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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 REPLY BRIEF

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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.

The State's claim that Pierre waived his challenge to the indictment is incorrect. The claim is erroneously premised on equating the defect in this case- failure to charge an actual offense- to a defect in an indictment that, for example, fails to put the defendant on adequate notice of the conduct in which he purportedly engaged that amounts to the actual charge. Simply stated, a defendant may raise the failure of an indictment to charge an offense at any time in the proceedings. Therefore, there is no waiver here and the Court must address this issue.[1] Assuming, *arguendo*, Pierre did waive this argument, the defect in the indictment amounts to plain error. A conviction for not performing a duty one does not have is an error "apparent on the face of the record; which [is] basic, serious and fundamental in [its] character, and which clearly deprive[s] one of a substantial right [and] which clearly show[s] manifest injustice.[2]

The State erroneously claims that the indictment did allege a criminal offense because it "substantially tracked the language" of 11 *Del.C.* §4120 (f) (1).[3] Unfortunately for the State, a simple side-by-side comparison of the indictment to

[1] *State v. Deedon*, 189 A.2d 660 (Del. 1963); *Del.Super.Ct.Crim.R.* 12 (b) (2).
[2] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[3] Ans.Br. at p. 7-8.

the statute immediately discredits this argument. Nowhere does the statute require Pierre to "provide adequate verification of his place of employment," such that a failure to comply is a crime as the State alleges in Pierre's indictment. But, instead of offering a cogent response to Pierre's thoughtful explanation of this discrepancy, the State mischaracterizes his argument.

In his Opening Brief, Pierre explains, in detail, that while 11 Del.C. § 4120 (f)(1) requires re-registration whenever an offender changes his "name, residence address or place of employment and/or study[,]" it requires something more when the offender is making a change to his address.[4] This "something more" requirement is reflected in a separate sentence requiring the offender to "provide adequate verification" only for a change of "residence at the stated address." No such requirement is set forth for a change in place of employment or any of the other registry information. The State disputes none of this. Instead, it erroneously claims that Pierre's position is that "he was under no legal obligation to provide truthful information about his employment or, in this case, lack of employment[]" or that he "could lie with impunity to SBI about his employment[.]"[5] That simply is not Pierre's argument.

[4] Op.Br. at p. 8.
[5] Ans.Br. at p. 8.

Pierre's argument is that the particular conduct the State alleges to be a crime in his indictment is "outside the sweep of the charging statute[.]"[6] In other words, assuming all of the State's allegations are true, Pierre is not guilty of the offense charged. With respect to a change of employment, he had a duty to reregister within 3 business days of the change. Had the State had a basis to charge Pierre of failing to comply with that duty, it could have indicted him of a crime related specifically related to that failure. It did not have the ability to charge him with failing to perform a duty which applied only to a change of address. Other jurisdictions addressing similar registration issues have made findings consistent with this conclusion.[7]

The State erroneously claims that "[i]f Pierre was unsure of what he had to defend against, he could have requested a bill of particulars."[8] However, the United States Supreme Court has stated that "it is a settled rule that a bill of particulars

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

[7] *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); *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).

[8] Ans.Br. at p. 8.

cannot save an invalid indictment"[9] and the State, itself, has previously "conceded that it is not the function of a bill of particulars to remedy a defective indictment."[10]

Accordingly, Pierre's criminal conviction is void.

[9] *Russell v. United States*, 369 U.S. 749, 770 (1962).
[10] *Deedon*, 189 A.2d at 663.

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.

It appears the State misunderstands the prosecutor's case at trial and, thus, the record and issue on appeal. This is reflected by two claims: 1) a rational trier of fact could find Sorkpah's testimony that "Pierre's last day of work at Mawull was January 17, 2018"[11] was more credible than Pierre's contrary factual claim;[12] and 2) "[a] rational trier of fact, viewing the testimony of Reif and Sorkpah in the light most favorable to the State, could find beyond a reasonable doubt that Pierre had not reported his change of employment in January 2018 as required by 11 *Del.C.* § 4120 (f) (1), and that the October 2018 employment reporting was false."[13] Neither one of these were argued below. Nor are they dispositive issues.

First, ***both*** Sorkpah and Pierre testified that the last time Pierre actually drove for Mawull was in January 2018.[14] In fact, none of the State's witnesses contradicted any of Pierre's testimony. The State's witnesses either agreed with Pierre's

[11] Ans.Br. at p.12
[12] Ans.Br. at p.12.
[13] Ans.Br. at p.12 .
[14] A20, 22.

testimony or failed to dispute his testimony. Thus, the State never made an issue out of the credibility of his testimony.

Second, the prosecutor's argument was not, as the State now suggests, that Pierre failed to ever report his change of employment from Mawull since he left in January 2018 and that his re registration in October 2018 was just an effort to maintain a belief that he was still working there. If, however, that was the prosecutor's argument, it is simply not supported by the record.

It is undisputed that the last time Pierre actually drove for Mawull was January 2018. However, the prosecutor presented no evidence nor made any argument that Pierre failed to report any change in place of employment in a timely manner in January 2018. In fact, on appeal, the State fails to point out that when Pierre filled out his annual registration on June 8, 2018, he accurately documented that he was not employed at Mawull at that time when he listed Stewart Moving & Storage as his employer.[15] The prosecutor offered no evidence contradicting this representation.

Both Pierre and Sorkpah testified that in late summer or early fall 2018 they discussed having Pierre drive for Mawull again.[16] Pierre testified that as of October 2, 2018, it was his understanding that he had been rehired because Sorkpah checked his "new MVR record" and his license and made sure he was "compliant to work."[17]

[15] A83.
[16] A17, 20.
[17] A21.

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] The State presented no evidence at trial through Sorkpah, or any other source that disputed this testimony.[19] Interestingly, even the detective who spoke with Sorkpah before trial to confirm Pierre's employment never relayed any out-of-court statements that contradicted this testimony.

Beyond its own misreading of the record, the State relies on nothing to show that the State provided sufficient evidence that, assuming Pierre was required but failed to provide adequate verification of his place of employment, he acted knowingly or recklessly in his failure.[20] Perhaps this is because, at trial, the prosecutor provided no evidence to counter Pierre's testimony that he had a reasonable belief (at the very least) that he had been re-employed by October 2, 2018. In fact, the State's argument below was that the employment information Pierre offered in October was false because he had not physically started driving again or received a paycheck again.

Further, under the State's argument, Pierre was in a "damned if he does, damned if he doesn't" situation. As mentioned in his Opening Brief, the statute requires the offender to report a change in his "place of employment," it does not

[18] A21.
[19] Ans.Br. at p. 4-5, 11.
[20] Op.Br. at pp. 16-17.

require him to wait to report a change in active work at the place of new employment.[21] Had he waited until that time to report a change, the State would likely claim that he failed to report in a timely manner.

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.

[21] *Andrews v. State*, 34 A.3d 1061, 1063–64 (Del. 2011).

CONCLUSION

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

Respectfully submitted

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