No. COA 21-390 NINETEENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

 v. ) From Cabarrus County

 )

NORMAN EDWARD CARTER )

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DEFENDANT-APPELLANT’S BRIEF

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DEFENDANT-APPELLANT’S BRIEF

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**ISSUE PRESENTED**

1. Did the trial court err by accepting and entering judgment on Mr. Carter’s guilty plea when that plea was unsupported by the factual basis offered at the plea hearing?

**STATEMENT OF THE CASE**

 In April of 2020, Defendant-Appellant Norman Edward Carter was convicted of several counts of third-degree exploitation of a minor. The charges were consolidated into two judgments, and in each judgment, Mr. Carter was sentenced to 6 to 17 months of active imprisonment. These sentences were set to run consecutively but were suspended for 30 months of supervised probation. Based on these convictions, Mr. Carter registered with North Carolina’s sex offender registry. (R pp 1, 10-13; T pp 22-24[[1]](#footnote-1))

On 26 October 2020, Mr. Carter was charged in three separate indictments with five total counts of failing to inform the sheriff’s office of new online identifiers (“online IDs”) or changes to existing online IDs. These same allegations led to the filing of two probation violation reports on 17 September 2020. (R pp 1, 10-13, 26‑28)

Both sets of allegations—the allegations that he had violated the terms of his probation, and the new criminal charges—were addressed at the 28 January 2021 Criminal Session of the Superior Court in Cabarrus County before the Honorable Martin B. McGee, judge presiding. Mr. Carter pleaded guilty to the five charges of failing to inform the sheriff’s office of any new online IDs or changes to existing online IDs. Mr. Carter also admitted willfully violating the terms of his probation based on the same conduct. (R pp 1, 29-32; T pp 3-18)

Based on Mr. Carter’s admission to the probation violations, the trial court revoked Mr. Carter’s probation and activated his suspended sentences. The trial court also entered judgment on Mr. Carter’s guilty pleas, consolidated the five charges into one judgment, and imposed a presumptive-range sentence of 15 to 27 months of active imprisonment. The trial court set this sentence to run concurrently with the sentences that were activated based on the probation violations. (R pp 1-2, 35-42; T pp 22‑24)

Mr. Carter returned to court during the 3 February 2021 Criminal Session of the Superior Court in Cabarrus County before the Honorable William A. Long, judge presiding, to enter notice of appeal. Because the parties were unfamiliar with appeals from judgments entered on guilty pleas, they recessed, then returned the next day. On 4 February 2021, Mr. Carter confirmed that he wanted to enter notice of appeal from the judgment entered on his guilty pleas. However, Mr. Carter did not separately appeal the revocation of his probation and the activation of his suspended sentences. (R pp 2, 43-45; 3 Feb. T pp 3-8; 4 Feb. T pp 3-4)

**GROUNDS FOR APPELLATE REVIEW**

Mr. Carter appeals from a final judgment of the Superior Court in Cabarrus County pursuant to ‑N.C. Gen. Stat. §§ 7A-27(b) and 15A‑1444‑. In addition, because Mr. Carter’s notice of appeal may not have complied with all the technical requirements of Rule 4, and because there is no statutory right to appellate review of a claim that a guilty plea was unsupported by a sufficient factual basis, Mr. Carter has contemporaneously filed a petition for a writ of certiorari. That petition is fully incorporated herein by reference.

**STATEMENT OF THE FACTS**

 On 26 October 2020, Mr. Carter was charged by indictment with five counts of “Fail to Inform of New Changes to Online ID” in violation of N.C. Gen. Stat. § 14-208.11, which allows the imposition of criminal liability for violations of North Carolina’s Sex Offender Registration Program. (R pp 26-28) The first count alleged that Mr. Carter

unlawfully, willfully, and feloniously did as a person required by Article 27A of Chapter 14 of the North Carolina General Statutes to register, failed to notify the registering Sheriff of any new or existing online identifiers that the person uses or intends to use. The defendant established and was using the Facebook screen name of Norman Carter.

