

No. 18-

IN THE
SUPREME COURT OF THE UNITED STATES

DEXTER LEON SURRETT,

Petitioner

v.

STATE OF NORTH CAROLINA,

Respondent

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The first generation of sex offender registration statutes required only that offenders register with the government and that information about the offenders be available to the public. In *Smith v. Doe*, 538 U.S. 84 (2003), the Court rejected an Ex Post Facto Clause challenge to the retroactive application of one of these statutes, on the ground that such statutes were not punitive.

In the years since *Smith v. Doe*, the states have enacted a second generation of sex offender statutes that impose much harsher restrictions on registrants than the first generation of statutes did. North Carolina's is typical. It prohibits registrants from being on the premises of schools, parks, libraries, and swimming pools. It bars registrants from residing within 1,000 feet of any school. It excludes registrants from certain occupations. It imposes onerous in-person reporting requirements. It mandates extremely long registration periods. And it punishes violations of these restrictions as felonies.

The lower courts are divided over whether these second-generation statutes are sufficiently punitive to distinguish them from the statute the Court considered in *Smith v. Doe*.

The Question Presented is whether the retroactive application of North Carolina's sex offender registration statute violates the Ex Post Facto Clause.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dexter Leon Surratt respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of North Carolina.

OPINIONS BELOW

The unpublished opinion of the North Carolina Court of Appeals is available at 814 S.E.2d 626. App. 1. The order of the North Carolina Supreme Court denying review is reported at 818 S.E.2d 295. App. 6.

STATEMENT OF JURISDICTION

The judgment of the North Carolina Supreme Court was entered on September 20, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Ex Post Facto Clause, U.S. Const. art I, § 10, provides: “No State shall ... pass any ... ex post facto Law.”

STATEMENT OF THE CASE

A. This matter raises legal issues identical to those in the petition for writ of certiorari filed in *Bethea v. North Carolina*.

This matter raises legal issues identical to those raised in the petition for writ of certiorari filed in *Bethea v. North Carolina*, a petition now pending before the Court. Accordingly, this petition includes a Question Presented identical to the Question in *Bethea*. This matter is similar to *Bethea* in that it argues that the retroactive application of North Carolina’s sex-offender

registration program violates the Ex Post Facto Clause. Petition for Writ of Certiorari at 1, *Bethea v. North Carolina*, No. 18-308 (petition for cert. filed Sept. 6, 2018) [hereinafter Bethea Petition].

The Court rejected an Ex Post Facto Clause challenge to the retroactive application of Alaska's sex-offender registration statute in 2003, finding that the statute was a civil regulation, as opposed to a criminal statute, in *Smith v. Doe*, 538 U.S. 84 (2003). The statute considered in *Smith* required only that offenders register with the state and that information about offenders be available to the public. *Id.* at 90-91.

However, in the fifteen years since *Smith*, states have significantly increased the restrictive nature of their sex-offender registration programs. North Carolina is no exception to this trend. The restrictions included in its current sex-offender registration program far exceed the limitations considered by the Court in *Smith*. Many examples of the burdens established by the North Carolina program are noted in the Bethea Petition. Bethea Petition at 4-5. Yet despite these restrictions, the North Carolina Court of Appeals has consistently held that sex-offender registration, and its attendant restrictions, are not punitive in purpose or effect and, therefore, are not subject to an ex post facto analysis. *In re Bethea*, ___ N.C. App. ___, ___, 806 S.E.2d 677, 681-82 (2017); *appeal dismissed by, review denied by, In re Bethea*, 371 N.C. 118 813 S.E.2d 241 (2018), *petition for cert. filed, Bethea v. North*

Carolina, (U.S. Sept. 6, 2018) (No. 18-308); *In re Hall*, 238 N.C. App. 322, 329-33, 768 S.E.2d 39, 44-46 (2015), *cert. denied*, *Hall v. North Carolina*, 136 S. Ct. 688, (U.S. Dec. 14, 2015) (No. 15-57); *State v. White*, 162 N.C. App. 183, 190-98, 590 S.E.2d 448, 453-58 (2004). The Supreme Court of North Carolina has not addressed this issue.

