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Statement of Issues

- I. Whether the judgment entered by the trial court is appealable?
- II. Whether the trial court properly ruled that Mr. Jackson was not required by the statute to register his employment when he did not change his name, school, or address?

Statement of the case

This is an appeal by the State of North Dakota from an Order and Judgment of Acquittal entered by the Honorable Frank L. Racek, East Central Judicial District Court on March 9, 2005. (Appendix 6; Docket No. 27).¹ Appellee Michael Darnell Jackson (hereinafter Mr. Jackson) was charged with failure to register as a sex offender pursuant to **N.D.Cent. Code §12.1-32-15**, as a Class C Felony, by Information dated September 17, 2004. (App. 3; D.1). The parties waived trial by jury, and a bench trial was conducted on February 22, 2005. (Transcript of proceedings; D.18-23). The State presented its evidence and rested its case. The Defense made a motion for a judgment of acquittal. (Tr. 18). The Court entered a verdict of not guilty. (Tr. 23).

Statement of the facts

Mr. Jackson was convicted in Norman County, Minnesota, of Criminal Sexual Conduct in the Third Degree on February 20, 1996. As a result, he is required to register as a convicted sex offender. (State's Ex. 1, D. 19). He was convicted in Cass County District Court of Failure to Register as a Convicted Offender, on

¹In the brief, the Docket will be abbreviated D, the Appendix App, and the Transcript T.

November 14, 2001. (State's Ex. 2, D. 20). Mr. Jackson was charged in this case with failure to register as a convicted offender, with the allegation of the prior conviction, making this charge a Class C Felony. (App. 3; D. 1).

None of the material facts in this record appear to be contested. Mr. Jackson registered with the Fargo Police Department on January 12, 2004. (State's Ex. 3; App. 4). On the form, he showed a former address of 817 1st Street North, #4, Fargo, North Dakota 58102. He showed a new address of 1115 - 4th Avenue North, Fargo, North Dakota 58102. He listed a phone number of 280-2514 and an occupancy date of January 10, 2004. The spaces on the form pertaining to school and employer were blank.

Mr. Jackson worked at Busy Bubbles in Fargo, North Dakota from January 20, 2004, until May 27, 2004.

Mr. Jackson again registered at the Fargo Police Department on June 28, 2004. (State's Ex. 4; App. 5). On this form, he showed the previous address of 1115 4th Avenue North, Fargo, North Dakota 58102, and a new address of 1013 10th Avenue North, Fargo, North Dakota, a phone number of 701-235-3136, and a date of occupancy of June 25, 2004. He also showed an employer of Concrete Company of FM, with an address and telephone number.

Mr. Jackson never reported his employment at Busy Bubbles on any registration form.

The officer conducted his investigation on June 24, 2004. He went to Busy Bubbles and talked to the manager. He talked to Mr. Jackson the same day. (Tr. 16). The officer was investigating another possible crime, and was "trying to find"

Mr. Jackson and "was having a hard time doing it." That statement makes no sense, because the officer then stated that he had phone number, called Mr. Jackson, and "he was very cooperative." The officer's investigation occurred on one day, June 24, 2004. The officer made personal contact with Mr. Jackson that day, and they discussed the fact that he had been employed at Busy Bubbles, and that he was no longer employed at Busy Bubbles, and that he did not know he was required to report changes of employment. (Tr. 16-17). The basis for the prosecution was only the failure to register the job at Busy Bubbles. (Tr. 20-23).

Argument

I. The Judgment Entered by the Trial Court is Not Appealable.

The State's has the right to appeal only when expressly authorized by statute. Mr. Jackson believes that the only possible basis for this appeal is N.D.Cent.Code Section 29-28-07(1), "an order quashing an information or indictment or any count thereof". **See State v. Flohr, 259 N.W.2d 293, 295 (N.D. 1977)**. If a defendant is acquitted of an offense, the State cannot appeal. **Id. at 296**. The United States Supreme Court and the North Dakota Supreme Court have recognized a distinction between an acquittal and the dismissal of an information. The Court must "look at the substance of the judge's ruling and determine whether it represents a resolution of some or all of the factual elements of the offense charged." **Id. at 295. See also United States v. Sisson, 399 U.S. 267, 289-90 (1970), State v. Meyer, 494 N.W.2d 364 (N.D. 1992)**.

The North Dakota Supreme Court has held "when a dismissal is based upon

legal conclusions, rather than the resolution of some or all of the factual elements of the offense charged, the dismissal is equivalent to an order quashing an information and is, therefore, appealable by the State." ***State v. Bettenhausen***, 460 N.W.2d 394, 395(N.D. 1990). In ***State v. Hogie***, 424 N.W.2d 630 (N.D. 1988), the trial court entered a judgment of acquittal based solely on the fact that the State had charged the defendant with theft of a motor vehicle as a Class B felony, ruling that theft of a motor vehicle can only be charged as a Class C Felony. *Id.* The Court made no factual determination as to the elements of the charged theft.

