IN THE COURT OF APPEALS OF IOWA

No. 0-494 / 09-1499
Filed October 6, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSEPH ALLAN ADAMS,
Defendant-Appellant.

Appeal from the Iowa District Court for Clarke County, Monty W. Franklin, District Associate Judge.

Joseph Allan Adams appeals his convictions and sentence for violating a sex offender residency restriction and failing to register a change of residence. **AFFIRMED IN PART AND REVERSED IN PART.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Ronald L. Wheeler, County Attorney, for appellee.

Heard by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes no part.

MANSFIELD, J.

Joseph Adams appeals his convictions and sentence for violating the sex offender residency and registration laws following a bench trial on a stipulated record. *See* Iowa Code §§ 692A.2A(2)-(3), 692A.3(2), 692A.7(1) (2007).[1] Although we are not persuaded by Adams's constitutional challenges to those laws or by his sufficiency of the evidence argument regarding the residency restriction, we agree the State failed to prove Adams had the necessary mens rea to violate the registration law. Therefore, we reverse that conviction and sentence.

I. Background Facts and Proceedings.

The parties stipulated below to the following facts:

On May 20, 1999, Adams was convicted of third-degree sexual abuse against a minor. As a result of this conviction, Adams is required to register as a sex offender, notify the Clarke County Sheriff of any changes of residence, and not reside within 2000 feet of a public elementary school.

At all relevant times, Adams was registered as a sex offender with the Clarke County Sheriff stating that his residence was in Murray. However, on the evenings of March 18, 19, and 20, 2008, Adams slept overnight at the residence of his fiancée in Osceola. Her residence is located within 2000 feet of the Clarke County Elementary School. Adams did not register a change of residence within five days following the three consecutive overnight stays with his fiancée.

[1] During the 2009 legislative session, the Iowa General Assembly enacted a comprehensive revision of the sex offender registry laws in Chapter 692A. *See* 2009 Iowa Acts ch. 119 (codified at Iowa Code §§ 692A.101-.130 (2009 Supp.)). This case predates that revision. Accordingly, all statutory references are to the 2007 Code unless the context specifically indicates otherwise.

The parties further stipulated that Adams never had an intention to abandon his Murray residence or establish a new residence at the home of his fiancée. Adams also did not know or understand that sleeping at the residence of his fiancée would establish a new residence, would constitute a violation of the residency restriction, or would require him to register the residence within five days.

On April 17, 2008, the State charged Adams by trial information with violating the 2000-foot residency restriction for certain sex offenders and with failing to register a change of residence. Before trial, Adams filed a motion to adjudicate law points, asserting the terms "reside" and "residence" as used in the sex offender residency restriction and registration statutes were unconstitutionally vague. On August 14, 2008, the district court overruled and denied Adams's motion to adjudicate law points. It found the sex offender residency restriction and registration statutes were not unconstitutionally vague or overbroad and did not infringe upon Adams's right to travel. Discretionary review was subsequently denied by the supreme court. Adams then filed a written waiver of presence, waiver of trial rights and privileges, and a stipulation of facts for determination of guilt by the district court.

On January 27, 2009, the district court entered a judgment and sentence finding Adams guilty of both charges and imposing fines and surcharges. Adams appealed. On August 26, 2009, the supreme court vacated the judgment and sentence and remanded the case for the district court to enter specific findings of fact and conclusions of law prior to entry of judgment and sentence, as required by Iowa Rule of Criminal Procedure 2.17(2). Before any ruling on remand had

occurred, Adams filed a motion to limit the assessment of court-appointed attorney fees.

On October 2, 2009, the district court issued an expanded ruling, again finding Adams guilty of both charges. The district court then ordered Adams to pay a fine of $500 on each offense plus the statutory surcharge. The district court further denied Adams's motion to limit court-appointed attorney fees and ordered him to pay court costs and the expense of his court-appointed attorney "to the extent [he] is reasonably able to do so," but only "in the amounts as determined by the State Public Defender's Office (Indigent Defense) and/or order of the Court."

Adams appeals.

II. Issues on Appeal.

Adams raises the following issues on appeal: (1) whether the terms "reside" and "residence" in the sex offender residency restriction statute are unconstitutionally vague (both facially and as applied) and violate the due process right to travel; (2) whether his trial counsel was ineffective for failing to argue the term "change" in the sex offender registration statute was also unconstitutionally vague and violated his right to travel; (3) whether there was sufficient evidence of mens rea to sustain his convictions; and (4) whether the district court erred in assessing court-appointed attorney fees.

