No. 45432-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Christopher Smith,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-00431-2

The Honorable Judge Stephen Warning

Appellant's Reply Brief

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ARGUMENT

I. THE FAILURE TO REGISTER STATUTE PLACES A SIGNIFICANT BURDEN ON THE FUNDAMENTAL RIGHTS TO TRAVEL AND TO FREEDOM OF MOVEMENT.

A statute implicates the fundamental constitutional right to travel if it indirectly burdens exercise of that right. *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986). A statute burdening a fundamental right cannot survive a constitutional challenge unless it is narrowly tailored to meet a compelling state interest. *Lawrence v. Texas*, 539 U.S. 558, 593, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *State v. J.D.*, 86 Wn. App. 501, 508, 937 P.2d 630 (1997).

The state does not address Mr. Smith's arguments that the failure to register statute is not narrowly-tailored or that it is unconstitutional as applied to Mr. Smith specifically. Brief of Respondent, pp. 3-6. Failure to argue those issues may be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). Instead, respondent's argument hinges solely on the assertion that the statutory scheme does not implicate the right to travel at all because impeding travel is not its primary goal. Brief of Respondent, pp. 3-6. But the state misunderstands the scope of the right to travel. The significant burden the registration scheme places on the right requires it to be narrowly-tailored to meet a compelling state interest. *Soto-Lopez*, 476 U.S. at 903.

A statute must be subjected to strict scrutiny if it *burdens* the fundamental right to travel. *Soto-Lopez*, 476 U.S. at 903. A state law implicates the right to travel if it indirectly burdens exercise of that right by creating "any classification which serves to penalize the exercise of the right." *Id.* (internal citations omitted). Still, the state argues that the failure to register statute does not implicate a fundamental right because it does not "actually prevent" a person from travelling. Brief of Respondent, p. 5. Respondent claims that a statute is not subject to strict scrutiny unless impeding travel is its primary objective. Brief of Respondent, p. 5 (*citing State v. Enquist*, 163 Wn. App. 41, 256 P.3d 1277 (2011), *review denied*, 173 Wn.2d 1008 (2012)).

First, the state's reliance on *Enquist* is misplaced. *Enquist* addressed a constitutional challenge to the registration requirements for transient sex offenders. *Enquist*, 163 Wn. App. at 50-51. The *Enquist* court held that the transient registration requirements did not affect the right to travel because (1) they did not actually inhibit travel and (2) restricting travel was not the statutes primary purpose. *Id.* As the court points out, appellant Enquist misunderstood the statute, which did not actually require him to return to his county of registration each week. *Id.* Instead, the scheme permitted a transient person to re-register if s/he was in a new county for more than 24 hours. *Id.*

But the registration scheme does not provide a method for a person with a fixed residence to reregister unless s/he moves to a new fixed residence or becomes transient. RCW 9A.44.130(4)-(5). Thus, as outlined in more detail below, a person like Mr. Smith who maintains a fixed residence would not be able to travel away from home for more than three days without risking prosecution. The holding in *Enquist* that the transient registration requirements do not implicate the right to travel is not relevant to Mr. Smith's claim regarding the requirements for a person with a fixed residence.

Second, the court's statement in *Enquist* stating that a statute does not implicate the right to travel unless impeding that right is its primary goal is contrary to U.S. Supreme Court precedent. In *Soto-Lopez*, for example, the court found that denial of additional points toward state employment for veterans from other states placed an unconstitutional burden on the right to travel. *Soto-Lopez*, 476 U.S. 898. This was so even though the statute's primary purpose was not to impede travel. *Id.* In fact, the court noted that the majority of its recent cases on the right to travel involved statutes indirectly burdening the right, rather than those with restricting travel as their primary purpose. *Id.* at 903-04.

