

[Cite as *State v. Stewart*, 2011-Ohio-612.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94863**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**ANTHONY STEWART**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-530970

**BEFORE:** Gallagher, J., Celebrezze, P.J., and Sweeney, J.

**RELEASED AND JOURNALIZED:** February 10, 2011

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SEAN C. GALLAGHER, J.:

{¶ 1} Appellant Anthony Stewart appeals his conviction by the Cuyahoga County Court of Common Pleas. For the reasons set forth herein, we affirm.

{¶ 2} On November 25, 2009, Stewart was indicted on one count of failure to provide notice of change of address, in violation of R.C. 2950.05(F)(1),<sup>1</sup> a fourth-degree felony. Stewart waived his right to a jury trial, and a bench trial commenced on February 16, 2010.

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<sup>1</sup> Prior to 2003, this section was known as R.C. 2950.05(E)(1).

{¶ 3} Stewart had a prior conviction for gross sexual imposition, and therefore was adjudicated a Tier I sexual offender. Accordingly, Stewart was required to register his address with the state for 15 years and to report once a year. In accordance with R.C. 2950.05, he was required to notify the state of any subsequent change in address 20 days prior to the change. Stewart registered his address with the state on July 27, 2009.

{¶ 4} As of July 31, 2009, Stewart listed his permanent address as 1701 Payne Avenue, Cleveland, Ohio, also known as The Spot, a homeless shelter for men with disabilities. Policies of The Spot require men planning to stay overnight to be in the shelter by 9:30 p.m. Men arriving after 10 p.m. are turned away for the evening, and the shelter does not keep records of those individuals who are turned away. Exceptions will be made for a resident who contacts The Spot in advance and notifies the attendant on duty he will arrive after 10:00 p.m. because of a late-running commitment.<sup>2</sup> In these instances, The Spot will hold a bed for that resident.

{¶ 5} David Titus runs the day-to-day operations at The Spot. According to Titus, Stewart lived at The Spot from July 31, 2009 to October 2, 2009. Titus testified that on rare occasions during that time period, Stewart did not stay overnight at The Spot, but that he considered Stewart a resident.

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<sup>2</sup> Examples of such commitments are late shifts at work, Alcoholics Anonymous meetings, or being in the hospital.

Specifically, Titus testified that, of the 30 days in September, Stewart slept at the shelter 23 or 24 nights. Records from The Spot for October 2009 indicated that Stewart did not spend any night there from October 3 to 31. Titus could not recall if Stewart stayed at The Spot in November or early December, but he remembered Stewart staying there in late December, and in January and February 2010.<sup>3</sup>

{¶ 6} Detective Susan Dechant of the Cuyahoga County Sheriff's Department, Sex Offender's Unit, testified that her duties include, among others, making sure all registered sex offenders are living where they are registered. In order to do so, she makes random address verifications throughout the year. Det. Dechant testified that in November 2009, she attempted to verify that Stewart was living at The Spot. She learned from Titus that Stewart had not stayed at the shelter any night in the two weeks prior to her verification.

{¶ 7} The trial court denied defense counsel's Crim.R. 29 motion, and Stewart testified on his own behalf. Stewart testified that he had stayed most nights at The Spot in October, but that the "bed check" procedure was not always done accurately. He stated that the nights he did not stay at the shelter were because of temporary work shifts he had in the evening and

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<sup>3</sup> The state did not produce records from The Spot for the months of November and December 2009, or any month in 2010.

conflicts he had with other residents at The Spot. Stewart said he would call The Spot on the evenings he was working late, and therefore he did not understand why the shelter's records did not reflect his calls. On the nights he did not report to The Spot, Stewart typically slept on the streets.

{¶ 8} There was no evidence that Stewart had been asked to leave the shelter or been removed for a violation of its rules. There was no dispute that Stewart was living at The Spot from the time he was released from jail after his arrest in January 2010 to the time of trial.

{¶ 9} The trial court found Stewart guilty of failure to provide change of address. It noted that he was already being supervised by the state of Ohio, and sentenced him to time served.

{¶ 10} Stewart filed his appeal, citing two assignments of error for our review.

{¶ 11} His first assigned error provides as follows: "The failure of the indictment against defendant to allege the mens rea of recklessness rendered it fatally defective."

{¶ 12} Despite Stewart's argument that the indictment against him was defective for failing to allege a mens rea, we find that a violation of R.C. 2950.05(F)(1) is a strict liability offense.

{¶ 13} As an initial matter, we note that "failure to timely object to a defect in an indictment constitutes a waiver of the error. Crim.R. 12(C)(2)

(objections to defect in indictment must be raised before trial). Any claim of error in the indictment in such a case is limited to a plain-error review on appeal.” *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, citing *State v. Frazier* (1995), 73 Ohio St.3d 323, 652 N.E.2d 1000; Crim.R. 52(B).

{¶ 14} Under Crim.R. 52(B), “plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” “Plain error exists only if but for the error, the outcome of the trial clearly would have been otherwise, and is applied under exceptional circumstances and only to prevent a manifest miscarriage of justice.” (Citation and quotations omitted.) *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912 N.E.2d 1106, ¶ 61.

{¶ 15} The Ohio Supreme Court recently held, “An indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state. (*State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162, reaffirmed; *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, overruled; *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, overruled in part.)” *Horner*, 126 Ohio St.3d, at paragraph one of the syllabus.