In this case, in the Information, the State charged the Defendant, stating "Count1: Failure to register as Convicted Offender in violation of Section 12.1-32-15, N.D.C.C. in that on or about January 19, 2004 through May 27, 2004, the above named individual failed to register....." (App. 3; D. 1). The Information does not designate whether the failure to register was as to address, school or employment. The State presented all of its evidence and rested its case. The State relied only upon Mr. Jackson's failure to report his employment at Busy Bubbles. That was a factual determination made by the Court after the close of the State's case. (T. 21-23). The uncontroverted evidence is that Mr. Jackson registered with the Fargo Police Department on January 12, 2004. (State's Ex. 3; App. 4). On the form, he showed a former address of 817 1st Street North, #4, Fargo, North Dakota 58102. He showed a new address of 1115 - 4th Avenue North, Fargo, North Dakota 58102. He listed a phone number of 280-2514 and an occupancy date of January 10, 2004. The spaces on the form pertaining to school and employer were blank.

Mr. Jackson worked at Busy Bubbles in Fargo, North Dakota from January

20, 2004, until May 27, 2004.

Mr. Jackson again registered at the Fargo Police Department on June 28, 2004. (State's Ex. 4; App. 5). On this form, he showed the previous address of 1115 4th Avenue North, Fargo, North Dakota 58102, and a new address of 1013 10th Avenue North, Fargo, North Dakota, a phone number of 701-235-3136, and a date of occupancy of June 25, 2004. He also showed an employer of Concrete Company of FM, with an address and telephone number. The prosecution is based only upon the allegation that he failed to report his employment at Busy Bubbles. Based upon the plain reading of **N.D. Cent. Code Section 12.1-32-15(7)** the trial court found that Mr. Jackson was not required to register his employment address unless and only when his address changed. The trial court made the determination that Mr. Jackson did register his address change and reported his employer on the form dated June 28, 2004. This was a factual determination. Had this been a jury trial, the trial court would have instructed on the language of the statute. The statute is unambiguous. The facts proven by the State, in light of the language of the statute, allowed the trial court to reach only one conclusion, that Mr. Jackson was not guilty of the charge, factually and legally. The Order and Judgment of Acquittal was a factual finding, based upon the trial court's reading of the statute. This case is distinguishable from ***State v. Hogie*, 424 N.W.2d 630 (N.D. 1988)**, where the trial court made no factual determination as to what the defendant did or did not do in that case. ***See Sanabria v. United States*, 437 U.S. 54, 68-69 (1978)**.

Therefore, since the trial court's decision was based upon factual determinations, this appeal should be dismissed.

II. The Trial Court Properly Interpreted N.D. Cent. Code Section 12.1-32-15(7).

This Court has stated the standard of review on this issue: "The interpretation of a statute is a question of law, which we fully review on appeal." ***Anderson v. Hensrud*, 548 N.W.2d 410, 412 (N.D. 1996)**. The language of the statute at issue is:

N.D.CENT.CODE § 12.1-32-15(7) Registration consists of a written statement signed by the individual, giving the information required by the attorney general, and the fingerprints and photograph of the individual.... If an individual required to register pursuant to this section has a change in name, school, or address, that individual shall inform in writing, at least ten days before the change, the law enforcement agency with whom that individual last registered of the individual's new name, school, residence address, or employment address....

The evidence is uncontested that Mr. Jackson was properly registered on January 12, 2004. (State's Ex. 3; App. 4). The State's entire argument with respect to the meaning of "address" is misplaced. The analysis in ***State v. Rubey*, 2000 ND 119, ¶ 15, 611 N.W.2d 888** is distinguishable. In that case the defendant had moved to another town. The evidence in this case is that Mr. Jackson never changed his residence address or telephone number during the time in question. (State's Ex. 3 & 4; App. 4 & 5). If the sexual offender changes his name, school, or address, the sexual offender shall inform the law enforcement agency with which he is registered of the sexual offender's "new name, school, residence address, *or employment address*." **N.D.Cent.Code § 12.1-32-15(7) (emphasis added)**. It is interesting to note that the statute uses the conjunction *or* not *and*. This statute

is not ambiguous, it says what it says. The State in this case wants this Court to rewrite the statute. This Court has very recently discussed interpretation of statutes and the invitation to rewrite a statute in *Larsen v. N.D. Department of Transportation*, 2005 ND 51, 693 N.W.2d 39, stating as follows:

