90058-2

Supreme Court No. (to be set)
Court of Appeals No. 43444-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MICHAEL DAVID COLLINS, II,

Respondent

PETITION FOR REVIEW FROM THE COURT OF APPEALS (DIVISION II)

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Skamania County Prosecuting Attorney

YARDEN F. WEIDENFELD
Chief Criminal Deputy Prosecuting Attorney
Attorney for Respondent

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P.O Box 790
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I. IDENTITY OF PETITIONER

The State of Washington, petitioner, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

The State of Washington seeks review of the Court of Appeals unpublished opinion State v. Michael David Collins, II, No. 43444-0-II, entered on February 20, 2014. A copy of the opinion is attached.

III. ISSUE PRESENTED FOR REVIEW

Is the unit of prosecution for Failure to Register as a Sex Offender always only one count over any particular time period, even when the offender migrates over more than one county and thereby takes on obligations to notify more than one county sheriff?

IV. STATEMENT OF THE CASE

A. PROCEDURAL FACTS

On December 15, 2011, the respondent, Michael David Collins, II, was charged by amended information with the crime of Failure to Register as a Sex Offender, CP 118-119. Specifically, the State alleged that on or between February 4, 2009 through February 9, 2009, he lacked a fixed residence and had failed to register with the

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Skamania County Sheriff within twenty-four hours of entering Skamania County, Id.

On the same date (December 15, 2011), the trial court heard Collins' motion to dismiss, RP 1-23, previously filed with the court clerk, CP 1-2, along with supportive briefing, CP 3-36.

In his supportive briefing, Collins' trial attorney acknowledged that on February 24, 2010, a Skamania County jury found him guilty of Attempted First Degree Felony Murder and Robbery in the First Degree for a February 9, 2009 incident in Skamania County Superior Court Case Number 09-1-00014-8. CP 3.[1] He went on to assert that the charge of Failure to Register as a Sex Offender "is based on the same 'Dougan Falls Fact Pattern' from Case No. 09-1-00014-8," Id.

Continuing the procedural history of Collins' various criminal cases, Collins' trial attorney outlined Collins' charges in Clark County for Failure to Register as a Sex Offender and Custodial Interference, Id., asserting once again that both charges "were based on the 'Dougan Falls Fact Pattern' from Case No. 09-1-00014-8," Id. Collins was acquitted of Custodial Interference but

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In reply, the State argued that in fact, the Failure to Register as a Sex Offender charge to which Collins had pled guilty in Clark County was for a time period in 2006, long before the 2009 dates at issue here. RP 11-13. However, Collins' trial attorney pointed out that these earlier dates were "a legal fiction," RP 5, based on a plea bargain whereby Collins entered an Alford plea to the earlier time period but that the case being settled was in fact for his failure to register during the 2009 period, RP 5-9. The trial court accepted Collins' trial attorney's argument on this point, RP 21-22.

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The State also argued that the Clark County charge was based on a longer time period than the Skamania County charge, RP 13-14. The time period originally charged in Clark County was January 1, 2009 through March 4, 2009. See Motion and Affidavit for Order Authorizing Issuance of Warrant of Arrest in Clark County Superior Court Cause Number 09-1-00260-6, attached to Collins' trial level brief, CP 13-15, which contains a full rendition of the facts underlying the Clark County Failure to Register charge.

The trial court agreed that the Clark County and Skamania County charges were based on two different omissions and that double jeopardy thus did not apply, RP 22. The motion to dismiss was denied. RP 22-23.

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Jury trial was held January 9, 2012 to January 10, 2012, RP 152-520. The jury returned a verdict of guilty as charged, RP 523-524, CP 120.

Sentencing was held on January 12, 2012, RP 27-546. Collins was sentenced within the standard range, CP 121-139, 140.

On appeal, Collins again argued that the entire prosecution was barred by double jeopardy, See Opinion at 3. The Court of Appeals agreed, holding that "the trial court erred by deciding that the Skamania County charge was a distinct unit of prosecution that did not violate double jeopardy," Id. at 5. The trial court's decision denying Collins' motion to dismiss was reversed, and the case remanded to the trial court for dismissal with prejudice, Id.

B. SUBSTANTIVE FACTS

On the dates in question, Collins had previously been convicted of a sex offense that would be classified as a felony under the laws of Washington and was required to register as a sex offender. RP 467.