B. The procedural history of this matter is different than the procedural history in *Bethea v. North Carolina*.

This case arises from a pre-trial motion to dismiss the charge of failure to register as a sex offender. In that motion, Mr. Surratt's trial counsel challenged the constitutionality of the retroactive application of North Carolina's sex-offender program. T pp. 4-17. As discussed below, that motion was denied and Mr. Surratt subsequently appealed the denial of the motion. *Bethea* has a different procedural history as it arises from the denial of a petition for removal from the North Carolina sex-offender registration program, and the subsequent denial of that petition. *Bethea*, ___ N.C. App. at ___, 806 S.E.2d at 679-80.

C. Mr. Surratt was convicted and served his sentence prior to the creation of North Carolina's sex-offender registration program.

While the primary legal issue in this matter is the same as the issue raised in the *Bethea* Petition, Mr. Surratt's case differs from *Bethea* since Mr. Surratt was convicted and served his sentence prior to the initial enactment of

North Carolina's sex-offender registration program. Mr. Surratt committed his allegedly reportable offense in 1993, when he was sixteen years old. R pp. 4, 16. He was charged with taking indecent liberties with a child and was convicted the following year. *State v. Surratt*, 241 N.C. App. 380, 382, 773 S.E.2d 327, 329 (2015). He completed the prison term associated with the offense in 1995. *Id.* at 385, 773 S.E.2d at 331.

Years after he committed the allegedly reportable offense and months after he completed the prison term associated with the offense, on January 1, 1996, North Carolina started its first sex-offender registration program. *Id.* at 383, 773 S.E.2d at 320.

Mr. Surratt was physically released from prison on January 24, 1999, after reaching the end of a separate sentence issued at the same time as the sentence associated with the allegedly reportable offense. *Id.* at 385, 773 S.E.2d at 331. Despite the facts that there was (1) no North Carolina sex-offender registration program at the time he committed the act in question, (2) no program at the time of his arrest or conviction, and (3) no program at the time he completed the relevant sentence, Mr. Surratt was required to register as a sex offender after his release from prison. *Id.* at 385, 773 S.E.2d at 331. Mr. Surratt complied with the requirement. *Id.*

Nearly fourteen years later, on January 7, 2013, Mr. Surratt was indicted for failing to change his address. *Id.* at 381, 773 S.E.2d at 329. He was

convicted on April 29, 2014, and received an active sentence of eighteen to thirty-one months. *Id.*

Mr. Surratt was released from incarceration on July 22, 2015. T pp. 70-71. Mr. Surratt did not re-register as a sex offender after his release from incarceration and he was subsequently arrested and charged with failure to register as a sex offender. R p 4; T p. 89. He was convicted on this most-recent charge on August 3, 2017. R p. 1.

D. The state used Mr. Surratt's 2014 conviction for failure to update his address to enhance Mr. Surratt's punishment in 2017.

In addition to being indicted in 2015 based on his failure to register as a sex offender, Mr. Surratt was indicted as a habitual felon. R p. 3. North Carolina indicted Mr. Surratt as a habitual felon based, in part, on his 2014 conviction for failure to register as a sex offender. R p. 3. As a result, the state was able to punish Mr. Surratt as though he had committed a Class C felony, when in fact he had only been convicted of a Class F felony. R p. 59. For a defendant with Mr. Surratt's criminal-record level, a Class F felony conviction carries with it a presumptive punishment of approximately 19-32 months; whereas, a Class C felony carries with it a presumptive punishment of approximately 81-116 months.¹ See N.C. Gen. Stat. § 15A-1340.17 (2018)

¹ Perhaps recognizing the severity of the sentencing enhancement caused by the additional habitual-felon indictment, the trial court ordered the lowest

(providing the mid-point of the minimum sentence, which can then be used to calculate the approximate length of the sentence). Accordingly, Mr. Surratt was convicted of failing to register as a sex offender in 2017 and his punishment was enhanced based on his status as a habitual felon, which was, in turn, based on his 2014 conviction for failing to update his address.