By subjecting persons to onerous registration requirements every time they move, the failure to register statute, likewise, places an indirect

burden on the right to travel. *Soto-Lopez*, 476 U.S. at 903-04. Such a burden is only constitutional if it is narrowly-tailored to meet a compelling state interest. *Soto-Lopez*, 476 U.S. at 911; *Aptheker v. Sec'y of State*, 378 U.S. 500, 514, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964), 378 U.S. at 514; *J.D.*, 86 Wn. App. at 508. As noted above, the state concedes that the failure to register statute is not narrowly-tailored. *Pullman*, 167 Wn.2d at 212 n.4.

The failure to register statute also places a direct burden on the right to travel. The statutory scheme requires that a person with a fixed residence register the address at which s/he spends "a majority of the week." RCW 9A.44.128(5); RCW 9A.44.130(4). Still, the state claims, without citation to authority, that a person with a registered address could travel to another city "for four weeks" without re-registering and not risk prosecution. Brief of Respondent, p. 6.

But there are cases in which people have been prosecuted for doing just that. *See e.g. State v. Mason*, 170 Wn. App. 375, 378, 285 P.3d 154 (2012) (upholding failure to register conviction based on accused visiting another county for two to three weeks). Under the statute, a person who does not spend "a majority of the week" at his/her registered address could face prosecution regardless of whether s/he actually poses any danger to

society. Such a scheme violates the fundamental rights to travel and to freedom of movement.

Mr. Smith was convicted under a statute that violates the constitutional right to travel both on its face and as applied to the facts of his case. *Aptheker,* 378 U.S. at 508, 514; *Soto-Lopez*, 476 U.S. at 909-10. His conviction must be reversed. *Id.*

II. NO RATIONAL TRIER OF FACT COULD HAVE FOUND MR. SMITH GUILTY OF FAILURE TO REGISTER BEYOND A REASONABLE DOUBT.

A. The state presented insufficient evidence that Mr. Smith had moved from the address at which he was registered.

Conviction for failure to register requires proof that the accused person changed his or her residence address. *State v. Drake*, 149 Wn. App. 88, 95, 201 P.3d 1093 (2009). Here, the state presented insufficient evidence that Mr. Smith had changed his address from the Rose Place address at which he was originally registered.

No witness testified that Mr. Smith had actually written the letter asking that his address be officially changed. RP 13-46. No expert verified whether the signature on the letter actually belonged to Mr. Smith. RP 13-46. In fact, no witness even offered a lay opinion claiming that the signature matched Mr. Smith's signature. RP 13-46. Even so, the state argues that the court properly determined, of its own accord, that the

signature on the letter belonged to Mr. Smith. Brief of Respondent, p. 9 (citing ER 901(b)(3)). But Mr. Smith does not argue that the letter was inadmissible or improperly authenticated under the rules of evidence. Rather, he argues that it was insufficient to prove beyond a reasonable doubt that he had moved. The state's argument regarding ER 901 is inapposite.

The state also relies on *Mitchell v. Mitchell*, a divorce case holding that the trial court properly acted as trier of fact by comparing a document in evidence to a handwriting sample provided in court. Brief of Respondent, p. 9 (*citing Mitchell v. Mitchell*, 24 Wn.2d 701, 704, 166 P.2d 938 (1946)).

First, there was testimony in *Mitchell* that the handwriting on the exhibit matched that of the husband. *Id.* There was no such testimony in Mr. Smith's case. RP 13-46.

Second, the standard of proof in a divorce case is preponderance of the evidence. *In re Marriage of Kim*, 179 Wn. App. 232, 317 P.3d 555, 560 (2014) *review denied,* 89984-3, 2014 WL 1976759 (Wash. Apr. 30, 2014). Here, the state was required to prove that Mr. Smith changed his residence beyond a reasonable doubt. *Drake*, 149 Wn. App. at 95.

Finally, the court in *Mitchell* compared the handwriting on the exhibit to a sample provided in open court. *Mitchell*, 24 Wn.2d at 704. In

Mr. Smith's case, the court compared the signature on the letter, *sua sponte*, to that on sixteen- and ten-year-old court documents. CP 41. The state's reliance on *Mitchell* is misplaced. The state provided insufficient evidence to demonstrate that Mr. Smith had written the letter purporting to change his registration address.