On December 5, 2008, Collins registered to a Clark County address as a sex offender with the Clark County Sheriff. RP 436. He signed a statement that he understood the requirements of

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On January 17, 2009, Collins, his son Teven Collins, Nathan Wade Davis, and Dania Whalen left for Apple Valley, California together. RP 278-279, 305, 316-317. On February 2-3, 2009, they drove back north to Washington State, first stopping in Vancouver at the home of Collins' brother Cory Collins, RP 279-280, 291, 305-306, 317-318, 322, 324.

Teven handed Cory a note telling Cory to meet them. RP 281. They needed Cory's help because they "had no home, . . . no car, . . . no money." RP 282. Collins, Teven, Davis, and Whalen then left without Cory, heading toward a campground in the woods at Dougan Falls in Skamania County, Washington. RP 283, 306, 313, 332-333. Collins and Teven were dropped off; Davis and Whalen left. RP 291, 307-308, 311, 323-324. This occurred on February 3, 2009. RP 324, 465. At the time, there was a warrant out for Collins' arrest. RP 370.

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the area they were dropped off, after which they left. RP 291-292, 299.

Collins and Teven were still there as of February 9, 2009 when they were seen there by Robert K. Tracey. RP 361-365.

Collins later admitted to Det. Garrity that he and Teven were in Dougan Falls in Skamania County during this time period to "[l]ie low and stay away from people," RP 374-376, 391. He admitted to having seen Tracey, RP 376, someone else in a pickup truck "[a]bout two days prior" to seeing Tracey, RP 377-378. He also admitted to seeing "another guy skiing in the area a few days prior" to seeing Tracey, RP 379-380.

Collins never registered as a sex offender in Skamania County. RP 397-398.

V. A RGUMENT

IT IS NEITHER DICTATED BY PRIOR HOLDINGS OF WASHINGTON COURTS NOR CONSISTENT WITH THE STATED PURPOSES OF THE SEX OFFENDER REGISTRATION STATUTE FOR THE UNIT OF PROSECUTION FOR THE CRIME OF FAILURE TO REGISTER AS A SEX OFFENDER TO BE CONSTRUED AS ALWAYS ONLY ONE COUNT OVER ANY PARTICULAR TIME PERIOD, EVEN WHEN THE OFFENDER MIGRATES OVER MORE THAN ONE COUNTY AND THEREBY TAKES ON OBLIGATIONS TO NOTIFY MORE THAN ONE COUNTY SHERIFF.

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The Supreme Court should accept review because "the decision of the Court of Appeals is in conflict with a decision of the Supreme Court," RAP 13.4(b)(1) and because this petition "involves an issue of substantial public interest that should be determined by the Supreme Court," RAP 13.4(b)(4).

A. THE COURT OF APPEALS MISINTERPRETS STATE V. PETERSON.

In State v. Peterson, the defendant argued

> that failure to register is an alternative means crime because it can be accomplished in three different ways: (1) failing to register after becoming homeless, (2) failing to register after moving between fixed residences within a county, or (3) failing to register after moving from one county to another.

168 Wn.2d 763, 769-770, 230 P.3d 588 (2010). These three situations each required different deadlines, Id. at 768. Therefore, Peterson argued, the State was required to produce "substantial evidence" supporting each of these means, Id. at 769.

The Supreme Court disagreed because

> the failure to register statute contemplates *a single act* that amounts to failure to register: the offender moves without alerting the appropriate authority. His conduct is the same—he either moves without notice or he does not. The fact that different deadlines may apply, depending on the offender's residential status, does not change the nature of the criminal act: moving without registering.

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Id. at 770 (emphasis in original). Therefore, the Supreme Court held, failure to register as a sex offender is *not* an alternative means crime, Id. at 771.

Secondly, Peterson argued that his residential status was an element of the crime of Failure to Register that the State was required to prove because this is what determines the offender's exact legal requirements, Id. at 771-772. The Supreme Court again disagreed, reasoning that

> residential status was not essential to proving the criminal act at issue: that he failed to provide timely notice of his whereabouts under *any* of the statutorily defined deadlines after vacating his registered address.

Id. at 772 (emphasis added). Therefore, the Court concluded, "residential status is not an element of the crime of failure to register," Id. at 774.