III. Standards of Review.

We review constitutional claims de novo. *Formaro v. Polk County*, 773 N.W.2d 834, 838 (Iowa 2009). If the constitutionality of a statute is challenged, we presume it to be constitutional. *State v. Seering*, 701 N.W.2d 655, 661 (Iowa

2005). The challenger bears the heavy burden to prove unconstitutionality beyond a reasonable doubt. *Id*. This requires the challenger to "refute every reasonable basis upon which the statute could be found to be constitutional." *Id*.

Claims regarding the sufficiency of the evidence to support a conviction are reviewed for the correction of errors at law. *State v. Johnson*, 770 N.W.2d 814, 819 (Iowa 2009). We will not disturb the findings on appeal if supported by substantial evidence. *Id*. "Evidence is substantial if, when viewed in the light most favorable to the State, it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *Id*.

We also review challenges to the district court's interpretation of a statute for the correction of errors at law. *Id*.

IV. Analysis.

A. Vagueness and Right to Travel.

Adams contends the terms "reside" and "residence" within the sex offender residency restriction and registration statutes are unconstitutionally vague and violate his right to travel.[2] As Adams's appellate counsel conceded at

[2] The 2009 revision has adjusted the definition of the term "residence." It now states:

> "Residence" means each dwelling or other place where a sex offender resides, sleeps, or habitually lives, or will reside, sleep, or habitually live, including a shelter or group home. If a sex offender does not reside, sleep, or habitually live in a fixed place, "residence" means a description of the locations where the offender is stationed regularly, including any mobile or transitory living quarters. "Residence" shall be construed to refer to the places where a sex offender resides, sleeps, habitually lives, or is stationed with regularity, regardless of whether the offender declares or characterizes such place as the residence of the offender.

2009 Iowa Acts ch. 119, § 1 (codified at Iowa Code § 692A.101(24) (2009 Supp.)). "Habitually lives" is further statutorily defined as:

> living in a place with some regularity, and with reference to where the sex offender actually lives, which could be some place other than a mailing

oral argument, these due process arguments were recently addressed and rejected by the supreme court in *Formaro*, 773 N.W.2d at 838-41.

In *Formaro*, the defendant was placed on the sex offender registry for having committed sexual abuse in the second degree as a juvenile against another minor. *Id*. at 837. After a subsequent incarceration for an unrelated offense, Formaro was paroled and moved into the home of his parents. *Id*. Nearly a year later, Formaro's parole officer discovered that the parents' home was located within 2000 feet of an elementary school. *Id*. As a result, the parole officer informed Formaro he had five days to move. *Id*. Formaro was ultimately able to find a new residence, but filed a petition for declaratory relief requesting the court to find the 2000-foot rule unconstitutional on right to travel, freedom of association, vagueness, overbreadth, bill of attainder, and ex post facto grounds. *Id*. at 838-44. The district court and the supreme court rejected each of Formaro's arguments. *Id*.

In disposing of Formaro's vagueness challenge, the supreme court concluded "use of the term 'sleeps' in section 692A.1(8) in connection with the definition of 'reside' means habitual sleep in a home." *Id*. at 841. Thus, the supreme court reasoned the legislature had drawn a distinction between "casual sleep within a prohibited zone," which was not covered by section 692A.2A, and "habitual sleep." *Id*. The supreme court added that the general assembly's use of the term "sleeps" "connotes more than a singular occurrence." *Id.* The supreme court went on to note:

> address or primary address but would entail a place where the sex offender lives on an intermittent basis.

2009 Iowa Acts ch. 119, § 1 (codified at Iowa Code § 692A.101(13) (2009 Supp.)).

> While it is true that under our construction a sex offender could have more than one residence, instead of making the statute unconstitutionally vague, we believe this was the clear intention of the legislature. By tying the definition of "residence" to habitual sleep, the legislature was attempting to close a potential loophole in the statute which would allow a registered sex offender from establishing an "official" residence outside the prohibited zone while living within a protected area.

Id. Therefore, the supreme court held the residency restriction requirement was not unconstitutionally vague.

Regarding the sex offender's right to travel, the supreme court found in *Formaro* that the residency restriction only dictates where certain sex offenders may reside, and does not impede a sex offender's freedom of movement. *Id*. at 840. Specifically, the court stated:

> The Iowa residency restriction does not prevent a sex offender from entering or leaving any part of the State, including areas within 2000 feet of a school or child care facility, and it does not erect any actual barrier to intrastate movement.