{¶ 16} R.C. 2901.21(B) provides: “When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.”

{¶ 17} “Offenses without any culpable mental state are strict-liability offenses, and they impose liability for simply doing a prohibited act.” *State v. Johnson*, \_\_\_ Ohio St.3d \_\_\_, 2010-Ohio-6310, ¶ 17. We have held that R.C. 2950.05 is a strict liability offense. Relying on *State v. Collins* (2000), 89 Ohio St.3d 524, 2000-Ohio-231, 733 N.E.2d 1118, this court held that “[t]he requirement that an offender provide notice of a change of address is intended for the public safety and well-being. It is thus a mala prohibita act, and constitutes a strict liability offense.” *State v. Beasley* (Sept. 27, 2001), Cuyahoga App. No. 77761. In *Beasley*, we stated, “Ohio courts have said that ‘when a statute reads “no person shall” engage in proscribed conduct, absent any reference to a culpable mental state, the statute indicates a legislative intent to impose strict liability.’ \* \* \* A finding that the failure to provide notice of a change of address is a strict liability offense is consistent with the legislative purpose behind the registration requirements for sexual offenders.” (Internal citations omitted.) *Id.*

{¶ 18} We are not persuaded by Stewart’s argument that subsequent Ohio cases have called *Beasley’s* holding into question. In *State v. Moody*, 104 Ohio St.3d 244, 2004-Ohio-6395, 819 N.E.2d 268, at syllabus, the Ohio Supreme Court declined to hold that a violation of R.C. 2919.24, contributing to the unruliness of a child, is a strict liability offense. Until the supreme court holds that a violation of R.C. 2950.05 is not a strict liability offense, we continue to follow the law in our district.<sup>4</sup>

{¶ 19} We find that the indictment against Stewart was not defective for failing to allege a mens rea. His first assignment of error is overruled.

{¶ 20} Stewart’s second assignment of error provides as follows: “The defendant’s conviction was based on insufficient evidence, in violation of his right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution.”

{¶ 21} Stewart argues that there was insufficient evidence presented that he changed his address. He acknowledges that there may have been a few nights in the fall of 2009 when he did not sleep at The Spot; however, he argues this is insufficient to show he had moved, especially since the evidence

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<sup>4</sup> See *Crotts v. Bradshaw* (Apr. 16, 2007), N.D. Ohio No. 1:06CV2519, reversed on other grounds (“[*State v.*] *Moody* stands only for the proposition that the culpable mental state of recklessness applies to the offense of contributing to the unruliness or delinquency of a child,” and does not support a finding that gross sexual imposition upon a victim less than thirteen years of age is not a strict liability offense).

showed he was living in the shelter in late December 2009 and in 2010, other than when he was in jail on the instant charge.

{¶ 22} A motion for acquittal under Crim.R. 29(A) is governed by the same standard used for determining whether a verdict is supported by sufficient evidence. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37. “The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” (Citations and quotations omitted.) *Id.*

{¶ 23} R.C. 2950.05(F)(1) states: “No person who is required to notify a sheriff of a change of address pursuant to division (A) of this section or a change in vehicle information or identifiers pursuant to division (D) of this section shall fail to notify the appropriate sheriff in accordance with that division.”

{¶ 24} The state presented evidence that Stewart had not slept at The Spot after October 2, 2009, or any nights in November 2009, when Det. Dechant conducted a random address verification on him. The state also presented evidence through Deputy Melissa Harris that Stewart never notified the sheriff’s office of any change of address, and that The Spot was

his address of record from July 31, 2009 to the present. Contradictory evidence came from Stewart's own testimony. He admitted the only reasons he did not stay at The Spot was because of his work commitments and conflicts he had with other residents.

{¶ 25} Although we are mindful that the statute at issue is designed to protect the general public by mandating the registry of addresses of previously convicted sex offenders, we question whether the legislature fully contemplated the viability of the registration process by the homeless offender. The fallacy of a homeless shelter serving as a permanent address does little to instill confidence in the registration process. While homeless offenders often have periods of regular contact with such shelters, it can hardly be said that any level of "permanence" is attained by such contact.

{¶ 26} In this instance, Stewart maintained regular contact with his probation officer and avoided any new criminal violations. His rationale for his absence from the shelter is credible. While few may feel empathy for convicted sex offenders like Stewart, it appears the conviction in this case results, at least in part, from poverty rather than from any affirmative failure on Stewart's part. Nevertheless, in the absence by the legislature of some alternative registration process for the homeless, we must apply the same statute as written to all those required to report.

{¶ 27} Therefore, we follow this court’s ruling in *Beasley*, which held that “An address ‘changes’ when one no longer lives at that address.” *Beasley*. Unlike Stewart’s residency at the shelter in September, when he slept there 23 or 24 nights out of 30, in October there was evidence that Stewart did not spend the night there for 29 consecutive nights, nor on any night in November.

{¶ 28} We find that Stewart’s testimony regarding his permanent address at The Spot does not negate the sufficiency of the evidence presented by the state. The evidence that Stewart was not at The Spot for several consecutive weeks is sufficient to prove he no longer lived at that address. Thus, there was sufficient evidence to withstand Stewart’s Crim.R. 29 motion for acquittal. Stewart’s second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant’s conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and  
JAMES J. SWEENEY, J., CONCUR