E. Mr. Surratt challenged the constitutionality of North Carolina's sex-offender program in the courts below.

Prior to the start of Mr. Surratt's most-recent trial, his trial counsel made a motion to dismiss the charge of failure to register as a sex offender based on the argument that North Carolina's sex-offender registration scheme violates the Ex Post Facto Clause of the federal constitution. T pp. 4-17. The trial court denied this motion, and Mr. Surratt was subsequently found guilty of failure to register as a sex offender. R p. 1; T pp. 16-17.

Mr. Surratt appealed the judgment to the North Carolina Court of Appeals and again argued that the retroactive application of North Carolina's sex-offender registration scheme was unconstitutional. Brief of Defendant-Appellant at 18-25, *State v. Surratt*, 814 S.E.2d 626 (2018) (No. COA17-1285), 2018 N.C. App. LEXIS 538 *10-12 (unpublished). The Court of Appeals issued its decision on June 5, 2018 and rejected Mr. Surratt's argument. App. 1, 4.

sentence available for Mr. Surratt: 58-82 months, a sentence at the bottom of the mitigated range. N.C. Gen. Stat. § 15A-1340.17 (2018); R pp. 50, 59.

Mr. Surratt sought review of the North Carolina Court of Appeals decision in the Supreme Court of North Carolina, but his petition to that court was denied. App. 6.

Mr. Surratt now seeks review in this Court.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari in this matter. As explained above, this case raises the same central legal issue as the issue raised in the *Bethea* Petition. Consequently, many of the reasons for granting certiorari in *Bethea* apply with equal force in this matter. Moreover, as Mr. Surratt completed his sentence prior to the enactment of North Carolina's sex-offender registration program, the requirement that Mr. Surratt register for the program violates one of the basic tenants of American law.

A. The reasons for granting certiorari in *Bethea* apply equally in this matter.

As explained in detail in the *Bethea* Petition, there is a split among the lower courts on the issue of retroactivity. *Bethea* Petition at 10-18. Likewise, the issue raised in this petition affects a significant number of people. *Bethea* Petition at 27-28. Moreover, as in *Bethea*, the courts of North Carolina have incorrectly held that the state's sex-offender registry complies with constitutional requirements. *Bethea* Petition at 28-33. Finally, this case presents a good vehicle to address the merits of this matter. As catalogued in

the Bethea Petition, the North Carolina sex-offender program has features in common with many other states. Bethea Petition at 20-24.

B. Punishing Mr. Surratt for failing to register for a program that did not exist at the time of his conviction violates a basic principle of American law.

Mr. Surratt was convicted of the allegedly reportable offense, and served the associated prison sentence, before the enactment of North Carolina's sex-offender registration program. Nevertheless, he was forced to register for the program upon his release from prison and has been required to maintain his registration since that time.

In addition to the hardships imposed by North Carolina's program, Mr. Surratt has now twice been convicted of failing to register as a sex offender, and is currently serving a prison sentence based on his second conviction. Moreover, the state of North Carolina used his first conviction to enhance the sentence issued for his second conviction. This enhancement will leave Mr. Surratt in prison for years to come. Without the habitual-felon enhancement, Mr. Surratt would have likely been issued a sentence with a release date in late 2018.

As discussed in detail in the *amicus* brief filed by the Cato Institute in support of the Bethea Petition, opposition to ex post facto laws has been a principal aspect of American jurisprudence since the framing of the Constitution. Brief for the Cato Institute as *Amicus Curiae*, *Bethea v. North*

Carolina, No. 18-308 (*petition for cert. filed* Sept. 6, 2018). Regardless of whether North Carolina’s sex-offender registration program wears the civil or criminal label, the retroactive application of the program violates a basic tenant of our law. It punishes a person for activity that occurred prior to passage of the law establishing the punishment.

In Mr. Surratt’s case, the retroactive application has resulted in twenty years of punishment and two prison sentences – all arising from a crime he committed when he was sixteen years old and all based on a statutory scheme that did not exist at the time he committed the crime. To allow Mr. Surratt to continue to be punished as a sex offender is unconstitutional and incompatible with justice.