The other four counts tracked the same language, while changing the online identifier alleged. Three of the charges related to email addresses; one related to a TikTok account; and one related to a Facebook account. (R pp 26-28) Mr. Carter later explained that the Facebook account was “the same Facebook [he’d] had for ten years.” (T p 15)

Mr. Carter eventually agreed to enter an *Alford* plea to these five charges, and to admit that the underlying conduct violated the terms of his probation, in exchange for consolidation of the charges and concurrent sentences. (R pp 29-32) To address these registry violations, a hearing was held on 28 January 2021 in the Superior Court in Cabarrus County. At that hearing, the trial court conducted the plea colloquy required by N.C. Gen. Stat. § 15A-1022(a). The State then offered the following factual basis for the charges:

Your Honor, this Defendant was convicted of sexual exploitation of a minor, two counts of that, in April of 2020. He went as part of his sentence to the Cabarrus County Sheriff’s Office on April 2020 to be advised and sign the notice of duty to register. He did follow through with all of that, and he was advised of all of the requirements of that.

Then in August of 2020, the probation officer, Officer Kubicek, seized his cell phone and on -- it was forensically evaluated, and on it they found six e-mails, one TikTok and one Facebook account that was brought into question. Mr. Carter had only declared one e-mail account at the sheriff’s office back in April.

They had a phone call with the Defendant and asked him about each one of those undeclared accounts. And he admitted to several, actually four different e-mail accounts. He also admitted to social media accounts, a TikTok account and a Facebook account that he had not declared. And he also stated that he knew about the accounts and that he did fail to declare those.

(T pp 12-13) This explanation did not describe when these accounts might have been created or changed following Mr. Carter’s initial registration.

 At this point, Mr. Carter spoke up to explain that he had tried to comply with the registration requirements. He admitted, however, that he’d fallen short. Mr. Carter explained:

[Mr. Carter]: Yes, sir. I tried to make sure I dotted my I’s and crossed my T’s. When I shaved my beard, I called to see if they needed new pictures. When I moved out of my house, the house I was staying in in a camper on the same property, I made sure they knew. The online identifiers had been discussed at various times. My mistake was I did not come in and register them in person myself.

(T pp 14-15) Mr. Carter continued, informing the court that he had attempted to comply by showing his phone to the officer with whom he was registering:

[Defense counsel]: So when you went to register your e-mail addresses, the officer at that time took your phone?

[Mr. Carter]: Yes. He looked at my phone. I was facing away from the desk and he’s facing towards the desk. And my phone was right there, and he picked it up and looked at it.

(T p 15) He then explained that they’d discussed his Facebook account in particular, and that by that time, he’d had the account for a decade:

[Defense counsel]: Did he specifically –

[Mr. Carter]: We discussed the e-mail that my boss had me and my company driver using, the one that I use for when I’m job hunting. And he had informed me that he would have to tell Facebook I was on the registry and that if it was deleted not to create a new one. And I have not, it’s the same Facebook I’ve had for ten years.

[Defense counsel]: So you thought that they knew of these e-mails?

[Mr. Carter]: Yes.

(T pp 15-16)

 The trial court, reluctant to accept a guilty plea from someone who appeared to maintain that he was not in fact guilty, asked “So what you’re telling me is that you’re innocent of all of this?” Mr. Carter responded by confirming that he believed he was technically guilty of the charged offenses: “Well, I accept responsibility that I didn’t write it down for them. . . . [I]t’s my fault that I didn’t come in in person and write it down for them.” (T p 16) Mr. Carter agreed that there was a factual basis for his *Alford* plea, and that he should be sentenced as if he were factually guilty. (T pp 16-17)

 The trial court ultimately accepted Mr. Carter’s *Alford* plea, and his admission that his conduct constituted a willful violation of his probation. Defense counsel asked that Mr. Carter be continued on probation. Instead, the trial court activated his previous sentences, and for the new charges, imposed an active sentence of 15 to 27 months of active imprisonment, set to run concurrently. (T pp 22-26) Several days later, on 3 and 4 February 2021, Mr. Carter returned to court to enter oral notice of appeal. (3 Feb. T pp 1-8; 4 Feb. T pp 1-4)

**ARGUMENT**

**I.** **The trial court erred by accepting and entering judgment on Mr. Carter’s guilty plea when that plea was unsupported by the factual basis offered at the plea hearing.**

N.C. Gen. Stat. § 14-208.11 provides several ways the failure to comply with the requirements of the North Carolina Sex Offender and Public Protection Registration Program can constitute a criminal offense. Under subsection (a)(1) of that statute, a person commits a crime if they “[fail] to register as required by this Article,” N.C. Gen. Stat. § 14‑208.11(a)(1)‑, which includes informing the sheriff of “[a]ny online identifier that the person uses or intends to use,” at the time of registration, N.C. Gen. Stat. §14-208.7(b)(7). And under subsection (a)(10) of that statute, a person commits a different crime if they “[fail] to inform the registering sheriff of any new or changes to existing online identifiers that the person uses or intends to use.” N.C. Gen. Stat. § 14‑208.11(a)(10)‑.

