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STATE OF NEBRASKA, APPELLEE, V. RICHARD FREY, ALSO KNOWN AS RICHARD KOUMA, APPELLANT.

790 N.W.2d 722

Filed November 9, 2010. No. A-09-818.

1. **Convicted Sex Offender: Police Officers and Sheriffs.** Neb. Rev. Stat. § 29-4004(2) (Reissue 2008) provides that any person required to register under Nebraska's Sex Offender Registration Act shall inform the sheriff of the county in which he or she resides, in writing, if he or she has a new address within such county within 5 working days after the address change.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Reversed and remanded.

David L. Kimble, Seward County Public Defender, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Richard Frey, also known as Richard Kouma, appeals his conviction on a charge of failure of a sex offender to register a new address. On appeal, Frey alleges that the evidence was insufficient to support a conviction. The State concedes that the evidence was insufficient. We concur that the evidence was insufficient, and we reverse, and remand.

II. BACKGROUND

There is no dispute that Frey is subject to the registration requirements of Nebraska's Sex Offender Registration Act. There is also no dispute that Frey was properly registered prior to February 2008 while he was residing in Seward, Nebraska. The events giving rise to the current action concern Frey's moving to a new address, in Utica, Nebraska, in February 2008.

On April 18, 2008, the State charged Frey by information with one count of failure of a sexual offender to register, a

Class IV felony offense pursuant to Neb. Rev. Stat. § 29-4011 (Reissue 2008). The State alleged that in February 2008, Frey had failed to notify the sheriff of Seward County, in writing, of his new address within 5 working days after the address change. Frey pled not guilty to the charge. On February 18, 2009, a trial was held during which the State elicited testimony from one of Frey's new neighbors in Utica, the city utility clerk from Seward, the city utility clerk from Utica, and the investigating deputy from the sheriff's department.

One of Frey's new neighbors testified that she notified law enforcement on February 21, 2008, that Frey was residing in Utica. She testified that she had noticed people moving belongings into the residence in Utica "[t]wo Saturdays before" February 21 and had noticed "new vehicles out in front parked there all the time." She also testified that she observed lights on in the residence at night "most of the time" during the 2 weeks prior to February 21. She acknowledged that she was not able to say that she actually saw Frey moving belongings into the residence. She also acknowledged that she could not say who was paying rent, who was living in the residence, who was receiving mail at the residence, when the utilities were turned on, who was paying the utilities, who was sleeping at the residence, or who was driving any of the vehicles she observed at the residence.

The city utility clerk for Seward testified that she had an order in her records for utilities at Frey's residence in Seward to be placed in the landlord's name, instead of Frey's, on February 11, 2008. The city utility clerk for Utica testified that Frey's wife contacted her on February 8 to have utilities for the Utica residence placed in her name and that Frey's wife paid a deposit for the utilities on February 12.

The investigating deputy from the sheriff's office testified that he received a call on February 21, 2008, about Frey's residing in Utica. The deputy testified that he was told that Frey had been residing at the Utica residence for 2 weeks. The deputy testified that as of February 21, Frey's registered address was still the address in Seward. The deputy made contact with Frey and arrested him for failing to register his

change of address within 5 days of moving. The deputy testified that he received information from the city utility clerk for Utica about the utilities being placed in Frey's wife's name and a deposit being paid on February 12 and that 5 working days from February 12 would have been February 19; because Frey had not registered his new address by February 19, the deputy placed him under arrest. The deputy also testified that Frey completed the paperwork for registering his new address on February 22. The deputy testified that Frey denied having lived at the Utica residence for 5 days. The deputy also testified that Frey's wife had indicated that they took possession of the Utica residence on February 8 or 18; the deputy was "not 100 percent positive that it was the 18th or the 8th, but an 8 was involved."

Frey called his wife to testify. She testified that she and Frey moved from Seward to Utica in February 2008. She testified that she paid rent to the landlord in Utica on February 10 or 11 and paid for utilities on February 12. She testified that they began moving belongings into the residence on February 16 and completed moving belongings on February 18. She testified that February 18 was the first night that they stayed at the Utica residence overnight. She testified that the utilities in Seward were placed in the landlord's name on February 12, but that they had his permission to remain in the Seward residence past that date. She testified that they received the keys to the Utica residence on February 12 and returned the keys to the Seward residence on February 18.

Frey's wife also testified that Frey was aware of the registration requirement. She testified that they attempted to register the change of address on February 16, 2008, which was a Saturday. She testified that they went to the sheriff's department and had a conversation with a woman working behind a glass window. The woman informed them that Frey did not need to register again because he had already registered.

After considering all of the evidence, the district court found Frey guilty of failing to register his change of address within 5 days of obtaining the new address. The court sentenced Frey to 2 years' probation. This appeal followed.