CONCLUSION

This petition for a writ of certiorari should be granted.

Should this Court grant the Bethea Petition, it should hold Mr. Surratt’s petition in abeyance until this Court issues a ruling in *Bethea* so that the two cases can be decided in a consistent manner.

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Respectfully submitted, this the 3rd day of December, 2018.

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State v. Surratt

Court of Appeals of North Carolina

May 17, 2018, Heard in the Court of Appeals; June 5, 2018, Filed

No. COA17-1285

Reporter

2018 N.C. App. LEXIS 538 *; 814 S.E.2d 626; 2018 WL 2642577

STATE OF NORTH CAROLINA v. DEXTER LEON
SURRATT

Notice: THIS IS AN UNPUBLISHED OPINION.
PLEASE REFER TO THE NORTH CAROLINA RULES
OF APPELLATE PROCEDURE FOR CITATION OF
UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE SOUTH
EASTERN REPORTER.

Subsequent History: Motion granted by *State v. Surratt, 818 S.E.2d 291, 2018 N.C. LEXIS 847 (N.C., Sept. 20, 2018)*

Motion granted by *State v. Surratt, 818 S.E.2d 295, 2018 N.C. LEXIS 848 (N.C., Sept. 20, 2018)*

Prior History: [*1] Catawba County, No. 15 CRS 004600.

State v. Surratt, 241 N.C. App. 380, 773 S.E.2d 327, 2015 N.C. App. LEXIS 440 (June 2, 2015)

Disposition: NO ERROR.

Core Terms

sex offender, indictment, register, trial court, argues, release date, motion to dismiss, convicted, sex offender registration, essential element, sheriff's office

Counsel: Attorney General Joshua H. Stein, by Special Deputy Attorney General J. Joy Strickland, for the State.
Drew Nelson for defendant-appellant.

Judges: TYSON, Judge. Judges DIETZ and BERGER concur.

Opinion by: TYSON

Opinion

Appeal by defendant from judgment entered 3 August 2017 by Judge Forrest D. Bridges in Catawba County Superior Court. Heard in the Court of Appeals 17 May 2018.

TYSON, Judge.

Dexter Leon Surratt ("Defendant") appeals from judgments entered after the jury returned verdicts finding him guilty of failure to register as a sex offender and attaining habitual felon status. We find no error.

I. Background

Defendant was released from prison on 16 July 2015 and was informed of his duty to register as a sex offender. Due to a compliance issue, Defendant remained in custody with the Catawba County Sheriff's Office until 22 July 2015. At a meeting with his parole officer, Sarah Lackey, on 27 July 2015, Defendant provided her the address of a Sleep Inn Hotel in Hickory, North Carolina, as his residence.

On 29 July 2015, Officer Lackey went to the Sleep Inn, but was unable to locate Defendant. Officer Lackey contacted Catawba County Sheriff's Deputy Tom Scarborough, who indicated [*2] to Officer Lackey that Defendant had not yet registered as a sex offender with the sheriff's office. Officer Lackey requested a warrant to arrest Defendant for absconding.

Deputy Scarborough attempted to locate Defendant at previous known addresses to inform him he was in violation for his failure to register as a sex offender. Deputy Scarborough requested an arrest warrant on 30 July 2015 for Defendant's failure to register as a sex offender within three business days of his release, as required by law. The warrant was served on 31 July 2015.

On 5 October 2015, Defendant was indicted for failure to register as a sex offender and for attaining habitual felon status. Defendant moved to dismiss the charges prior to trial, at the close of the State's evidence, and at the close of all evidence. The trial court rejected all of Defendant's motions.

The jury found Defendant guilty of all charges. The trial court sentenced Defendant to a mitigated, active term of 58 to 82 months imprisonment. Defendant entered timely notice of appeal.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Issues

Defendant argues the trial court erred by: (1) denying his motion to [*3] dismiss; and, (2) failing to instruct the jury that it had to find Defendant was incarcerated on 1 January 1996 in order to find him guilty of failure to register as a sex offender. Defendant also challenges the retroactive application of North Carolina's sex offender registration. He argues the requirement to register violates the *ex post facto* clauses of the Constitution of the United States and the North Carolina Constitution.