 Accordingly, these two subsections address similar conduct, but apply at different times: Subsection (a)(1) applies where a defendant fails to satisfy their *initial* registration requirements by providing the necessary information about their online IDs, while subsection (a)(10) applies where they fail to provide the necessary *updates* to the information already on file. And our Supreme Court has held that the provisions of N.C. Gen. Stat. § 14-208.11(a)(1) through (a)(10) create separate and distinct offenses, rather than different ways of committing a single offense. *See* *State v. Crockett*, 368 N.C. 717, 721 (2016) (“Subsection 14‑208.11(a) lists several distinct offenses, each of which applies to a different fact pattern . . . .”).

Here, Mr. Carter pleaded guilty to five counts of failing to inform the sheriff’s office of new online IDs or changes to existing online IDs. However, the State’s factual basis tended to show that the online identifiers at issue already existed at the time of Mr. Carter’s original registration, and there was little indication that they had undergone any substantial change in the period between his initial registration and the time he was charged with the present offenses. This was particularly true for Mr. Carter’s Facebook account, which he’d had for ten years. Therefore, the factual basis tended to show that if Mr. Carter was guilty of anything, it was one violation of subsection (a)(1), rather than five violations of subsection (a)(10).

The plea agreement between Mr. Carter and the State required him to plead guilty to five counts of failing to inform the sheriff’s office of any new online identifiers or changes to existing online identifiers. Should this Court agree that at least one of those charges was unsupported by a sufficient factual basis, then the parties will be unable to get the benefit of their bargain. Under those circumstances, the appropriate remedy will be to vacate the judgment, set aside the plea agreement, and remand to superior court so that the parties can either negotiate a new plea agreement or proceed to trial on the underlying charges.

1. **Standard of review.**

N.C. Gen. Stat. § 15A-1022 provides that a trial court “may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea.” N.C. Gen. Stat. § 15A-1022(c). Accordingly, a claim that the record did not include a sufficient factual basis to support a defendant’s *Alford* plea involves “an alleged statutory violation [that is reviewed] *de novo*.” *State v. Crawford*, 2021-NCCOA-272, ¶ 29; *see also* *See State v. Agnew,* 361 N.C. 333, 335-38 (2007) (providing *de novo* review of “whether the trial court complied with N.C.G.S. § 15A-1022(c) in determining there was a factual basis for [the] defendant’s guilty plea”). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Biber*, 365 N.C. 162, 168 (2011) (citation omitted).

1. **N.C. Gen. Stat. § § 14-208.11(a)(1) and (a)(10) create separate and distinct offenses.**

Article 27A of North Carolina’s General Statutes imposes numerous, distinct requirements on those required to register as sex offenders, some of which apply at the time of the initial registration, and some of which apply at a later time. Two of the requirements imposed under that Article are at issue here.

First, N.C. Gen. Stat. § 14-208.7(b) requires a sex offender, upon their initial registration with the sheriff’s office, to provide “[a]ny online identifier that the person uses or intends to use.” N.C. Gen. Stat. § 14‑208.7(b)(7)‑. The term “online identifier” is defined broadly to include any “[e]lectronic mail address, instant message screen name, user ID, chat or other Internet communication name,” N.C. Gen. Stat. § 14‑208.6(1n)‑, and thus includes the usernames, screennames, and tags associated with social media sites like Facebook and TikTok. For a current resident of North Carolina, this information must be provided “immediately” to the sheriff’s office upon conviction of an offense requiring registration where an active term of imprisonment is not imposed. N.C. Gen. Stat. § 14‑208.7(a)(2)‑.[[2]](#footnote-2)

Second—and separately—a person who is *already* registered must inform the sheriff’s office if they “change[] an online identifier, or obtain[] a new online identifier[.]” N.C. Gen. Stat. § 14-208.9(e). They must provide this new information, in person, within ten days of the creation of the new ID, or the change to the old ID. *Id.*[[3]](#footnote-3)

A related statute, N.C. Gen. Stat. § 14-208.11, makes it a crime for a person who is required to register to fail to comply with either of these requirements. Subsection (a)(1) of that statute provides that a person is guilty of a Class F felony if they willfully “[fail] to register as required by this article.” N.C. Gen. Stat. § 14-208.11(a)(1). This includes willfully failing to provide “[a]ny online identifier that the person uses or intends to use.” N.C. Gen. Stat. § 14‑208.7(b)(7). Similarly, but separately, subsection (a)(10) provides that a person is guilty of a Class F felony if they willfully “[fail] to inform the registering sheriff of any new or changes to existing online identifiers that the person uses or intends to use.” N.C. Gen. Stat. § 14-208.11(a)(10).