The property manager of the 9th Ave. address testified that he had seen a man at that residence, but he did not identify the man as Mr. Smith. RP 36-46. He also said that he had talked on the phone to a man at the 9th Ave. address, but he did not testify that he recognized the voice as Mr. Smith's. RP 36-46. Even so, respondent argues that the apartment manager testified that he saw Mr. Smith at the house and talked to him on the phone there. Brief of Respondent, p. 10-11. The state claims that the manager made clear that he was testifying about Mr. Smith by "looking at him" during his testimony. Brief of Respondent, p. 11. But Mr. Smith was sitting at counsel table and was likely directly in the witness's line of sight. "Looking at" Mr. Smith during testimony was probably an inevitable result of the way courtrooms are designed and does not constitute proof beyond a reasonable doubt that Mr. Smith lived at the 9th Ave. residence.

The sheriff's investigator never went to the Rose Place address to see if Mr. Smith still lived there. RP 31-35. The state responds that, even

if Mr. Smith had been living at the Rose Place residence, he still would have been in violation because he was no longer registered at that address. Brief of Respondent, p. 11. But, as argued here and in Mr. Smith's Opening Brief, the state also presented insufficient evidence that Mr. Smith ever changed his address of registration from the home on Rose Place. The state cannot remedy one evidentiary infirmity with another.

No rational trier of fact could have found beyond a reasonable doubt that Mr. Smith moved from the Rose Place address to the 9th Ave. residence, or that he asked to have his registration changed. *Drake*, 149 Wn. App. at 95. Mr. Smith's conviction must be reversed. *Id.*

B. The state presented insufficient evidence that the letter validly changed Mr. Smith's address of registration.

To be valid, a letter purporting to change a registered sex offender's address must be sent via certified mail with return receipt requested. RCW 9A.44.130(4)(a).

Here, the court determined that Mr. Smith had changed his registration address based on a letter received by the sheriff's office. CP 41. But no witness testified that the letter was sent by certified mail. RP 13-30. Nor did the state present any other evidence that the letter had been sent in accordance with the statute. Ex. 6; RP 13-46. Even so, respondent argues that the fact that the clerk changed Mr. Smith's address

of registration based on the letter demonstrates that it was sent via certified mail. Brief of Respondent, p. 8.

But the clerk never stated that her practice is only to change an address in the system if she receives a certified letter, rather than any other type of letter. RP 13-46. Instead, she simply delineated the requirements as they are provided to people who are informed of their duty to register. RP 16. Respondent's logical leap is insufficient to remedy the hole in the state's case at trial. Because the state failed to prove that it was sent via certified mail, the letter could not effectuate a valid change of Mr. Smith's registration address. RCW 9A.44.130(4)(a).

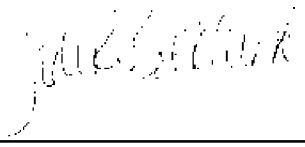
The state introduced insufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Mr. Smith had changed his address of registration. *Drake*, 149 Wn. App. at 93; RCW 9A.44.130(4)(a). Mr. Smith's conviction must be reversed, and the charge dismissed with prejudice. *Drake*, 149 Wn. App. at 96.

CONCLUSION

For the reasons set forth above and in Mr. Smith's Opening Brief, his conviction must be reversed.

Respectfully submitted on June 2, 2014.

BACKLUND AND MISTRY



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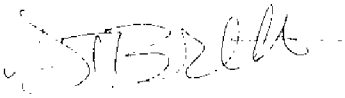

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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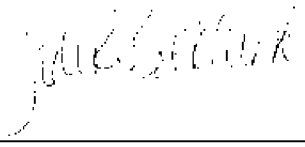
Signed at Olympia, Washington on June 2, 2014.



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