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STATE OF NEBRASKA, APPELLEE, V. TIMOTHY GASKILL, APPELLANT.

824 N.W.2d 655

Filed November 9, 2012. No. S-11-528.

1. **Appeal and Error.** Consideration of plain error occurs at the discretion of an appellate court.
2. ____. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
3. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Motion for rehearing sustained. See 284 Neb. 236, 817 N.W.2d 754 (2012), for original opinion. Original opinion withdrawn. Judgment reversed and vacated, and cause remanded with directions to dismiss.

Joshua W. Weir, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

In an opinion filed on July 27, 2012,[1] we affirmed Timothy Gaskill's Class IV felony conviction[2] based on his failure to comply with certain registration provisions of the Sex Offender Registration Act (SORA).[3] We subsequently sustained Gaskill's motion for rehearing and ordered the case submitted without further oral argument. We now withdraw

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[1] *State v. Gaskill*, *ante* p. 236, 817 N.W.2d 754 (2012).

[2] See Neb. Rev. Stat. § 29-4011(1) (Cum. Supp. 2012).

[3] Neb. Rev. Stat. §§ 29-4001 through 29-4014 (Reissue 2008 & Cum. Supp. 2012).

our prior opinion, reverse and vacate Gaskill's conviction and sentence, and remand the cause to the district court with directions to dismiss.

BACKGROUND

In April 1995, at the age of 18, Gaskill was convicted of attempted first degree sexual assault. He was sentenced to probation for a period of 2 years. He was still on probation on January 1, 1997, when the original SORA was enacted.[4] SORA applied to Gaskill because he had been convicted of a registrable offense prior to January 1, 1997, and remained "under probation or parole" as a result of that conviction.[5] SORA required Gaskill to register for 10 years from the date he was released from probation,[6] which occurred in April 1997. Pursuant to the risk assessment instrument then utilized by the Nebraska State Patrol, Gaskill was determined to be at low risk to reoffend and was classified as a "Level 1 offender," which meant that his registration was not publicly disseminated on the Nebraska sex offender registry Web site.

In late October 2009, Gaskill received a letter from the sex offender registry advising him that under 2009 amendments to SORA, which would become effective on January 1, 2010, he would be considered a "lifetime registrant." Pursuant to these 2009 SORA amendments, Gaskill's name, address, and photograph were disseminated on the sex offender registry Web site on January 1, 2010. At that time, Gaskill was living with his wife and children at a Lincoln apartment while pursuing graduate studies. On April 1, he received a notice to vacate the apartment. The apartment manager explained that Gaskill was being evicted because other tenants complained after learning he was on the Nebraska sex offender registry.

After spending several nights in motels, Gaskill and his family found another residence in Lincoln and began residing there on April 10, 2010. On May 1, Gaskill was contacted by the Lancaster County sheriff's office and informed that he had not

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[4] 1996 Neb. Laws, L.B. 645.

[5] See § 29-4003(c) (Supp. 2000).

[6] See § 29-4005(1) (Supp. 2000).

updated his registration. He immediately went to the sheriff's office to do so. After being interviewed, he was arrested and later charged in the district court for Lancaster County with failing to report his change of address as required by SORA,[7] a Class IV felony.[8]

Gaskill filed a motion to quash the information, asserting that the 2009 amendments to SORA as applied retroactively to him violated his right to due process and constituted ex post facto legislation. During a hearing on the motion, counsel for Gaskill and the State stipulated that Gaskill was subject to SORA. The district court overruled the motion to quash, and Gaskill entered a plea of not guilty. After a stipulated bench trial at which he preserved his constitutional challenges, Gaskill was found guilty and sentenced to pay a fine of $250 and costs of the action and to serve 200 hours of community service. He filed a timely appeal.

In his brief on appeal, Gaskill assigned that the district court erred in rejecting his constitutional challenges to SORA as amended in 2009. He made no contention that he was not subject to SORA at the time of the charged offense. But in its brief, the State advised the court as follows:

> This Court should be aware that Gaskill is no longer required to register as a sex offender. See http://www.nsp.state.ne.us/sor/find.cfm. Because his conviction for violating SORA is at issue, the State will address his arguments. However, any as applied arguments that Gaskill makes as to *future* registration obligations should be rendered moot.[9]

When questioned about this statement during oral argument, counsel for the State replied that she had confirmed with the Nebraska State Patrol that Gaskill was no longer required to register. When asked why this was so, counsel indicated that there had been a "miscalculation" by the State Patrol. She did not indicate the precise nature of the miscalculation, when

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[7] § 29-4004(9) (Cum. Supp. 2012).

[8] § 29-4011(1) (Cum. Supp. 2012).

