



Missouri Court of Appeals

Southern District

Division Two

STATE OF MISSOURI,

Plaintiff-Respondent,

v.

JACOB RAY MARSH,

Defendant-Appellant.

)
)
)
)
)
)
)
)
)
)

No. SD36348

Filed: December 16, 2020

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable David C. Jones

AFFIRMED AND REMANDED WITH DIRECTIONS

Jacob Ray Marsh (“Defendant”) appeals his conviction, after a bench trial, of failing to register as a sex offender.¹ Defendant’s five points on appeal challenge the admission of separate statements he made to his probation officer and to the Greene County Sex Offender Registrar (“Registrar”) about where he had been residing during the date range alleged in the State’s Information.

Because statements a probationer makes to his probation officer are privileged, we assume, *arguendo*, that the trial court erred in ordering the probation officer to testify about them at trial. We nonetheless affirm Defendant’s convictions because he fails to

¹ See sections 589.400 and 589.425. Unless otherwise noted, all statutory references are to RSMo 2016. Defendant was also convicted of loitering within 500 feet of a public park or swimming pool (*See* section 566.150), but he does not appeal that conviction.

demonstrate that the trial court erred in refusing to exclude similar testimony from Registrar.²

The Evidence³

Because Defendant had previously been found guilty of sexual abuse, he was required by law to register as a sex offender. *See* sections 589.400 and 589.425. Defendant had been placed on probation, and his probation officer was Cheree Gaunt (“P.O. Gaunt”), who supervises sex offenders in Greene County.

Defendant had last registered on December 30, 2016, and he was therefore required to update his registration during the month of March, 2017. Defendant failed to meet that deadline, and he did not register until July, 2017. During that same time period, Defendant also failed to report to P.O. Gaunt.

When Defendant failed to report to P.O. Gaunt as required, she visited the homeless camp that Defendant had listed as his address, but she could not locate him there. On March 20, 2017, P.O. Gaunt declared Defendant an absconder, and the judge that had granted Defendant probation issued a warrant for his arrest.

Defendant was eventually picked up on the warrant, and P.O. Gaunt visited him in the Greene County Jail on June 22, 2017. She did not read Defendant his *Miranda*⁴ rights, but she cautioned him that anything he said to her could be included in a probation violation report, and she told Defendant that he had the right to say nothing at all. Defendant agreed to talk with P.O. Gaunt, and he told her that he moved to a new homeless camp about two weeks after he last updated his sex offender registration in December 2016. After her visit

² We remand the case solely to direct the trial court to correct, *nunc pro tunc*, its written judgment to conform with its orally-pronounced sentence. *See McArthur v. State*, 428 S.W.3d 774, 781-82 (Mo. App. E.D. 2014).

³ We view the evidence in the light most favorable to the verdict and ignore all contrary evidence and inferences. *State v. Hunt*, 451 S.W.3d 251, 257 (Mo. banc 2014).

⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

with Defendant at the jail, P.O. Gaunt contacted Registrar and informed her that Defendant was no longer living at his registered address.

At trial, P.O. Gaunt told the trial court that, “because of statute, I have to be ordered to testify on anything that I know regarding [Defendant].” The trial court ordered P.O. Gaunt to testify, and she provided the evidence set forth above.

Registrar testified that her job is to register persons who have been “convicted of a sexual-in-nature crime that reside in Greene County[,]” and she had been registering Defendant for several years.⁵ As part of her normal job duties, Registrar was required to go over personal details with individuals who were required to register. Those duties included asking “if there’s any new email or social media, any type of online identifiers, *if they’re still residing at the same place*, same phone number, same employment, same vehicles” (emphasis added).

On July 26, 2017, Registrar spoke with Defendant when he came to her office to fill out paperwork updating his noncompliant sex-offender registration status after he was released from jail. Registrar asked Defendant where he had been residing because he had been noncompliant since March. Defendant told Registrar that he had been residing at “homeless camps . . . throughout the city [of Springfield, Greene County] and just place to place, friend to friend.”

