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IN THE SUPREME COURT

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STATE OF NORTH DAKOTA

SUPREME COURT NO.'S 20010298 and 20010299

State of North Dakota,

FILED
IN THE OFFICE OF THE
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Plaintiff-Appellee,

MAY 21 2002

vs.

Michael Darnell Jackson,

STATE OF NORTH DAKOTA

Defendant-Appellant.

.....
Appeal from the Criminal Judgments of Convictions on
November 14, 2001, of the Cass County District Court,
East Central Judicial District
District Court Criminal No.'s 09-01-K-1513 and 09-01-K-1514
The Honorable Norman J. Backes, District Judge
.....

BRIEF OF APPELLEE

.....
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STATEMENT OF THE ISSUE

I. Whether the Defendant was denied effective assistance of counsel when his attorney failed to move for a judgment of acquittal, after the State had presented a prima facie case establishing the essential elements of the offenses charged to the jury.

STATEMENT OF THE CASE

This is an appeal from two East Central Judicial District Court Judgments and Convictions of Appellant Michael Darnell Jackson (hereinafter "Jackson") for Failure to Register as a Convicted Offender, both Class A misdemeanors, in violation of N.D.C.C. § 12.1-32-15. The State has reviewed Jackson's statement of the case at page 1 of the Appellant's Brief, and has no objection or additions to include regarding the statement of the case provided. The State respectfully urges this Court to affirm the District Court's Judgments.

STATEMENT OF THE FACTS

The State also concurs, for the most part, with the statement of the facts as set forth by Jackson. For clarity, the State offers its own statement of the facts. Jackson was charged by two separate Informations and accompanying Affidavits of Probable Cause, with one count in each Information of Failure To Register As Convicted Offender. (A-10 & 11)¹. On September 25, 2001, the two cases were consolidated for trial by the Honorable Norman J. Backes. (A-2, entry 22). The cases as consolidated were tried to a jury on November 13-14, 2001, and the jury found Jackson guilty on both counts. The Honorable Norman J. Backes sentenced Jackson

¹Appendix page.

and entered Criminal Judgments on the same date, November 14, 2001. (A-12 & 13).

At trial, the State presented, in it's case in chief, evidence required to prove the elements of the crimes alleged. The State produced a certified copy of a Criminal Judgment and Warrant of Commitment from Norman County, Minnesota, documenting Jackson's conviction of Criminal Sexual Conduct in the 3rd Degree, as well as Jackson's requirement to register as a sex offender. (Tr. at 20, Exhibit 1)².

Det. Tammy Lynk of the Fargo Police Department testified that Jackson registered a change of address with the Fargo Police Department on May 15, 2000, from 4303 9th Avenue Southwest, #106 in Fargo to a new address at 520 Third Street North, Apt. 4 in Fargo. (Tr. at 104, Exhibit 20). The form that Jackson filed on that date included an area for acknowledging that the registrant was aware of the potential penalties for failing to register a change of address within ten days, and Jackson signed and dated the form. Jackson's Probation Officer, Shelly Prochnow, testified that she met with Jackson on May 18, 2000, and Jackson indicated he was living at 520 Third Street North, Apt. 4 in Fargo. (Tr. at 33-34). A report of Ms. Prochnow's meeting with Jackson was introduced into evidence. (Tr. at 34-35, Exhibit #4).

²Trial Transcript.

On June 7, 2000, Ms. Prochnow had another probationary meeting with Jackson, where he indicated that he had moved back to 4303 9th Avenue Southwest, #106 in Fargo to live with his girlfriend Shelly Flaagan and their son. (Tr. at 36). A copy of Ms. Prochnow's report was also introduced into evidence in regard to this residence change. (Tr. at 35-36, Exhibit #5). Det. Tammy Lynk testified that Mr. Jackson did not ever report this change of address back to 4303 9th Avenue Southwest, #106 in Fargo to the Fargo Police Department. (Tr. at 105). However, on the next change of residence form filed, he indicated that 4303 9th Avenue Southwest, #106 was the address he was moving from, indicating a gap in registration with Fargo Police Department. (Tr. at 105-06, Exhibit 15). Ms. Prochnow also testified that North Dakota Parole and Probation closed Jackson's file on October 31, 2000, due to the fact that he had absconded from supervision, and his whereabouts were unknown. (Tr. at 39-40).

Ms. Shelly Flaagan testified that Jackson was living with her at 4303 9th Avenue Southwest, #106 in April of 2000, but he moved out on April 28, 2000, to a place in North Fargo. (Tr. at 52). Ms. Flaagan also testified that Jackson moved back in with her on May 28, 2000, at 4303 9th Avenue Southwest, #106 and resided with her there until October 26, 2000, when he moved out again. (Tr. at 52-53). Testimony provided by

Lonnie Dodoo indicates that Dodoo's daughter, Anessa Shalesky, and Jackson moved in with her at her West Fargo apartment located at 1151 Prairie Parkway, No. 8 on November 5, 2000. (Tr. at 58-61). Detective Brad Berg of the West Fargo Police Department testified that Jackson did not make contact with the West Fargo Police Department to register this change of address until December 5, 2000. (Tr. at 81). A form registering the change of residence was admitted into evidence. (Tr. at 83, Exhibit #16). When the State concluded its case in chief, Jackson's attorney made no motions, but moved directly into presentation of his defense. (Tr. at 109). At the conclusion of the trial, a jury found Jackson guilty of both offenses charged. (Tr. at 185).