In Collins' case, however, the issue is not whether Failure to Register as a Sex Offender is an alternative means crime or whether residential status is an element of that crime. The issue is the unit of prosecution for the crime and whether distinct omissions in different counties constitute different such units.

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However, "[a]n 'alternative means crime' is one 'that provide[s] that the proscribed criminal conduct may be proved in a variety of ways.'" Peterson, 168 Wn.2d at 769, quoting State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). Different units of prosecution, on the other hand, contemplate two entirely different *crimes*.

This is not a situation, like in Peterson, where there is "*a single act*" of "mov[ing] without alerting the appropriate authority," where the offender's "conduct is the same—he either moves without notice or he does not." 168 Wn.2d at 770 (emphasis in original).

The issue there was whether the State had to provide evidence of *which* exact obligation he had taken on when he failed to notify the sheriff of his move. Id. at 766-770. Here, however, there is no question that Collins took on two *separate* obligations to two separate county sheriffs and thus, as the trial court concluded, committed two separate omissions, RP 22.

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However, where a sex offender migrates over more than one county and does not meet his registration requirements in more than one of them, the State *would* have to prove that an offender was residing in a particular county and failed the offender's obligation(s) to a particular county sheriff.

In fact, the Court in Peterson specifically distinguishes the issue of residential status from particular county sheriff:

> The issue before us is whether the offender's *residential status* must be proved in order to convict. Peterson also seems to claim that the particular county sheriff to which one must give notice is an element of the crime because an offender's deadline is different depending on if he moves outside of his county or within it. [citation omitted] But because the jury instruction here included the 72-hour deadline, it is clear that the sheriff identified in the instruction was the sheriff of the county in which the trial took place. [citation omitted]

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Peterson, 168 Wn.2d at 771 n.7 (emphasis in original). The footnote concludes, specifically foreshadowing Collins' case, "*Where an allegation involves a cross-county move, greater specificity may be required,*" Id. (emphasis added).

For these reasons, the Court of Appeals incorrectly interpreted State v. Peterson to prohibit the State from prosecuting Collins for distinct omissions in distinct counties.

B. THE HOLDING OF THE COURT OF APPEALS IS AGAINST SUBSTANTIAL PUBLIC POLICY

The substantial public policy concern presented by Collins' case is not identical but similar to one that concerned the Supreme Court in Peterson:

> Peterson's argument is that an offender who successfully hides his whereabouts after moving cannot be convicted of failure to register despite clear evidence that he failed to register within any statutorily prescribed deadline. We reject this argument...

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In the case at issue here, Collins' own actions created two very different obligations to two different entities:

> Any person who lacks a fixed residence and leaves the county in which he or she is registered and enters and remains within a new county for twenty-four hours

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To construe these requirements as the same unit of prosecution would produce a result nearly as problematic as the one that concerned the Supreme Court in Peterson. It would essentially give a sex offender *carte blanche*, once he or she had already initially moved without notifying the previous county sheriff, to wander from county to county without facing any additional sanction. This cannot be the Legislature's intent. As the Supreme Court recognized in Peterson:

> The purpose of the sex offender registration statute is to aid law enforcement in keeping communities safe by requiring offenders to divulge their presence *in a particular jurisdiction.*

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Each county prosecutor and *each* county sheriff has a separate interest in tracking sex offenders residing in their respective communities. This has been reiterated time and time again and is the reason why registration is done by *county*, not through a state agency:

> "The legislature finds that sex offenders often pose a high risk of reoffense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders *who live within the law enforcement agency's jurisdiction*. Therefore, this state's policy is to assist *local* law enforcement agencies' efforts to protect *their* communities by regulating sex offenders by requiring sex offenders to register with *local* law enforcement agencies as provided in section 402 of this act."

LAWS of 1990, ch. 3 § 401, quoted in State v. Watson, 160 Wn.2d 1, 9, 154 P.3d 909 (2007)(emphasis added).

The egregious facts of the various cases involving this appellant prove the point. As the prosecutor pointed out at sentencing:

> [A]lthough this was a crime separate and apart from the assault and robbery of Mr. Tracey, nevertheless it takes on enhanced seriousness because of the crime, in the sense that if he [i.e., the appellant] had lived up to the obligation to register as a sex offender . . . this

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> "The legislature finds that sex offenders often pose a high risk of reoffense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders *who live within the law enforcement agency's jurisdiction*. Therefore, this state's policy is to assist *local* law enforcement agencies' efforts to protect *their* communities by regulating sex offenders by requiring sex offenders to register with *local* law enforcement agencies as provided in section 402 of this act."