Another duty of Registrar’s job is to regularly communicate with employees of the Greene County offices of Probation and Parole, including P.O. Gaunt. P.O. Gaunt and Registrar had communicated about Defendant throughout the duration of P.O. Gaunt’s supervision of Defendant, including the fact that Defendant was not in compliance with his registration obligations after March 2017.

⁵ Defendant had prior Greene County failure to register convictions in 1997, 2003, and 2016.

Analysis

Count 1 of the State's Information alleged that Defendant,

in violation of Sections 589.400 and 589.425, RSMo, committed the unclassified felony of failing to register as a sex offender, punishable upon conviction under Sections 589.425, 558.002 and 558.011, RSMo, in that on or between April 1, 2017 and June 11, 2017, [Defendant] resided in the county of Greene, State of Missouri, and, being required to register as a sex offender under Section 589.400.1(1), RSMo, knowingly failed to register as a sex offender with Greene County Sheriff's Office, the chief law enforcement official of [sic] Greene, within ninety days of [D]efendant's last updated registration on December 30, 2016.

The only testimony that Defendant challenges on appeal relates to the State's proof that Defendant actually resided in Greene County between the dates of April 1, 2017, and June 11, 2017, the range charged in the State's Information.⁶

In general,

[t]he standard of review for the admission of evidence is abuse of discretion. *State v. Primm*, 347 S.W.3d 66, 70 (Mo. banc 2011). The trial court has broad discretion in admitting evidence, and we will not disturb an exercise of that discretion unless it is clearly against the logic of the circumstances. *Id.* On direct appeal, we review the trial court for prejudice, not mere error, and will reverse only if the error was so prejudicial it deprived the defendant of a fair trial. *State v. Naylor*, 510 S.W.3d 855, 862 (Mo. banc 2017).

State v. Hein, 553 S.W.3d 893, 896 (Mo. App. E.D. 2018).

In court-tried cases judges are given great latitude in the admission of evidence because of the presumption that they will not give weight to incompetent evidence. *Pike v. Pike*, 609 S.W.2d 397, 403 (Mo. banc 1980). "Because of this, it is difficult to base reversible error on the erroneous admission of evidence in a court-tried case." *Blackburn v. Richardson*, 849 S.W.2d 281, 291 (Mo.App. S.D.1993). Erroneous admission of such evidence constitutes harmless error if other properly admitted evidence supports the judgment. *Id.*

Worthington v. State, 166 S.W.3d 566, 573 (Mo. banc 2005).

⁶ Under section 589.400.2, Defendant was required to register with the chief law enforcement official of the county in which he resided.

The elements of the crime of failing to register as a sexual offender are: “(1) Defendant was required to register under Sections 589.400 to 589.425; (2) Defendant changed his residence; (3) Defendant did not inform [the chief law enforcement official of the county in which he was residing] of the change within three days of the change; and (4) Defendant acted knowingly.”

State v. Moore, 508 S.W.3d 148, 150 (Mo. App. S.D. 2016) (quoting *State v. Jacobs*, 421 S.W.3d 507, 513 (Mo. App. S.D. 2013) (en banc)).

Points 1 and 4 challenge the admissibility of P.O. Gaunt’s testimony. Points 2, 3, and 5 challenge the admissibility of Registrar’s testimony. Because the admissibility of Registrar’s testimony is dispositive, we address first the points related to her.

Defendant’s Statements to Registrar

Point 2

Point 2 claims the trial court erred in allowing Registrar to testify that Defendant told her that he lived in Greene County between April 1, 2017, and June 11, 2017, because section 559.125 makes his statement to Registrar privileged, and therefore inadmissible.

We disagree.

