

1-10-0716

Offender Registration Act (Act) (730 ILCS 150/3(a)(1) (West 2006)) and sentenced to seven years in the Illinois Department of Corrections with 276 days credit for time considered served.

¶ 3 On appeal, Gray claims the trial court erred because: (1) the State failed to prove her guilty beyond a reasonable doubt, (2) the State failed to prove she established a residence or temporary domicile, (3) the State failed to prove she violated the Act's timing requirements for registration, (4) the State failed to prove that she was in non-compliance with the Act, (5) section 150/3(c)(5) of the Act is unconstitutionally vague, (6) the Act is unconstitutional because it punishes a defendant solely based on indigency, (7) the trial court considered inadmissible evidence, and (8) the mittimus should be corrected to reflect the name of the single offence for which Gray was convicted. For the reasons that follow, we reverse the conviction.¹

¶ 4 BACKGROUND

¶ 5 On June 4, 2008, defendant Sherry Gray was arrested by Chicago police for failing to register as a sex offender. Gray was subsequently indicted on a single count of violating the Illinois Sex Offender Registration Act (Act) (730 ILCS

¹ Following Justice Gordon's death, Justice Taylor was added as a panel member, has reviewed the briefs and listened to the oral argument.

1-10-0716

150/3(a)(1) (West 2006)).

¶ 6 The single count indictment alleged that on or about March 5, 2008, Gray:

"[C]ommitted the offense of Violation of the Sex Offender Registration Act, in that she, having been previously convicted of aggravated criminal sexual assault under case number 96 CR 26492, knowingly failed to register, in person, as a sex offender with the Chicago Police Department within 5 days of establishing residence or temporary domicile in the city of Chicago, Cook County, Illinois, and the State shall seek to sentence Sherry Gray as a Class 2 offender because Sherry Gray was previously convicted of failure to register as a sex offender under case number 06 CR 6897, in violation of 730 ILCS 150/3(a)(1)."

¶ 7 On August 27, 2008, Gray filed a motion to quash her arrest and suppress evidence. At the suppression hearing, she testified that she appeared at the Chicago Police Department Headquarters at 35th Street and Michigan Avenue to register as a sex offender on two occasions after her release from the Illinois

1-10-0716

Department of Corrections. She testified that she reported to the Chicago police station on February 29, 2008, but was not permitted to register because she could not produce a state identification card. Gray testified that she provided police with the address of her residence, 117 North Lavergne, but a police officer would not complete her registration because she could not provide any proof she lived at the address.

¶ 8 Gray testified that she returned to the police station on March 1, 2008, with her boyfriend Tommy Statton. A police officer informed the pair that Statton needed to bring in a notarized affidavit attesting that Gray was staying with him at his address.

¶ 9 The trial court granted Gray's motion to quash her arrest and suppress evidence. Prior to trial, the trial court granted Gray's motion *in limine* to preclude the State from presenting any evidence concerning her arrest.

¶ 10 At trial, State's witness Sandra Stirewalt, a former parole counselor at Dwight Correctional Center, testified that she met with Gray on February 28, 2008, before Gray was released from prison. Stirewalt testified that she reviewed paperwork with Gray, including a notification form required for convicted sex offenders. The form notified Gray that upon release from prison she was required by law to register as a sex offender with

1-10-0716

police by March 3, 2008. Stirewalt testified that she witnessed Gray sign and initial the form. On the form, Gray listed her address at 117 North Lavergne, Chicago, Illinois.

¶ 11 State's witness Chicago Police Officer Cleveland Hardy, a member of the Chicago Police Criminal Sex Registration Unit, testified that sex offenders are required to provide proof of their address. Officer Hardy testified that his unit maintains a daily sex offender registration log which identifies all individuals who report to the office and whether or not they complete registration.

¶ 12 Gray's name was not entered into the log on February 29 or March 1, as she had testified in the motion to suppress. Gray's name was entered into the log on March 4 and 6, 2008. Officer Hardy was not the officer who spoke with Gray on March 4, 2008. The officer who met with her did not testify at the trial. The log indicates Gray was turned away on March 4 for failure to present proof of residency. The log indicates that on March 4, 2008, a total of 21 individuals who appeared for the purpose of registering with the Chicago Police Department under the Sex Offender Registration Act, were also turned away.

¶ 13 Hardy did speak to Gray when she appeared on March 6, 2008. He explained to her that she needed to bring in some kind of proof of her address. Officer Hardy testified "[s]he wanted

1-10-0716

to register where she's living and I just - I asked her for proof of residency and she didn't have any at the time and I explained to her in order for her to complete her registration, she would have to bring in some kind of proof of her address."