ARGUMENT

The Defendant was not denied effective assistance of counsel when his attorney did not move for a judgment of acquittal following presentation of the State's case, or at the end of trial, when the State had presented a prima facie case establishing the essential elements of the offenses charged to the jury.

Criminal Defendants are guaranteed effective assistance of counsel by our state and federal constitutions. State v. Norman, 507 N.W.2d 522, 525 (N.D. 1993). Unless counsel was plainly defective, ineffective assistance of counsel claims should not be made by direct appeal. Id.;

State v. Messner, 1998 ND 51, ¶129, 583 N.W.2d 109. There is a strong presumption that counsel's conduct falls within a reasonable range of professional assistance, and the Court will not second guess an unsuccessful counsel's defense strategy. State v. Norman, 507 N.W.2d at 525.

If the State clearly presents a prima facie case in support of the charges presented, it is not ineffective assistance of counsel for failure to move for a judgment of acquittal at the close of the State's case. Id.; see also State v. Kroeplin, 266 N.W.2d 537, 543 (N.D. 1978) (stating defense counsel cannot be faulted for electing not to make a motion for judgment of acquittal, when the trial court could not have granted the motion).

The essential elements of the offenses charged are provided for in N.D.C.C. § 12.1-32-15(2) & (7), which in pertinent part states:

The court shall impose, . . . a requirement that the individual register, within ten days of coming into a county in which the individual resides or is temporarily domiciled. The individual must register with the chief of police of the city or the sheriff of the county if the individual resides, attends school, or is employed in an area other than a city. The court shall require an individual to register .

. . if that individual: a. Has pled guilty or nolo contendere to, or been found guilty as a felonious sexual offender or an attempted felonious sexual offender . . . [or] b. Has pled guilty or nolo contendere to, or been found guilty as a sexual offender for, a misdemeanor or attempted misdemeanor. N.D.C.C. § 12.1-32-15(2). Upon a change of address, the individual required to register shall also register within ten days at the law enforcement agency having local jurisdiction of the new place of residence, school or employment. N.D.C.C. § 12.1-32-15(7).

More simply, the State had to prove the following essential elements for each offense: 1) Jackson had pled guilty or been convicted of a sexual offense; 2) Jackson was required to register as a sexual offender; and, 3) Jackson willfully failed to register with the chief of police his changes of address within ten days of his change in address. See State v. Knowels, 2002 ND 62, ¶12 (interpreting N.D.C.C. § 12.1-32-15 not to be a strict liability offense, but one which requires the culpable mental state as "willfully.").

A prima facie case of the elements as set forth above was clearly presented by the State. Elements one and two were met by the admission into evidence the conviction from Norman

County, Minnesota, setting forth both the offense for which he was convicted, and the requirement to register. The willful portion of element three was met by the admission into evidence of several change of residence forms, signed and acknowledged by Jackson, each of which stated that the person signing the form understands his requirement to register with law enforcement within ten days of relocating. In addition, Jackson testified on cross examination that he understood he had an obligation to register each time he moved. (Tr. at 134-36). The failing to register a change of address within ten days was met by the testimony of the State's witnesses, who indicated that Jackson moved, and failed to register either of these changes of address within ten days: 1) from 520 Third Street North, Apt. 4 in Fargo., to 4303 9th Avenue Southwest, #106 in Fargo, and 2) from 4303 9th Avenue Southwest, #106 in Fargo to 1151 Prairie Parkway, No. 8, in West Fargo.

Because it was obvious that the State presented a prima facie case, failure for Jackson's defense counsel to move for a judgment of acquittal does not constitute ineffective assistance of counsel.

The defendant argues that there was insufficient evidence for a conviction, based on his past registration history, and his informing his probation officer on nine different occasions of his changes of address. This argument is without

merit. The statute specifically provides that: "[u]pon a change of address, the individual required to register shall . . . register within ten days at the law enforcement agency having local jurisdiction of the new place of residence, school or employment." N.D.C.C. § 12.1-32-15(7). The Court has recognized that the clear intent of the legislature in requiring registration was to enable law enforcement to keep better track of sex offenders and notify law enforcement of the offender's presence in the community, State v. Rubey, 2000 ND 119, ¶17, 611 N.W.2d 888. Meeting with a probation officer from North Dakota Parole and Probation does not meet the requirement to register with local law enforcement. The Defendant acknowledged he understood his obligation to register with local law enforcement. In addition, Jackson was terminated from probation in North Dakota for absconding from supervision on October 31, 2000, just following his move from 4303 9th Avenue Southwest, #106 in Fargo.

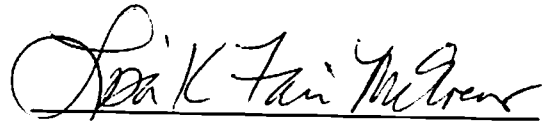
CONCLUSION

In summary, the State contends that Jackson was not denied effective assistance of counsel when his attorney did not move for a judgment of acquittal following presentation of the State's case or at the end of trial. The State had presented a prima facie case establishing the essential

elements of the offenses charged, and there was sufficient evidence to support the two convictions.

For the reasons set forth, the State respectfully requests this Court to affirm the Judgments of Convictions of the District Court.

Respectfully submitted this 21st day of May, 2002.

A handwritten signature in cursive script, reading "Lisa K. Fair McEvers", written over a horizontal line.

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