Section 559.125.2 states as follows:

Information and data *obtained by a probation or parole officer* shall be privileged information and shall not be receivable in any court. Such information shall not be disclosed directly or indirectly to anyone other than the members of a parole board and *the judge entitled to receive reports*,^[7] except the court or the board may in its discretion permit the inspection of the report, or parts of such report, by the defendant, or offender or his or her attorney, or other person having a proper interest therein.

(Emphasis added.)

⁷ Here, we presume that the “judge entitled to receive [the] report[.]” was the judge that had taken Defendant’s guilty plea in the underlying case, granted probation, and eventually issued the warrant for Defendant’s arrest when P.O. Gaunt declared him an absconder.

Defendant concedes in his brief that Registrar “was not a probation officer[,]” and that concession is dispositive of this point.⁸ Because Registrar was not a probation officer, under the plain language of section 559.125.2, Defendant’s statement to Registrar about his whereabouts was not privileged. Point 2 fails.

Points 3 and 5

Points 3 and 5 claim the trial court clearly erred in refusing to suppress Defendant’s statements to Registrar on the ground that their admission constituted “fruit of the poisonous tree” because his statements to Registrar were made only after P.O. Gaunt had illegally obtained the same information from Defendant in violation of his *Miranda* rights.⁹ These claims fare no better.

“Generally, evidence discovered and later found to be derivative of a Fourth Amendment violation must be excluded as fruit of the poisonous tree.” *State v. Miller*, 894 S.W.2d 649, 654 (Mo. banc 1995). “However, there is no steadfast rule that evidence discovered after a . . . violation must be excluded.” *Id.* “Instead, ‘[i]n determining whether the exclusionary rule should apply to render evidence inadmissible as “fruit of the poisonous tree,” the question is “whether, granting establishment of the primary illegality, the evidence to which . . . objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” *Id.* (citations omitted).

State v. Renfrow, 224 S.W.3d 27, 33-34 (Mo. App. W.D. 2007).

“We ‘will reverse a trial court’s ruling on a motion to suppress only if it is clearly erroneous.’” *State v. Rumbaugh*, 550 S.W.3d 492, 494-95 (Mo. App. S.D. 2017) (quoting *State v. Holman*, 502 S.W.3d 621, 624 (Mo. banc 2016)). In reviewing the ruling, we state

⁸ Despite that admission, Defendant argues that his disclosures to her were nonetheless protected by the statute in that “the only reason that [Registrar] even asked [Defendant] this information is because of what [P.O.] Gaunt had told her[.]” We address this contention in our analysis of points 3 and 5, *infra*.

⁹ To the extent that Point 3 also claims that the statements should have been suppressed under section 559.125, that argument fails for the reasons stated in our disposition of Point 2.

the evidence, and any reasonable inferences therefrom, in the light most favorable to it and disregard any contrary evidence. *Id.* at 495.

In support of his “fruit of the poisonous tree” claims, Defendant claims that Registrar only asked Defendant about his whereabouts because of what she had learned in a conversation with P.O. Gaunt. Viewing the evidence as we must, the record does not support Defendant’s claim that Registrar only asked him about where he had been living because of what she had learned from speaking with P.O. Gaunt.

Registrar was arguably inconsistent in her testimony about why she asked Defendant to tell her where he had been residing in Greene County. In one portion of her testimony, Registrar testified that she asks every sex offender who is required to register about where they had been residing as a routine part of her job. But she also answered, “Yes,” to defense counsel’s question whether she had asked Defendant about where he had been residing “based off of the information brought to [her]” about the physical layout of a particular homeless camp Defendant had listed as his registered address.¹⁰ If we assume that her more specific testimony called her credibility into question or was otherwise unfavorable to the trial court’s ruling, our mandatory standard of review requires us to ignore it. *See Rumbaugh*, 550 S.W.3d at 494-95. Further, the testimony that Defendant prefers was