¶ 14 Officer Hardy testified that Gray stated she would go and get her ID. The Chicago Police Department accepts as proof: a driver's license, lease, voter registration card or notarized letter from the registrant's roommate.

¶ 15 After the State rested, Gray moved for a directed finding, which was denied. After closing arguments, the trial court found that Gray had partially complied with the Act and reserved its ruling on the case. The trial court released Gray from custody on an I-Bond and informed her that it was giving her 30 days to complete her registration and that her compliance would impact the court's final ruling.

¶ 16 Gray failed to appear at a scheduled hearing on January 15, 2009. Her counsel informed the court that she mistakenly informed Gray that the next court date was January 16, 2009. The matter was continued for the next day. When Gray did not appear, the trial court issued a bench warrant for her arrest. On February 17, 2009, the trial court entered a judgment on the bond forfeiture.

¶ 17 Gray was arrested on September 16, 2009, and appeared

1-10-0716

in court on September 18, 2009. She told the trial court that she had been hospitalized and was only recently discharged. On October 14, 2009, the trial court found Gray guilty of failing to register as a sex offender. Gray's posttrial motion for a new trial was denied. Gray was sentenced to seven years in the Illinois Department of Corrections with 276 days credit for time considered served. Gray filed this timely appeal.

¶ 18

ANALYSIS

¶ 19 Gray argues that the State failed to prove her guilty beyond a reasonable doubt of violating the Sex Offender Registration Act as charged in the indictment.

¶ 20 Due process requires that a person may not be convicted in a criminal proceeding "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). When this court considers a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, the relevant inquiry 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. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). A court of review

1-10-0716

will not overturn the fact finder's verdict unless "the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *People v. Sherrod*, 394 Ill. App. 3d 863, 865 (2009) (citing *People v. Maggette*, 195 Ill. 2d 336, 353 (2001)).

¶ 21 Gray claims the State only succeeded in proving the first element beyond a reasonable doubt, that she was convicted of aggravated criminal sexual assault in case number 96 CR 26402-02. Gray argues the State failed to prove that she did not comply with the remaining registration requirements of section 3(a)(1) of the Act.

¶ 22 To sustain a conviction for a violation of section 150/3(a)(1) of the Act, the State must prove beyond a reasonable doubt that the defendant: (1) was previously convicted of a qualifying sex offense; (2) the defendant failed to register in person and provide accurate information as required by the State Police Department; (3) failed to register in person with the Chicago Police Department; (4) failed to register within 5 days of establishing a place of residence or temporary domicile in the City of Chicago.² 730 ILCS 150/3(a)(1) (West 2006).

¶ 23 However, the State argues that Gray failed to present

²The Act was subsequently amended reducing the period for registration from 5 to 3 days of establishing a place of residence or temporary domicile in the City of Chicago.

1-10-0716

positive documentation of her residence as required by section 150/3(c)(5) of the Act, which provides:

"(5) The person shall provide positive identification and documentation that substantiates proof of residence at the registering address." 730 ILCS 150/3(c)(5) (West 2010).

¶ 24 Gray argues she was never charged with failing to produce "positive" identification and documentation in violation of section 3(c)(5) of the Act. Instead, she was indicted for violating section 3(a)(1) - failure to appear and provide accurate information about her address. Gray claims the evidence is insufficient to support her conviction for a section 3(a)(1) violation.

¶ 25 The State contends Gray forfeited a claim challenging the sufficiency of the indictment because she did not present the argument at trial or in a posttrial motion. However, Gray is not challenging the sufficiency of the indictment, instead, she is challenging the sufficiency of the evidence. Gray challenged the sufficiency of the evidence at the trial. Moreover, a defendant may challenge the sufficiency of the evidence for the first time on appeal. *People v. Letcher*, 386 Ill. App. 3d 327, 330 (2008).

¶ 26 The State argues the court's review is limited to

1-10-0716

whether the indictment sufficiently apprised defendant of the offense with which she was charged to prepare her defense, citing *People v. Winford*, 383 Ill. App. 3d 1, 6 (2008).