Critically, subsections (a)(1) through (a)(10) of N.C. Gen. Stat. § 14‑208.11 do not describe multiple potential ways of being guilty of a single offense. Rather, our Supreme Court has expressly held that “**[s]ubsection 14‑208.11(a) lists several distinct offenses, each of which applies to a different fact pattern**, and each of which refers explicitly or implicitly to other provisions within Article 27A of Chapter 14 of the North Carolina General Statutes, governing sex offender registration programs.” *Crockett*, 368 N.C. at 721. Accordingly, under *Crockett*, the failure to provide the necessary information at their initial registration is a separate and distinct offense from the failure to update that information later on with relevant changes or additions.

1. **The factual basis provided at the plea hearing was insufficient because it tended to show violations of N.C. Gen. Stat. §** **14-208.11(a)(1), not (a)(10).**

“Because a guilty plea waives certain fundamental constitutional rights such as the right to a trial by jury, our legislature has enacted laws to ensure guilty pleas are informed and voluntary.” *Crawford*, 2021‑NCCOA-272 at ¶ 33 (quoting *Agnew*, 361 N.C. at 335). “One of those laws, N.C.G.S. § 15A-1022(c), requires that prior to accepting a plea of guilty, the trial court must determine there is a factual basis for the plea.” *Id.* That statute in turn provides:

The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

(1) A statement of the facts by the prosecutor.

(2) A written statement of the defendant.

(3) An examination of the presentence report.

(4) Sworn testimony, which may include reliable hearsay.

(5) A statement of facts by the defense counsel.

N.C. Gen. Stat. § 15A-1022(c). While “some substantive material independent of the plea itself [must] appear of record which tends to show that the defendant is, in fact, guilty” of the crimes charged, the “sources listed in N.C.G.S. § 15A-1022(c) are not exclusive, and therefore the trial judge may consider any information properly brought to his attention.” *Id.* (citations omitted).

 Here, the trial court erred by accepting and entering judgment on Mr. Carter’s *Alford* plea. Mr. Carter was charged with, and entered an *Alford* plea of guilty to, five counts of failing to inform the sheriff’s office of new online IDs or changes to existing online IDs within ten days. However, the factual basis offered at the plea hearing was insufficient to support even a single count of that offense, much less five.

 Once the trial court conducted the plea colloquy required by N.C. Gen. Stat. § 15A-1022(a), the State offered the factual basis for the charges. It provided the following three paragraph explanation:

Your Honor, this Defendant was convicted of sexual exploitation of a minor, two counts of that, in April of 2020. He went as part of his sentence to the Cabarrus County Sheriff’s Office on April 2020 to be advised and sign the notice of duty to register. He did follow through with all of that, and he was advised of all of the requirements of that.

Then in August of 2020, the probation officer, Officer Kubicek, seized his cell phone and on -- it was forensically evaluated, and on it they found six e-mails, one TikTok and one Facebook account that was brought into question. **Mr. Carter had only declared one e-mail account at the sheriff’s office back in April.**

They had a phone call with the Defendant and asked him about each one of those undeclared accounts. And he admitted to several, actually four different e-mail accounts. **He also admitted to social media accounts, a TikTok account and a Facebook account that he had not declared. And he also stated that he knew about the accounts and that he did fail to declare those.**

(T pp 12-13) (emphasis added) This explanation did not describe *when* these accounts might have been created or changed following Mr. Carter’s initial registration. And in the absence of that information, it is impossible to know when, if at all, Mr. Carter might have violated the statutory requirement that he inform the sheriff’s office within ten days. *See* N.C. Gen. Stat. § 14-208.9(e) (imposing the ten-day deadline).