LAWS of 1990, ch. 3 § 401, quoted in State v. Watson, 160 Wn.2d 1, 9, 154 P.3d 909 (2007)(emphasis added).

The egregious facts of the various cases involving this appellant prove the point. As the prosecutor pointed out at sentencing:

> [A]lthough this was a crime separate and apart from the assault and robbery of Mr. Tracey, nevertheless it takes on enhanced seriousness because of the crime, in the sense that if he [i.e., the appellant] had lived up to the obligation to register as a sex offender . . . this

> crime [i.e. the robbery and near murder of Mr. Tracey] likely would never have occurred...

RP 534-535.

Clearly, it was not the Legislature's intent to tie the hands of local prosecutors and local sheriffs by not making sex offenders additionally accountable for their own actions of moving from one county to another without registering with that particular county's sheriff. *Each* prosecutor and *each* sheriff has an independent duty to protect his or her own citizens that the Legislature meant to support.

For these reasons, it would be against substantial public policy to interpret the unit of prosecution for Failure to Register as a Sex Offender in such a way as to prevent prosecution for failing registration requirements in multiple counties over a particular period of time.

VI. CONCLUSION

The Opinion of the Court of Appeals misapplies State v. Peterson and is against public policy. For these reasons, the Supreme Court should accept review and hold that a sex offender who fails registration requirements in multiple counties over a

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VI. CONCLUSION

The Opinion of the Court of Appeals misapplies State v. Peterson and is against public policy. For these reasons, the Supreme Court should accept review and hold that a sex offender who fails registration requirements in multiple counties over a

particular period of time may be prosecuted by each county for the failure that occurred in that county.

DATED this 21st day of March, 2014.

RESPECTFULLY submitted,
By: _____
YARDEN WEIDENFELD, WSBA 35445
Chief Deputy Prosecuting Attorney
Attorney for the Respondent

CERTIFICATE OF SERVICE

Electronic service of this Brief of Respondent was effected today via the Division II upload portal upon opposing counsel:

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_____
Yarden F. Weidenfeld, WSBA # 35445
March 21, 2014
City of Stevenson, Washington

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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL DAVID COLLINS, II, Appellant.	No. 43444-0-II UNPUBLISHED OPINION

LEE, J. — Clark County charged Michael David Collins II with felony failure to register as a sex offender between January 1, 2009 and March 4, 2009. However, Clark County negotiated a plea bargain based on the legal fiction that Collins committed the offenses in 2006, and Collins pleaded guilty. Later, Skamania County charged Collins with felony failure to register as a sex offender between February 4, 2009 and February 9, 2009. A jury found Collins guilty of Skamania County's felony failure to register charge. Collins appeals arguing that his conviction violates double jeopardy. We agree. Accordingly, we reverse and remand for Collins's Skamania County conviction to be dismissed with prejudice.

FACTS

On December 5, 2008, Collins was released from Clark County jail and registered his address as required by RCW 9A.44.130. On December 29, 2008, the Clark County Sheriff's Office received information that Collins was no longer living at his registered address. In early February 2009, Collins was camping in the Dougan Falls area in Skamania County. *State v. Collins*, noted at 162 Wn. App. 1051 (2011). Collins did not register as transient with Skamania

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County Sheriff's Office, nor did he inform Clark County Sheriff's Office of a change of residential address as required by the failure to register statute.

On March 13, 2009, the State charged Collins with failure to register as a sex offender between January 1, 2009, and March 4, 2009 in Clark County. In the Clark County case, the State negotiated a plea bargain based on a legal fiction that allowed Collins to plead guilty to failing to register as a sex offender in 2006, rather than the actual offense dates in 2009. Collins accepted the plea bargain and pleaded guilty to amended charges of failure to register as a sex offender in 2006, rather than the 2009 dates that the State charged in the original information.