Id. (quoting *Doe v. Miller*, 405 F.3d 700, 713 (8th Cir. 2005)). Therefore, even assuming that a constitutional right to intrastate travel existed, the court held there would be no violation. The court also made clear that its analysis applied equally to the U.S. and Iowa Constitutions. *Id*.

We find that Adams's vagueness and right to travel arguments are foreclosed by *Formaro*.

B. Ineffective Assistance of Counsel.

Adams further contends his counsel was ineffective for failing to challenge the registration statute's requirement that a sex offender register within five days of "changing residence" within a county. *See* Iowa Code § 692A.3(2). Adams

contends the reference to "change" also is unconstitutionally vague and infringes upon his right to travel.[3]

"Generally we preserve ineffective-assistance-of-counsel claims for postconviction relief; however, we will address these claims on direct appeal if the record is sufficient." *State v. Braggs*, 784 N.W.2d 31, 34 (Iowa 2010). We find the record adequate to address Adams's claim.

To establish a claim of ineffective assistance of counsel, Adams must show by a preponderance of the evidence that his trial counsel breached an essential duty and prejudice resulted. *Id*. "Counsel has no duty to raise an issue that has no merit." *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010). Therefore, we must first determine whether the record demonstrates the existence or absence of a meritorious claim or error. *Id*.

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903, 909 (1983); *accord State v. Millsap*, 704 N.W.2d 426, 436 (Iowa 2005). "Statutory terms meet this constitutional test if their meaning 'is fairly ascertainable by reference to similar statutes, prior judicial determinations, reference to the dictionary, or if the questioned words have a

[3] The 2009 revision has addressed this potential vagueness argument by adding a definition of "change." Under the 2009 revision, "change" now means "to add, begin, or terminate." 2009 Iowa Acts ch. 119, § 1 (codified at Iowa Code § 692A.101(5) (2009 Supp.)).

common and generally accepted meaning.'" *Millsap*, 704 N.W.2d at 436 (quoting *State v. Aldrich*, 231 N.W.2d 890, 894 (Iowa 1975)).

We find Adams's argument without merit. "Change" is commonly defined as "to make different in some particular." Merriam-Webster's Collegiate Dictionary 206 (11th ed. 2004). The law makes clear that a person may have more than one residence at a time. Iowa Code § 692A.1(8). Thus, a person who establishes a new residence has made his or her residence "different in some particular," either because the new residence has replaced the old one, or because he or she now has two residences rather than one. Either way, the sheriff must be notified under section 692A.3(2). Accordingly, we do not find the reference to "change" unconstitutionally vague. To put it another way, given the supreme court's conclusion in *Formaro* that "residence" is sufficiently clear, we are unable to conclude that "changing residence" is unconstitutionally vague.

In addition, requiring a person to register upon changing residence does not erect any actual barrier to a person's right to travel within the state, for reasons already discussed in *Formaro*. *Formaro*, 773 N.W.2d at 840. Adams complains the statute infringes on his "right to visit his fiancée," but this argument is off the mark. Adams can still visit his fiancée at her residence as long as he does not "habitually sleep" there, and he can still live with his fiancée so long as they comply with the residency restrictions in section 692A.2A. *State v. Willard*, 756 N.W.2d 207, 213-14 (Iowa 2008); *State v. Groves*, 742 N.W.2d 90, 93 (Iowa 2007); *Seering*, 701 N.W.2d at 663-64 ("While the residency restriction may impact the [family] insofar as they cannot choose the precise location where they

can establish their home, it does not absolutely prevent them from living together."). Therefore, we reject Adams's constitutional arguments.

C. Sufficiency of the Evidence.

Adams further contends there is insufficient evidence to sustain his convictions. Specifically, he maintains he did not "knowingly" violate either statute and thus lacked any mens rea to sustain his convictions. Adams's challenge to the sufficiency of the evidence is expressly limited to the mens rea element.

1. Residency Restriction (2000-Foot Rule).

The residency restriction law provides in relevant part:

> 2. A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.
> 3. A person who resides within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or a child care facility, commits an aggravated misdemeanor.

Iowa Code § 692A.2A(2)-(3). There is no express mens rea requirement in the statute. The supreme court has addressed this situation in the past with other criminal laws:

> It is well established that the Legislature may forbid the doing of an act and make its commission a crime without regard to the intent or knowledge of the doer. Whether a criminal intent or guilty knowledge is an essential element of a statutory offense is to be determined as a matter of construction from the language of the act, in connection with its manifest purpose and design.

State v. Wharff, 257 Iowa 871, 875, 134 N.W.2d 922, 925 (1965) (internal quotations omitted).