IV. Motion to Dismiss

Defendant argues the trial court erred by denying his motion to dismiss the charge of failure to register as a sex offender due to a fatal variance between the indictment and the evidence introduced at trial.

A. Standard of Review

In ruling on a motion to dismiss, the trial court must consider:

whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State,

and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies [*4] arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (internal citations and quotations omitted).

A variance between allegations in an indictment and the proof at trial requires reversal only when the defendant is prejudiced as a result of the variance. State v. Fink, N.C. App. ..., 798 S.E.2d 537, 540 (2017). "This court reviews the trial court's denial of a motion to dismiss *de novo*." State v. Smith, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted).

B. Analysis

Defendant asserts the date on the indictment (1) alleges an offense that is not subject to prosecution; (2) is an essential element of the offense; and, (3) prejudiced Defendant.

Section 15A-924(a)(4) of the North Carolina General Statutes requires indictments to include "[a] statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time." N.C. Gen. Stat. § 15A-924(a)(4) (2017). Section 14-208.7 requires a person convicted of a reportable offense to register as a sex offender with the sheriff's office of the county in which he or she will reside "within three business days of release from a penal institution or arrival in a county to live outside a penal institution." N.C. Gen. Stat. § 14-208.7(a)(1) (2017). Failure to report in person to the sheriff's office as required is a Class F felony. N.C. Gen. Stat. § 14-208.1(a)(7) (2017).

Defendant's indictment [*5] indicated the date of offense as "on or about 07/26/2015." Defendant was released from confinement on 22 July 2015. Defendant requests this Court take judicial notice that 22 July 2015 was a Wednesday, and that 26 July 2015 was a Sunday. Because only two business days had elapsed between his release date and the date listed on the indictment, Defendant asserts he had not committed an offense as of 26 July 2015. Evidence presented at trial shows Defendant did not register as a sex offender at any point after his release until his arrest on 31 July

2015.

Defendant argues this Court should review the indictment in this case in the same manner as we review indictments in cases where the indictment alleges a date of offense that is beyond the statute of limitations period. Such a review and analysis under that analogy is not appropriate. The date provided in the indictment sufficiently complied with the statute and was not a fatal variance from the evidence presented at trial. See N.C. Gen. Stat. § 15A-924(a)(4).

Further, the date was not an essential element of the offense, nor has Defendant showed he was prejudiced by the stated date on the indictment. "Error as to a date or its omission is not ground for dismissal of [*6] the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice." *Id.* Allegation of a date certain is not an essential element of a violation under N.C. Gen. Stat. § 14-208.11(a)(7). *State v. Pierce*, 238 N.C. App. 141, 147, 763 S.E.2d 634, 658 (2014).

Presuming time is of the essence in this matter, an indictment is subject to dismissal under N.C. Gen. Stat. § 15A-924(a)(4) "only if (1) there is an error in the date or period of time listed on the indictment, or the omission thereof, and (2) the error or omission misled the defendant to his prejudice." *State v. McKinney*, 110 N.C. App. 355, 370, 430 S.E.2d 300, 303 (1993) (emphasis original) (citations omitted).

Defendant argues the trial court prejudiced him by not dismissing the charge because "it allowed the jury to potentially convict [him] based on the allegation that he failed to report on 26 July 2015," but he has failed to provide any evidence of how the alleged error in the date on the indictment prevented him from preparing a defense or subjected him to subsequent prosecution for the same offense.

"An indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution [*7] for the same offense." *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984). Defendant has failed to show he suffered prejudice in the trial court's ruling. Defendant's argument is overruled.

V. Jury Instruction

Defendant argues his release date is a finding of fact to be determined by the jury in order to establish whether he was required to register as a sex offender, and to be convicted of failing to report and register as a sex offender. Defendant asserts the trial court was required to instruct the jury that it had to find Defendant was incarcerated on 1 January 1996 in order to be convicted of this offense. Defendant's argument attempts to relitigate an issue previously before and resolved by this Court. *State v. Surratt*, 241 N.C. App. 380, 773 S.E.2d 327 (2015).