¹⁰ Specifically, Registrar testified that,

Upon [P.O. Gaunt’s] arrival, there was an incline to the homeless camp. And [Defendant] claims to be in a wheelchair. There was no way physically possible, for their observation, that a wheelchair would have been able to get into that homeless camp, and there was no sign of anyone residing in that homeless camp.

specifically received by the trial court “not for the truth of the matter but if it provides the explanation as to why she [(Registrar)] did certain things.”¹¹

Assuming, *arguendo*, that the same information Registrar provided in her testimony about where Defendant had been residing was wrongly received into evidence from P.O. Gaunt, Registrar’s testimony suffers from no such defect. *See Miller*, 894 S.W.2d at 654 n.5 (the tainted information is admissible if provided by a source independent of the alleged illegality). For that reason, the trial court did not clearly err in denying Defendant’s motion to suppress and admitting Registrar’s trial testimony that Defendant told her he was residing in Greene County during the time period charged by the State.

Points 3 and 5 are denied.

Defendant’s Statements to P.O. Gaunt

Points 1 and 4

Because these points fail for the same reason, we address them together. Point 1 claims the trial court erred in ordering P.O. Gaunt to testify that Defendant told her he had lived in Greene County between April 1, 2017, and June 11, 2017, because such statements were inadmissible under section 559.125. Defendant argues that this testimony prejudiced him because it “was necessary to show that [Defendant] had failed to register as a sex offender in Greene County, since it showed that [Defendant] actually lived in Greene County between April 11, 2017, and June 11, 2017.”

Point 4 claims the trial court erred in admitting into evidence his statements to P.O. Gaunt because it violated his right against self-incrimination and due process of law, in that

¹¹ Finally, as earlier noted, it is very rare to base reversible error on the erroneous admission of evidence in a bench-tried case as we presume that the judge does not give weight to incompetent evidence. *Worthington*, 166 S.W.3d at 573.

P.O. Gaunt obtained the statements without having first read Defendant his *Miranda* rights.¹²

As noted in our analysis of Point 2, Registrar provided the same information when she testified that Defendant told her he had been staying in different homeless camps around Greene County since his last registration in December 2016. Assuming, *arguendo*, that the trial court erred in ordering P.O. Gaunt to disclose privileged information, the error was harmless as other properly-admitted evidence -- Registrar's testimony -- supported the judgment. See *Worthington*, 166 S.W.3d at 573. See also *State v. Davalos*, 128 S.W.3d 143, 148 (Mo. App. S.D. 2004) (evidence of marijuana discovered in vehicle was cumulative of other evidence, such that any error in denying motion to suppress was harmless). Points 1 and 4 also fail, but one additional item must be addressed.

Correction of Written Judgment

As the State rightly points out, the trial court orally pronounced concurrent sentences of 10 years on Count 1 and 4 years on Count 2. Despite that pronouncement, the trial court's written judgment purports to impose concurrent sentences of 10 years on Count 1, and 10 years on Count 2 (emphasis added).

If there is a material difference between the trial court's oral pronouncement of sentence and the written judgment, the oral pronouncement of sentence controls. *State ex. rel. Zinna v. Steele*, 301 S.W.3d 510, 514 (Mo. banc 2010). "The failure to memorialize accurately the decision of the trial court as it was announced in open court [is] clearly a clerical [mistake]." *State v. Taylor*, 123 S.W.3d 924, 931 (Mo.App.S.D.2004).

McArthur, 428 S.W.3d at 781-82.

¹² Like the State, we read this point as challenging the trial court's denial of Defendant's motion to suppress the statements Defendant made to P.O. Gaunt.

This clerical mistake may be corrected by a *nunc pro tunc* order, *id.* at 782, and we hereby direct the trial court to correct its written judgment to impose concurrent sentences of 10 years on Count 1 and 4 years on Count 2. In all other respects, the judgment of the trial court is affirmed.

DON E. BURRELL, J. – OPINION AUTHOR

GARY W. LYNCH, J. – CONCURS

MARY W. SHEFFIELD, J. – CONCURS