> Generally, a criminal intent is essential before it can be said that an offense has been committed. Within certain limits, however,

> the legislature may forbid the doing or require the doing of an act and make its commission or omission criminal without regard to the intent or knowledge of the doer.

State v. Schultz, 242 Iowa 1328, 1331, 50 N.W.2d 9, 11 (1951). Thus, we must examine the "language" of the statute, along with its "manifest purpose and design." *Wharff*, 257 Iowa at 875, 134 N.W.2d at 925.

On a number of occasions, the supreme court has construed a statute to include a criminal intent element absent from its face. *See State v. Conner*, 292 N.W.2d 682, 685 (Iowa 1980) (listing cases). Yet the supreme court has specifically held that public welfare legislation can dispense with *mens rea*. *Iowa City v. Nolan*, 239 N.W.2d 102, 104 (Iowa 1976). A public welfare offense is one that may not have been recognized at common law, and where the violation of the law may not result in direct or immediate injury, but the law has been enacted as a prophylactic measure to reduce a danger to society. *Id*. Sex offender residency requirements fall within this "public welfare" offense category. The supreme court has repeatedly held that the purpose of chapter 692A is not to punish sex offenders, but "to protect the health and safety of individuals, especially children." *Seering*, 701 N.W.2d at 667; *see also Willard*, 756 N.W.2d at 212 (residency restrictions "were enacted for the legitimate purpose of protecting children"); *State v. Finders*, 743 N.W.2d 546, 549 (Iowa 2008) ("[T]he clear purpose of chapter 692A is to reduce the high risk of recidivism posed by sex offenders."); *State v. Pickens*, 558 N.W.2d 396, 398-400 (Iowa 1997) ("[T]he primary purpose of a sex offender registry is not to punish but to aid the efforts of law enforcement officers in protecting society."). Thus, given the circumstances

here, we believe the legislative intent not to have a criminal intent requirement is "clearly apparent." *Schultz*, 242 Iowa at 1332, 50 N.W.2d at 11.

The legislative history of section 692A.2A further bolsters this conclusion. Before 2002, section 692A.2A did not exist. There were no residency restrictions on sex offenders, only registration requirements. Moreover, section 692A.7 made it clear that only "knowing" violations of the registration requirements would be punished criminally. It provided, "A person required to register under this chapter who *knowingly* violates any requirements specified under sections 692A.2 through 692A.4 commits an aggravated misdemeanor . . . ." Iowa Code § 692A.7(1) (2001) (emphasis added).

During the 2002 legislative session, the general assembly adopted two separate laws relating to sex offenders. It enacted chapter 1020, which amended section 692A.7 to eliminate the word "knowingly" while adding, "For purposes of this subsection, a violation occurs when a person knows or reasonably should know of the duty to fulfill a requirement specified in the offense charged." 2002 Iowa Acts ch. 1020, § 3. That section also modified the phrase "sections 692A.2 through 692A.4" to read, "sections 692A.2, 692A.3, and 692A.4." *Id*. The general assembly also enacted chapter 1157, which amended the Iowa Code to add a new section 692A.2A establishing residency requirements for certain sex offenders. 2002 Iowa Acts ch. 1157, § 3. That new section contained its own criminal provision, subsection 3, which specified that a person who violates the 2000-foot residency restriction "commits an aggravated misdemeanor." *Id*. As we have noted, that section contained no explicit mens rea requirement.

We read these actions as a deliberate attempt by the legislature to establish two different levels of required criminal intent. The legislature could have amended the sex offender laws in 2002 so one criminal provision applied to any failure to comply with *either* the registration *or* the residency requirements. Instead, it adopted two separate criminal provisions: one applying to the registration requirements in section 692A.7 with a "know[] or reasonably should know" required state of mind, and the other applying to the residency requirements in section 692A.2A(3) with no required state of mind. We conclude the legislature intended to make violations of section 692A.2A a strict liability crime.

Mitigating the potential harshness of this result was another provision added by the legislature in 2002. As part of the residency restriction law, it also amended section 692A.5 to require the sheriff, warden, superintendent, or court to notify any sex offender covered by the residency restriction not to reside within 2000 feet of a school or childcare facility. *See* 2002 Iowa Acts ch. 1157 § 2 (codified at Iowa Code § 692A.5(1)(h)). Adams does not claim he was not given that notification. Rather, his contention (which was not disputed for purposes of trial or appeal) was that he did not realize sleeping at his fiancée's home would amount to "residing" there for purposes of the sex offender laws.

Thus, we reject Adams's argument that he lacked the required mens rea to violate section 692A.2A. We affirm his conviction for violating this statute.