¶ 27 In *Winford*, Count II of an indictment charged defendant with possessing between 1 and 15 grams of a "controlled substance, to wit: cocaine" in violation of the Illinois Controlled Substances Act (720 ILCS 570/401(c)(1) (West 2004)). *Winford*, 383 Ill. App. 3d at 2. Although count II of the indictment alleged defendant possessed cocaine, the statutory provision that was cited in the indictment referred to heroin. *Id.* An officer of the Chicago Police Department testified he observed the defendant engaging in what appeared to be drug transactions and arrested the defendant. *Id.* At the time of his arrest, defendant had in his possession \$40 and eight clear plastic bags of a substance which tested positive for heroin. *Id.* The trial court convicted defendant of simple possession under count II.

¶ 28 On appeal, defendant argued his conviction on count II should be reversed because the State failed to prove he possessed "cocaine" as alleged in the indictment. *Id.* The State argued that there was a typographical error where the word cocaine was typed instead of heroin. The indictment should have read heroin. *Id.* at 3.

1-10-0716

¶ 29 The appellate court noted that the indictment cited the statute applicable to heroin (20 ILCS 570/401(c)(1) (West 2004)). However, the indictment alleged the defendant possessed a "controlled substance to wit: cocaine." Therefore, a variance was created between the allegations made in the indictment and the proof at trial. *Id.* at 4. The court noted that a variance between allegations in an indictment and proof at trial is fatal to a conviction if the variance is material and could mislead the accused in making his defense. *Id.* (citing *People v. Collins*, 214 Ill. 2d 206, 219 (2005)). An indictment must, among other things, cite the statutory provision alleged to have been violated and set forth the nature and elements of the offense charged. *Id.*

¶ 30 The *Winford* court noted the variance in the indictment, "to wit: cocaine," was not material because the indictment listed the proper section of the Act for possessing heroin. *Id.* at 4-5.

¶ 31 The *Winford* court distinguished *People v. Durdin*, 312 Ill. App. 3d 4 (2000):

"Unlike *Durdin*, the sufficiency of the evidence is not at issue here. There was sufficient evidence here to prove defendant guilty of possessing heroin. The evidence conformed to the indictment insofar as the indictment charged defendant with

violating section 401(c) (1) of the Act, which makes it unlawful to possess with intent to deliver '1 gram or more but less than 15 grams of any substance containing heroin, or an analog thereof.' 720 ILCS 570/401(c) (1) (West 2004). The problem here is that the indictment, while citing the statute applicable to heroin, went on to allege that defendant possessed between 1 and 15 grams of a 'controlled substance, to wit: cocaine.' This created a variance between the allegations made in the indictment and the proof at trial." *Winford*, 383 Ill. App. 3d at 3-4.

¶ 32 In *Durdin* the appellate court reached a different result and reversed the defendant's conviction for possession of cocaine where the indictment alleged he possessed cocaine but the evidence presented showed he possessed heroin. *Durdin*, 312 Ill. App. 3d at 8.

¶ 33 In *Durdin*, count I of defendant's indictment alleged defendant delivered less than one gram of cocaine on a public way within 1,000 feet of a public school. *Id.* at 5. Count II alleged that the defendant delivered less than 10 grams of heroin. At trial, the evidence showed police recovered heroin from the defendant but there was no evidence that the defendant

1-10-0716

possessed cocaine. *Id.* Defendant was convicted on both counts. *Id.* On appeal, defendant challenged the sufficiency of the evidence to convict him of count I because there was no evidence he possessed cocaine as alleged in the indictment. *Id.* at 6.

The *Durdin* court held:

"In this case, the State failed to present any evidence that defendant knowingly delivered cocaine within 1,000 feet of a school. *** The parties stipulated that the controlled substance at issue was heroin. *** When finding defendant guilty of the count I, delivery of cocaine within 1,000 feet of a school, neither the parties nor the trial judge realized the discrepancy between the indictment and the trial testimony. However, the proof at trial failed to prove count I of the indictment. Moreover, the State also stipulated that the controlled substance at issue was heroin and never moved to amend count I of the indictment. Here the State was required to prove that defendant knew he was delivering cocaine. [citation]. The conviction for delivery of cocaine within 1,000 feet of a school under count I cannot stand because the State did not present

1-10-0716

evidence beyond a reasonable doubt to support each element of the charge in the indictment. The State therefore failed to prove defendant guilty beyond a reasonable doubt of delivery of cocaine within 1,000 feet of a school." *Id.* at 7.

¶ 34 The *Durdin* court recognized there was a material variance between allegations of the indictment that defendant possessed cocaine and the evidence at trial that defendant possessed heroin. The *Durdin* court held that the possession of cocaine was a material element of the offense in count I of defendant's indictment and that the court would not speculate how the defense may have changed had the evidence showed cocaine. *Id.* at 8.