III. ASSIGNMENT OF ERROR

Frey's sole assignment of error is that there was insufficient evidence to support the conviction.

IV. ANALYSIS

The issue presented in this case is whether the State established beyond a reasonable doubt that Frey had a new address more than 5 working days before February 22, 2008, when he notified the sheriff's department in writing of his address change. Frey submits that the State failed to adduce sufficient evidence, the State agrees on appeal that it failed to adduce sufficient evidence, and we concur that there was not sufficient evidence.

[1] Neb. Rev. Stat. § 29-4004(2) (Reissue 2008) provides that any person required to register under Nebraska's Sex Offender Registration Act shall inform the sheriff of the county in which he or she resides, in writing, if he or she has a new address within such county within 5 working days after the address change. There are no prior cases in Nebraska concerning what constitutes an "address change" to trigger the start of the 5-working-day period for registering the new address.

In this case, the evidence indicates that Frey notified the sheriff's department of his new address on February 22, 2008. Thus, the question is whether the State adduced sufficient evidence to prove beyond a reasonable doubt that Frey had an address change more than 5 working days prior to February 22. Evidence in the record establishes that February 22 was a Friday, so 5 working days prior to February 22 would have been the previous Friday, February 15. Thus, we must review the evidence presented by the State to determine if there was sufficient evidence to prove beyond a reasonable doubt that Frey changed his address to the Utica residence on or before February 15.

The State's first witness, one of Frey's new neighbors in Utica, testified that she had observed belongings being moved into the Utica residence as early as February 9, 2008, but acknowledged that she could not identify Frey as somebody she had even seen at the Utica residence. She was not able to

present any testimony about who was at the residence at any point in time. Her testimony clearly was not sufficient to establish that Frey had changed his address to the Utica residence at any particular time, let alone on or before February 15.

The State's evidence from the city utility clerks of Seward and Utica established the dates on which the utilities were placed in particular names. The clerks were not able to present any testimony, however, concerning who was actually living at any particular place on any particular date. Their testimony clearly was not sufficient to establish that Frey had changed his address to the Utica residence at any particular time, let alone on or before February 15, 2008.

Finally, the State's final witness, the investigating deputy from the sheriff's department, testified that he calculated the running of the 5-working-day period from February 12, 2008, based on information from the city utility clerk about Frey's wife's making a utility payment on that date. He presented no testimony indicating any evidence that Frey had actually changed his address to the Utica residence at any particular time, let alone on or before February 15.

Frey's wife presented uncontroverted testimony that Frey did not spend the night at the Utica residence prior to February 18, 2008. She also presented uncontroverted testimony that she and Frey had gone to the sheriff's department on February 16, the date on which she testified they first began moving belongings into the Utica residence, to attempt to register the address change, but were turned away by the employee they spoke with.

Even considering the evidence adduced in a light most favorable to the State, the State failed to adduce evidence proving beyond a reasonable doubt that Frey had an address change prior to February 15, 2008. We need not determine exactly what constitutes an "address change" pursuant to § 29-4004(2) because the evidence adduced in the present case was clearly insufficient to establish that Frey had changed his address sufficient to trigger § 29-4004(2). Although we conclude, and all parties agree, that the evidence was insufficient in this case regardless of the proper definition of what constitutes a "new address" pursuant to § 29-4004(2), the State, the defense,

and this court also all agree that some guidance from the Legislature concerning this important undefined term would be beneficial for future cases.

V. CONCLUSION

The evidence adduced was clearly insufficient to support the conviction. We reverse the conviction and remand the matter with directions to dismiss.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V.
JAY J. SCHUETZ, APPELLANT.
790 N.W.2d 726

Filed November 9, 2010. No. A-10-276.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Sentences: Appeal and Error.** The sentencing court rather than the appellate court is entrusted with the power to impose sentences for the commissions of crimes against the State, and the judgment of the sentencing court cannot be interfered with in the absence of an abuse of discretion.
3. **Criminal Law: Probation and Parole.** A motion to revoke probation is not a criminal proceeding.
4. ____: ____. A probation revocation hearing is considered a continuation of the original prosecution for which probation was imposed—in which the purpose is to determine whether a defendant or a juvenile has breached a condition of his existing probation, not to convict or adjudicate that individual of a new offense.
5. ____: ____. A probation revocation hearing is not part of a criminal prosecution or adjudication and therefore does not give rise to the full panoply of rights that are due a defendant at a trial or a juvenile in an adjudication proceeding.
6. **Criminal Law: Probation and Parole: Sentences.** Violation of probation is not itself a crime or offense, and the court may impose a new sentence for the offense for which the offender was originally convicted or adjudicated.
7. **Double Jeopardy: Probation and Parole.** Double jeopardy is not implicated by probation revocation proceedings.
8. **Sentences.** The considerations for sentencing an offender are well known and include the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.