On December 15, 2011, the State charged Collins with failure to register as a sex offender between February 4, 2009, and February 9, 2009 in Skamania County. On that same day, the trial court heard arguments on Collins's motion to dismiss the failure to register charge in Skamania County. Collins argued that the Skamania County charge violated double jeopardy. The State argued that double jeopardy was not violated because (1) Collins was convicted of failing to register in Clark County in 2006, not the dates charged in Skamania County, and (2) based on the unit of prosecution for failure to register as a sex offender, Collins's failure to register in Skamania was a separate offense from his failure to register in Clark County. The trial court denied Collins's motion to dismiss. A jury found Collins guilty of failing to register as a sex offender in Skamania County. Collins appeals.

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ANALYSIS

Collins argues that the trial court erred by denying his motion to dismiss because his conviction violates double jeopardy. We agree.

The State concedes that although Collins's Clark County conviction was for failing to register in 2006, the 2006 date was merely a legal fiction and was a negotiated settlement with respect to the charges that he failed to register in Clark County in 2009. However, while the State concedes that the Skamania County charge encompassed the same time period within which Collins was charged and convicted in Clark County, it argues that the unit of prosecution for failure to register as a sex offender allows a defendant to be guilty of failing to register in two counties at the same time. We hold that the failure to register statute does not allow for a defendant to be guilty of failing to register in two different counties in the same time period.

This court reviews questions of statutory interpretation de novo. *State v. Bunker*, 169 Wn.2d 571, 577, 238 P.3d 487 (2010). The inquiry begins by examining the plain language of the statute to discern and give effect to the legislature's intent. *Bunker*, 169 Wn.2d at 577-78. In *State v. Peterson*, 168 Wn.2d 763, 230 P.3d 588 (2010), our Supreme Court clarified the interpretation of the failure to register statute, RCW 9A.44.130, as it relates to the unit of prosecution. In *Peterson*, the defendant argued that the failure to register statute was essentially an alternative-means crime because each specified residential designation, and the associated registration deadlines, created different means of committing failure to register each with specific elements that the State was required to prove. 168 Wn.2d at 769-70. Our Supreme Court rejected this argument and held that the failure to register statute was not an alternative means crime. *Peterson*, 168 Wn.2d at 769-71.

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Although *Peterson* is not dispositive of the issue presented here, it provides guidance on resolving this issue. Here, the relevant portion of RCW 9A.44.130 provides:

> If any person required to register pursuant to this section moves to a new county, the person must register with that county sheriff within three business days of moving. Within three business days, the person must also provide, by certified mail, with return receipt requested or in person, signed written notice of the change of address in the new county to the county sheriff with whom the person last registered.

RCW 9A.44.130(4)(b). Under the State's theory, Collins committed failure to register in Clark County in 2009, by failing to provide the Clark County Sheriff's Office with proper notice of his move to Skamania County. Then Collins committed failure to register in Skamania County during the same time period by failing to give notice to the Skamania County Sheriff's Office that he had moved into Skamania County. This theory does not comport with our Supreme Court's reasoning in *Peterson*. The State's theory essentially interprets RCW 9A.44.130 as an alternative means crime, an interpretation that our Supreme Court explicitly rejected. *Peterson*, 168 Wn.2d at 771 ("We hold that the failure to register is not an alternative means crime.").

Further, in *Peterson*, our Supreme Court stated that residential status was not an element of failure to register. "[I]t is possible to prove that a registrant failed to register within any applicable deadline without having to specify the registrant's particular residential status." *Peterson*, 168 Wn.2d at 772. Thus, the State must only prove that the defendant failed to register within any required deadline, which is what happened in *Peterson*. 168 Wn. App. at 772. Similarly, the question here is not which specific notification requirement Collins was required to comply with, but rather whether Collins failed to register by failing to comply with any notification requirement at all.

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Here, Collins had moved from his registered address and did not give the statutorily-required notice to any county sheriff's office regarding his location. The failure to provide any notice in compliance with the statute was the conduct resulting in the crime of failure to register, and he was already convicted in Clark County of failing to provide notice of his move for the same time period charged in Skamania County. Accordingly, the trial court erred by deciding that the Skamania County charge was a distinct unit of prosecution that did not violate double jeopardy. We reverse the trial court's decision denying Collins's motion to dismiss and remand this case to dismiss Collins's Skamania County conviction with prejudice.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

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SKAMANIA COUNTY PROSECUTOR

March 21, 2014 - 4:11 PM

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