¶ 35 Unlike *Winford*, here Gray challenges the sufficiency of the evidence to convict her of the charge in the indictment as did the defendant in *Durdin*. Here, Gray was charged and convicted of violating section 3(a)(1). However, at trial the State submitted evidence that Gray did not submit positive documentation as required by section 3(c)(5). Unlike *Winford*, where the indictment cited the statute which pertained to heroin but alleged the defendant possessed cocaine, the indictment here neither alleged Gray failed to provide positive documentation as required by 3(c)(5) nor was section 3(c)(5) referred to in the

1-10-0716

indictment.

¶ 36 This case is more like *Durdin* where the defendant was charged with possession of cocaine but the State proved the defendant possessed heroin. The variance was material because Gray was charged with failure to appear and provide accurate information and the evidence does not prove the elements of the offense. The evidence in this case shows Gray went in person to the main headquarters for the Chicago Police Department within five days of her release from prison and informed an officer of an address where she was living. There is no evidence that the information she provided was inaccurate. The evidence does not support a conviction of violating Section 3(c)(1).

¶ 37 Moreover, we cannot say on the record before us that no prejudice or realistic possibility of prejudice existed. The officer who interviewed Gray on March 4, 2008, did not testify at trial. In essence, Gray was convicted based on the log book entry because there was no testimony admitted at trial concerning what documents Gray had or did not present on March 4, 2008. Officer Hardy testified at trial about his meeting with Gray on March 6, 2008. However, this meeting took place after March 5, 2008, the date of the violation alleged in the indictment.

¶ 38 As such, like *Durdin*, the order of the trial court here must be reversed because the elements of the charged offense,

1-10-0716

section 3(a)(1), were not proven beyond a reasonable doubt.

¶ 39 The State, however, contends that section 3(c)(5) is invoked under the portion of section 3(a) of the Act that states the offender shall "within the time period prescribed in sections (b) and (c), register in person." 730 ILCS 150/3(a) (West 2006).

¶ 40 Specifically, section 3(b) requires a convicted sex offender to register within five days of establishing a residence. 730 ILCS 150/3(b) (West 2006). Section 3(c)(4) requires a convicted sex offender to register within five days of discharge, parole or release. 730 ILCS 150/3(c)(4) (West 2006). No time periods are provided for in section 3(c)(5), it requires a convicted sex offender to provide "positive" information and documentation of residence. 730 ILCS 150/3(c)(5) (West 2006). Accordingly, we find that section 3(c)(5) is not invoked by section 3(a) because section 3(c)(5) does not prescribe a time period.

¶ 41 Therefore, we cannot say the State proved beyond a reasonable doubt that Gray was guilty of violating the requirement under the charged offense, section 3(a)(1), to register in person and provide accurate information.

¶ 42 The State also claims Gray violated the five-day registration requirement of the Act when she attempted to register on March 4, 2008. Gray signed a notification form

1-10-0716

required for convicted sex offenders before her release from prison. The form stated that upon release from prison she was required by law to register as a sex offender with police by March 3, 2008. The State contends that Gray was released from prison on February 28, 2006, and did not attempt to register until six days later on March 4, 2006, in violation of the timing requirements.

¶ 43 Gray claims that if she was released on February 28, 2008, she complied with the timing requirements of the Act when she appeared at the Chicago Police Headquarters on March 4, 2008, because March 4th is within five days of her February 28th release from prison. In support Gray cites section 1.11 of the Statute on Statutes which provides:

"The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last ***." 5 ILCS 70/1.11 (West 2006).

¶ 44 Accordingly, pursuant to section 1.11, we are required to exclude the first day, February 28, 2008, in computing the five-day period from section 3(c)(4), which would then end on March 4, 2008 - the first day Gray attempted to register at the main headquarters of the Chicago Police Department. Notwithstanding the admonishment on the notification form under

1-10-0716

the statute, and the fact that 2008 was a leap year, Gray complied with the five-day period timing requirements of the Act when she appeared on March 4, 2008.

¶ 45 The evidence, when taken in a light most favorable to the prosecution, does not prove beyond a reasonable doubt that Gray violated section 3(a)(1) of the Act. Therefore, Gray's conviction for failing to register as a sex offender must be reversed.

¶ 46 Given our disposition of this issue, we need not address Gray's other claims raised in this appeal.

¶ 47 CONCLUSION

¶ 48 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County.

¶ 49 Reversed.