[¶10] DOT is asking this Court to rewrite the statute for the legislature. This Court's primary objective when interpreting a statute, however, is to ascertain the legislative intent, which must be sought initially from the language of the statute itself. *E.g.*, *State v. Higgins*, 2004 ND 115, ¶ 13, 680 N.W.2d 645; *Ralston v. Ralston*, 2003 ND 160, ¶ 5, 670 N.W.2d 334; *Kjolsrud v. MKB Mgt. Corp.*, 2003 ND 144, ¶ 7, 669 N.W.2d 82. If the language of a statute is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit, because legislative intent is presumed clear from the face of the statute. N.D.C.C. § 1-02-05; *Ralston*, at ¶ 5; *Kjolsrud*, at ¶ 7.

[¶11] We have specifically held that "[t]his Court will not add words or additional meaning to a statute." *First Union Nat'l Bank v. RPB 2, LLC*, 2004 ND 29, ¶ 17, 674 N.W.2d 1; *see also Haggard v. Meier*, 368 N.W.2d 539, 541 (N.D. 1985)... We cannot ignore the plain language of the statute under the pretext of pursuing some unexpressed legislative intent, nor can we add words or phrases which the legislature did not include. In construing a statute, we must presume the legislature said all that it intended to say. *Selzler v. Selzler*, 2001 ND 138, ¶ 18, 631 N.W.2d 564; *Johnson v. North Dakota Workers' Comp. Bureau*, 539 N.W.2d 295, 298 (N.D. 1995).

Mr. Jackson acknowledges what this Court stated in *Rubey*, 2000 ND 119:

[¶16] It is true we construe ambiguous criminal statutes in favor of the defendant. *State v. Larson*, 479 N.W.2d 472, 473 (N.D. 1992). We also construe statutes to avoid a ludicrous result, *id.*, and we endeavor to effectuate the legislative purposes which prompted a law's enactment. *State v. Jelliff*, 251 N.W.2d 1, 7 (N.D. 1977).

[17]The clear intent of the legislature in requiring this registration was to enable law enforcement to keep better track of sex offenders and those who commit crimes against children....

The obvious intent of the registration requirement is to "keep track of sex offenders."

In this case, the officer's entire investigation took less than one day; he called Mr. Jackson and met with him. Ironically, the officer evidently learned that Jackson had been working at Busy Bubbles and went there first to talk to the manger. (Tr. 12-13; 16). So, if the intent is to be able to keep track of a sex offender, that intent was well met in this case. The State argues that registration of every change of job after registering residence and employment is essential to carry out the intent of the statute. The legislature could have required that if they had wanted to, which they did not. When a registered offender has not changed his residence or his phone number, whether he works or where he works is not essential to "keeping track" of him. Not every offender will have a job, some are disabled and unemployed. A lot of offenders do day labor. A ludicrous result would obtain if the statute were interpreted to require such an offender to register every day when he is sent to a new work site. All of **N.D.Cent. Code 12.1-32-15** should be read as a whole. Offenders who are "temporarily domiciled" in this state are required to register. **N.D.Cent. Code 12.1-32-15(1)(g)**. This includes working in the state for over ten days. So, offenders who only work in this state, and live in another state, are required to register. Thus, by stating "or employment" in **N.D.Cent. Code 12.1-32-15(7)**, the statute is consistent in application to those who are registered only because they work here, and do not live here.

Mr. Jackson complied with the statute, and the trial court was correct in ruling that he did.

Conclusion

The judgment of the trial court is not appealable because it was based upon factual determinations and not legal conclusions alone. The trial court properly interpreted the plain language of the statute in determining the Defendant did not have to re-register with law enforcement upon changing his employment. The Judgment of the trial court should be affirmed.

Respectfully submitted this 23rd day of May, 2005.



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RE: State of North Dakota, Plaintiff and Appellant vs. Michael Darnell Jackson, Defendant and Appellee
Supreme Court No. 20050072
Cass County Civil No. 09-04-K-03752

CERTIFICATE OF SERVICE BY MAIL

I, Joy Becker, do hereby certify that, on the 23 day of May, 2005, I served the Brief of Defendant/Appellant upon the following, by placing true and correct copies in envelopes addressed as follows:

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and depositing the same, with postage prepaid, in the United States Mails at Fargo, North Dakota.

Dated this 23rd day of May, 2005.

Joy Becker
Joy Becker

Subscribed and sworn before me this 23rd day of May, 2005.

Kelly Fritel
Notary Public

KELLY FRITEL
Notary Public
State of North Dakota
My Commission Expires Feb. 24, 2011