"The doctrines of *res judicata* and collateral estoppel apply to criminal, as well as, civil proceedings, and their application against a criminal defendant does not violate the defendant's rights to confront the State's witnesses or to a jury determination of all facts." *State v. Dial*, 122 N.C. App. 298, 306, 470 S.E.2d 84, 89 (1996) (citations omitted). The requirements to preclude relitigation are: (1) the parties are the same; (2) the issue in question is the same; (3) the issue was "raised and actually litigated" in the prior action; (4) the issue in question was material and relevant [*8] to the disposition of the prior action; and, (5) the determination of the issue was necessary and essential to the resulting judgment. *Id.*

Defendant argues the factual issue of his release date was not "raised and actually litigated" during his 2014 trial for the charge of failing to notify his change of address as a sex offender. Defendant's previous appeal to this Court contained the following findings and conclusions:

In 2014, Defendant was convicted of failing to notify the sheriff's office of a change of address as a sex offender, in violation of N.C. Gen. Stat. § 14-208.11. *Surratt*, 241 N.C. App. at 381, 773 S.E.2d at 329. On that appeal, Defendant argued, in part, that the trial court erred by denying his motion to dismiss on the basis the State failed to prove he was required to register as a sex offender. *Id.* Defendant asserted: (1) the sex offender registration law was not in effect when he was convicted of indecent liberties with a child in 1994; (2) the sex offender registration program did not apply to him; and, (3) "the State failed to prove [he] was released from prison for a reportable offense on or after 1 January 1996." *Id.* at 384, 773 S.E.2d at 330-331.

This Court concluded Defendant's previous conviction for indecent liberties with a child was a reportable offense, and that [*9] "the fact that the release date is

not part of the record does not automatically warrant the conclusion that defendant was not required to register." *Id.* at 384-385, 773 S.E.2d at 331.

Pursuant to the North Carolina Rules of Evidence, Rule 201, this Court took judicial notice of the fact Defendant's release date for the indecent liberties charge was 24 September 1995, but that date was merely a release "on paper." *Id.* at 385, 773 S.E.2d at 331. Defendant remained incarcerated on a "consecutive sentence resulting from a conviction for committing a crime against nature." *Id.* Defendant was not actually released from prison and placed on parole until 24 January 1999, whereupon he registered as a sex offender. *Id.* This Court held it was this 1999 release date that controlled the sentencing outcome in his previous case, and the sex offender registration law applied to Defendant because it went into effect on 1 January 1996, while Defendant was still incarcerated. *Id.*

"Because a contention not made in the court below may not be raised for the first time on appeal," this Court would not have conducted such an extensive analysis of the issue of Defendant's release date and the applicability of the sex offender registration act unless it was "raised and actually litigated" below. *See Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 (1989).

The settled [*10] issue of Defendant's release date and the applicability of the sex offender registration act from the prior appeal meets all five of the *Dial* factors to preclude relitigation. *Dial*, 122 N.C. App. at 306, 470 S.E.2d at 89. The trial court did not commit reversible error by failing to instruct the jury that it had to find as a fact the date of Defendant's release. Defendant's argument is inapposite and overruled.

VI. Application of Sex Offender Registry Act

Defendant asserts a re-evaluation of the current sex offender registry act would "compel a conclusion that its restrictions are punitive in effect" and as such its application is in violation of both federal and state ex post facto clauses. Defendant acknowledges that under the Supreme Court's precedent of *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), this Court is bound by its earlier decisions holding that such statutes do not violate federal or state ex post facto clauses. *See, e.g.*, *State v. White*, 162 N.C. App. 183, 590 S.E.2d 448 (2004); *In re Hall*, 238 N.C. App. 322,

768 S.E.2d 39 (2014), cert. denied, ___ U.S. ___, 136 S.Ct. 688, 193 L. Ed. 2d 519 (2015); *In re Bethea*, N.C. App., 806 S.E.2d 677 (2017).