Moreover, it was at this point that Mr. Carter spoke up to explain that he had, in fact, informed officers about the accounts—he simply had not done so at the sheriff’s office, in writing and in person. (T pp 14-17) He also addressed the Facebook account specifically, explaining that he’d had the account for a decade:

[Mr. Carter]: We discussed the e-mail that my boss had me and my company driver using, the one that I use for when I’m job hunting. And he had informed me that he would have to tell Facebook I was on the registry and that if it was deleted not to create a new one. **And I have not, it’s the same Facebook I’ve had for ten years.**

(T p 15) (emphasis added)

The factual basis described by the State did not indicate either (1) that the five accounts at issue (three email addresses, the TikTok account, and the Facebook account) were created *after* Mr. Carter registered in April of 2020, or (2) that any of these accounts were changed, after he registered, in any material way. Rather, the factual basis described at the hearing tended to show that if Mr. Carter fell short of the registration requirements, he did so by failing to disclose one or more of these accounts in the first place. That might have constituted a *single* violation of N.C. Gen. Stat. § 14-208.11(a)(1), but it could not have constituted *five* violations of N.C. Gen. Stat. § 14-207.11(a)(1). *Cf. State v. Garris*, 191 N.C. App. 276, 285 (2008) (holding there was “no indication that the North Carolina Legislature intended for [the felon in possession statute] to impose multiple penalties for a defendant’s simultaneous possession of multiple firearms”).

As reviewed, N.C. Gen. Stat. § 14-208.11(a)(1) through (a)(10) describe several distinct offenses, and not multiple ways of committing a single offense. Here, the factual basis provided at the plea hearing may have supported one count of failure to register under section (a)(1) based on Mr. Carter’s admitted shortcomings in disclosing all of the online accounts in writing, in person, when he first registered. It did not, however, establish a factual basis for five counts under subsection (a)(10) of failing to update or supplement that information later on. For that reason, the factual basis was insufficient for the trial court to accept and enter judgment on Mr. Carter’s *Alford* plea.

1. **The appropriate remedy is to vacate the judgment and remand for further proceedings.**

The plea agreement in this case required *Alford* admissions of guilt to five counts of “Fail to inform of New Changes to Online ID.” (R p 30) Should this Court conclude that any of those five charges was not supported by a sufficient factual basis, the parties will be unable to receive the mutual benefits of their bargain.

Under those circumstances, the appropriate remedy will be to vacate the judgment, set aside the plea agreement, and remand to the Superior Court in Cabarrus County. *See State v. Rico*, 218 N.C. App. 109, 122 (Steelman, J., dissenting), *rev’d for reasons stated in dissent*, 366 N.C. 327 (2012). The parties will then be free to negotiate a new plea agreement, proceed to trial on the already-charged offenses, or proceed to trial on charges the State may seek through one or more superseding indictments.

**CONCLUSION**

For the foregoing reasons, Mr. Carter respectfully requests that this Court vacate the judgment and remand this matter to the Superior Court in Cabarrus County for further proceedings.

Respectfully submitted this the 19th day of August, 2021.

By Electronic Submission:

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ATTORNEYS FOR DEFENDANT-APPELLANT

**CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28**

 I hereby certify that Defendant-Appellant’s Brief is in compliance with Rule 28(j) of the North Carolina Rules of Appellate Procedure as it is printed in fourteen-point Century Schoolbook and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by the word-processing program used to prepare the brief.

This the 19th day of August, 2021.

By Electronic Submission:

 Aaron Thomas Johnson

 Assistant Appellate Defender

North Carolina State Bar Number 46157

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that the original Defendant-Appellant’s Brief has been filed, pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the above and foregoing Defendant‑Appellant’s Brief has been duly served upon Ms. Amber I. Davis, Assistant Attorney General, North Carolina Department of Justice, by electronic means by emailing it to aidavis@ncdoj.gov.

This the 19th day of August, 2021.

By Electronic Submission:

 Aaron Thomas Johnson

 Assistant Appellate Defender

North Carolina State Bar Number 46157

1. For clarity, the transcript of the 28 January 2021 hearing at which Mr. Carter pleaded guilty and his probation was revoked will be cited as “(T p X);” the transcript of the 3 February 2021 hearing at which Mr. Carter indicated his desire to enter notice of appeal will be cited as “(3 Feb. T p X);” and the transcript of the 4 February 2021 hearing at which the trial court confirmed that Mr. Carter wanted to enter notice of appeal will be cited as “(4 Feb. T p X).” [↑](#footnote-ref-1)
2. *See* N.C. Gen. Stat. § 14-208.7(a)(2) (“A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides. . . . If the person is a current resident of North Carolina, the person shall register . . . [i]mmediately upon conviction for a reportable offense where an active term of imprisonment was not imposed.”). [↑](#footnote-ref-2)
3. *See* N.C. Gen. Stat. § 14-208.9(e) (“If a person required to register changes an online identifier, or obtains a new online identifier, then the person shall, within 10 days, report in person to the sheriff of the county with whom the person registered to provide the new or changed online identifier information to the sheriff”). [↑](#footnote-ref-3)