2. Registration Requirements.

We now turn to Adams's claim that there is insufficient evidence he had the required mens rea to violate the registration requirements. As we have noted, those penalty provisions read as follows:

> A person required to register under this chapter who violates any requirements specified under sections 692A.2, 692A.3, and 692A.4 commits an aggravated misdemeanor for a first offense and a class "D" felony for a second or subsequent offense. . . . *For purposes of this subsection, a violation occurs when a person knows or reasonably should know of the duty to fulfill a requirement specified in the offense charged*.

Iowa Code § 692A.7(1) (emphasis added).[4] Here, the legislature has specified the intent necessary for a criminal violation of the registration statutes. The person required to register must "know[] or reasonably should know" of the relevant duty.

The "knows or reasonably should know" standard of intent is not uncommon in our criminal statutes. *See, e.g., id*. §§ 709.9 (defining indecent exposure); 723.4(3) (defining an alternative of disorderly conduct). Under this standard, the State may prove the defendant's knowledge through either subjective or objective evidence. The mens rea element can be met by evidence of the person's actual knowledge or by the showing of such circumstances from which the person's knowledge may be inferred including the person's conduct, remarks, and all surrounding circumstances. *State v. Jorgensen*, 758 N.W.2d 830, 837 (Iowa 2008); *State v. Isaac*, 756 N.W.2d 817, 820 (Iowa 2008).

[4] The 2009 comprehensive revision has left the language in the final sentence unchanged. *See* 2009 Iowa Acts ch. 119, § 11 (codified at Iowa Code § 692A.111(1) (2009 Supp.)).

In this case, the parties stipulated that Adams "did not know or understand that the mere act of sleep effects the establishment of a new residence under Iowa Code Chapter 692A." Adams argues, in effect, that the State had to prove not only he knew or should have known of the sex offender's duty to register a residence change, but also that the duty would be triggered if he spent several consecutive nights at his fiancée's home. We disagree. Generally, persons are presumed to know the law. Iowa Code § 701.6. Ignorance of the law is relevant only when knowledge of the law is a required element of the crime. *Id*.; *State v. Clark*, 346 N.W.2d 510, 512 (Iowa 1984). According to section 692A.7, a violation occurs "when a person knows or reasonably should know of the duty to fulfill a requirement specified in the offense charged." Here the offense charged was a "failure to register a residence change." As we read section 692A.7, therefore, the State had to establish Adams knew or should have known of *the duty to register a residence change*. The State did not have to prove Adams knew or should have known his sojourn at his fiancee's constituted a change of "residence."

Having said that, this case went to trial on a very limited, two-page, agreed-upon record. The parties stipulated that Adams already had registered as a sex offender, giving his residence as an address in Murray. The parties also stipulated that Adams had "continued to register his residence" as being in Murray. That is all. Although Iowa law requires the offender to be informed of the duty to register within five days of changing residence, Iowa Code § 692A.5(1)(c), there is *no* evidence in this record that Adams was so informed. The fact that Adams had registered, in our view, could allow an inference he was

aware of the basic duty to register, but nothing in this record supports a finding that Adams knew or should have known of the duty to register a change in address. For these reasons, we are unable to affirm Adams's conviction for violating the registration requirements. Hence, we reverse Adams's conviction under section 692A.7(1).

D. Limitation on Court-Appointed Attorney Fees.

Adams further contends he cannot be required to reimburse the State for his court-appointed attorney fees in an amount above the amount he would be required to reimburse if represented by the state public defender. *See* Iowa Code §§ 13B.4(4)(a); 815.14; *State v. Dudley*, 766 N.W.2d 606, 621-23 (Iowa 2009). Adams asserts that since he was convicted of an aggravated misdemeanor, his restitution for the services he received in the district court should be limited to $1200. *See* Iowa Admin. Code r. 493-12.6(1).

The State agrees the amount of attorney fee restitution should be limited to $1200, but contends that Adams's appeal of this point is premature because there is no indication the restitution will exceed that amount. We agree with the State.

V. Conclusion.

The sex offender residency restriction and registration statutes are not unconstitutionally vague nor do they infringe upon a right to travel. There is sufficient evidence to sustain Adams's conviction under Iowa Code section 692A.2A, because that is a strict liability offense. However, we reverse Adams's conviction and sentence under section 692A.7, because there is insufficient evidence he knew or should have known of the duty to register a change in

residence. We decline to consider Adams's premature appeal of the attorney fee restitution order.

AFFIRMED IN PART AND REVERSED IN PART.