Defendant argues the recent cases of *Hall* and *Bethea* relied upon reasoning from *State v. White*, a case decided in 2004, and that the registration program in effect when *White* was decided contained fewer restrictions and burdens than the current scheme.

In *Hall*, this Court noted "it is well established that N.C.G.S. § 14-208.1(a) creates a non-punitive civil regulatory [*11] scheme." *Id.* at 331, 768 S.E.2d at 45 (citation omitted). However, as urged by the defendant's "vigorous argument" this Court proceeded to "further examine whether the statutory scheme is so punitive . . . as to negate the legislature's civil intent." *Id.* at 331, 768 S.E.2d at 45 (citation and internal quotation marks omitted).

This Court acknowledged the defendant's arguments and noted they had been previously reviewed, addressed, and rejected by our appellate courts. *Id.* at 332, 768 S.E.2d at 46. This Court then reaffirmed that the "regulatory means of addressing the need for law enforcement officers and the public to have information regarding certain convicted sex offenders may seem burdensome, but it is not penal or punitive." *Id.* Being bound by precedent, this Court held the defendant's arguments lacked merit. *Id.*

In the case of *In re Bethea*, a case decided after the Supreme Court of the United States denied the petition for writ of *certiorari* in *Hall*, this Court followed *Hall* in rejecting the defendant's argument the registration scheme violates *ex post facto* proscriptions. *In re Bethea*, N.C. App. at 806 S.E.2d at 682.

Defendant argues the current sex offender registration program is punitive under the factors outlined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 251, 9 L. Ed. 2d 144 (1962), an argument this Court previously rejected in *Hall*. *In re Hall*, 238 N.C. App. at 331, 768 S.E.2d at 45-46. Defendant cites to non-binding authority [*12] from other jurisdictions to also support his argument. We do not find these other jurisdiction's cases persuasive or instructive of the issue before us.

Following the precedents in *Hall* and *Bethea*, we reject Defendant's arguments. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37 ("Where a panel of the Court of Appeals has decided the same issue, albeit in a

different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Defendant's arguments are overruled.

VII. Conclusion

The trial court properly denied Defendant's motions to dismiss. The date on the indictment is not an essential element of the offense. Defendant cannot show any prejudice from the entry of the date as stated on the indictment.

Defendant's request for an instruction to require the jury to find Defendant's date of release was inappropriate. Such a conclusion would allow relitigation of an issue settled by this Court on a previous appeal. We remain bound by precedents on the application and enforcement of the sex offender registry act. *Id.*

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or in the judgments entered thereon. [*13] *It is so ordered.*

NO ERROR.

Judges DIETZ and BERGER concur.

Report per Rule 30(e).

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State v. Surratt

Supreme Court of North Carolina

September 20, 2018, Decided

No. 203P18

Reporter

2018 N.C. LEXIS 848 *; 818 S.E.2d 295

STATE OF NORTH CAROLINA v DEXTER LEON
SURRATT

"Allowed by order of the Court in conference, this the 20th of September 2018."

Notice: DECISION WITHOUT PUBLISHED OPINION

/s/ Morgan, J.

Prior History: [*1] From N.C. Court of Appeals. (17-1285). From Catawba. (15CRS4600, 15CRS4601).

For the Court

State v. Surratt, 814 S.E.2d 626, 2018 N.C. App. LEXIS 538 (N.C. Ct. App., June 5, 2018)

Upon consideration of the petition filed on the 5th of July 2018 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 20th of September 2018."

/s/ Morgan, J.

For [*2] the Court

Core Terms

order of the court, motion to dismiss, follow orders

Counsel: Ms. Joy Strickland, Assistant Attorney General, For State of North Carolina.

Mr. Drew Nelson, Attorney at Law, For Surratt, Dexter Leon.

Mr. Daniel P. O'Brien, Special Deputy Attorney General, For State of North Carolina.

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Judges: Morgan, J.

Opinion by: Morgan

Opinion

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Defendant on the 5th of July 2018 in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the State of NC, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is