[9] Brief for appellee at 12.

it had been discovered, or when Gaskill was notified that he was no longer required to register. In our original opinion, we rejected Gaskill's constitutional challenges and affirmed his conviction.[10]

Gaskill moved for rehearing. In his brief in support of the motion, he argued for the first time that his obligation to register under SORA ended in 2007 at the expiration of his original 10-year registration requirement. He contended that "[t]his explains why the State informed the Court that Gaskill was no longer on the Sex Offender Registry in [the State's] Brief."[11] He concluded that because he "was not required to register pursuant to SORA" on May 1, 2010, the date of the alleged offense, "his conviction should be vacated."[12]

When the State elected not to file a response to the motion for rehearing, we ordered it to do so. We directed that the response should include a representation by the State as to (1) the date on which the Nebraska State Patrol determined that Gaskill was "no longer required to register as a sex offender" under SORA and the date that the Attorney General's office was first advised of this determination; (2) the specific reason for that determination, including an explanation of why Gaskill was no longer considered to be a "lifetime registrant"; and (3) whether, according to the State's most recent calculation, Gaskill was subject to SORA as of May 1, 2010, the date of the offense underlying the conviction which is the subject of this appeal. In addition, we directed the State to address the issue of whether its most recent calculation of the duration of SORA's application to Gaskill requires that his conviction be vacated.

In its response, the State advised this court that the Nebraska State Patrol determined that Gaskill was no longer required to register as a sex offender on December 23, 2011, and that the State Patrol "voluntarily removed Gaskill from the registry in late December 2011 due to a miscalculation of willful noncompliance time." The State further represented:

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[10] *State v. Gaskill, supra* note 1.

[11] Brief for appellant in support of motion for rehearing at 2.

[12] *Id.*

> Because the amount of willful noncompliance time was not raised below and because the parties actually stipulated at the hearing on the motion to quash that Gaskill was subject to SORA, there was no reason for the State to question that it was the properly calculated amount of willful noncompliance time that required Gaskill to register as of May 1, 2010, the date of the offense underlying the conviction which is the subject of this appeal. However, in the interest of full disclosure, the State advised this Court in brief and at oral argument that Gaskill was no longer required to register as a sex offender not knowing when that requirement ceased. It was *not* because the State knew that Gaskill was not subject to SORA's registration requirements after 2007 that it "informed the Court that Gaskill was no longer on the Sex Offender Registry."

The State further represented that it was not until preparing its response to the motion for rehearing, as directed by this court, that it determined from the State Patrol that "the ten-year registration period for Gaskill, beginning April of 1997, should not have been tolled and should have ended in April of 2007." Further, the State represented that "Gaskill was not subject to SORA on May 1, 2010."

Because the State's response did not address the question of whether Gaskill's conviction should be vacated as a result of this information, we entered an order directing the State to show cause why that should not occur. The State responded that it had "no additional response to the order to show cause beyond the comments made at oral argument and the prior response to the Court's questions."

STANDARD OF REVIEW

[1-3] Consideration of plain error occurs at the discretion of an appellate court.[13] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a

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[13] *State v. Britt*, 283 Neb. 600, 813 N.W.2d 434 (2012); *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.[14] Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.[15]

ANALYSIS

This case presents the rather unusual circumstance of a reversible error which is plainly evident from a record made not in the trial court but on appeal. But it is plain error nonetheless. Based upon the information which the State has provided in the course of this appeal, it was impossible for Gaskill to have committed the offense for which he was charged and convicted, because he was not subject to SORA on May 1, 2010, and therefore had no legal obligation to report his change of address to the Nebraska sex offender registry. Thus, it is apparent as a matter of law that Gaskill did not commit the charged offense.

It is regrettable that the State Patrol miscalculated the time period that Gaskill was subject to SORA. It is unfortunate that neither counsel discovered the full nature and significance of the miscalculation sooner. But based upon the record now before us, it would be untenable for this court to permit Gaskill's conviction to stand. To do so would have an obvious prejudicial effect upon his substantial right in the presumption of innocence and would result in even greater damage to the integrity, reputation, and fairness of the judicial process. Accordingly, we exercise our discretionary authority to note plain error and reverse and vacate Gaskill's conviction and sentence.

CONCLUSION

For the reasons discussed, we withdraw our opinion filed on July 27, 2012. We reverse and vacate the judgment of

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[14] *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011); *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010).

[15] *State v. Ross*, 283 Neb. 742, 811 N.W.2d 298 (2012); *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

conviction and sentence, and we remand the cause to the district court with directions to dismiss.

JUDGMENT REVERSED AND VACATED, AND CAUSE REMANDED WITH DIRECTIONS TO DISMISS.

CASSEL, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
WESLEY E. KITT, APPELLANT.
823 N.W.2d 175

Filed November 9, 2012. No. S-11-629.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
4. **Constitutional Law: Witnesses: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and reviews the underlying factual determinations for clear error.
5. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
6. **Rules of Evidence.** When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.
7. **Rules of Evidence: Hearsay: Witnesses: Proof.** For purposes of hearsay analysis, it is within the discretion of the trial court to determine whether the unavailability of a witness under Neb. Evid. R. 804, Neb. Rev. Stat. § 27-804 (Reissue 2008), has been shown.