so. Appellant failed to prove that under R.C. 2950.05(F)(1) and/or 2950.05(G)(1) he provided Deputy Russell notice of his change of address either by telephone or in a written notice after he was evicted from the Knight's Inn.

{¶25} Appellant testified he went to the sheriff's office during the week of September 7 on the days Deputy Russell was working. As stated earlier, Deputy Russell works from 8 a.m. to 4 p.m. on Tuesdays and Thursdays. On direct examination, appellant testified he went to the sheriff's office twice that week "in the evening." However, on cross-examination, he asserted he went to the sheriff's office that week around 2:30-3:00 p.m. Appellant also asserted he talked to a deputy on both occasions about his situation and was told to come back. Two deputies who

were working that week testified they did not see appellant in the sheriff's office that week.

{¶26} Although there was no written policy in place at the sheriff's office for when a sex offender would come in if Deputy Russell was not in his office, there was nonetheless a procedure in place. The two deputies and Deputy Russell all testified that in the event Deputy Russell is not working or in his office when a sex offender comes in, other employees will leave him a note letting him know that a sex offender came in. Deputy Russell testified that he did not see appellant in the sheriff's office during the week of September 7. There is no evidence he received a note from the staff telling him that appellant had come to the sheriff's office that week.

{¶27} According to his testimony, appellant chose to go to the sheriff's office on both occasions mid-afternoon rather than in the morning. There was no evidence that appellant was working on the days he came to the sheriff's office. Nothing prevented him from coming back several times on either day. There was also no evidence that appellant was prevented from staying at the sheriff's office either day and waiting for Deputy Russell's return to his desk.

{¶28} In light of the foregoing, we cannot say that the jury erred in finding appellant guilty of failure to register a change of address pursuant to R.C. 2950.05(F)(1). Appellant's assignment of error is accordingly overruled.

{¶29} Judgment affirmed.

HENDRICKSON, P.J., and PIPER, J., concur.

