92639-5

Supreme Court No. (to be set)
Court of Appeals No. 47368-2-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Fauzi Zain
Appellant/Petitioner

Cowlitz County Superior Court Cause No. 14-1-00596-0
The Honorable Judge Marilyn Haan

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Fauzi Zain, the appellant below, asks the court to review the decision of Division II of the Court of Appeals referred to in Section II.

II. COURT OF APPEALS DECISION

Fauzi Zain seeks review of the Court of Appeals opinion entered on December 1, 2015. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Does Washington's failure to register statute violate substantive due process because it burdens the fundamental right to travel, but is not narrowly tailored to meet a compelling state interest?

ISSUE 2: Did the state fail to present sufficient evidence that Mr. Zain knowingly failed to comply with his duty to register?

ISSUE 3: Did the trial judge err by imposing discretionary legal financial obligations absent any inquiry into whether Mr. Zain had the means to pay?

IV. STATEMENT OF THE CASE

People who commit sex offenses as juveniles have very low recidivism rates.[1] When he was 17, Fauzi Zain pled guilty to three counts of second-degree rape of a child, all committed in March of 2000. CP 9; Ex. 3. Since that time, he has not committed another sex offense, but has been convicted four times of failure to register.[2] CP 9.

On January 16th, Mr. Zain was released from prison after serving his most recent sentence for failing to register. RP 11, 51; Ex. 7. The Department of Corrections provided him a voucher to enable him to obtain housing. RP 16, 51, 52. He moved into the Hudson Hotel Annex, a facility in Cowlitz County that accepts registered sex offenders and others released from DOC custody.[3] RP 16, 24, 51. Mr. Zain lived at the hotel with a roommate named Ben Held. RP 18. He properly registered his address with the Cowlitz County Sheriff's Department. Ex. 1; RP 10-12.

The DOC voucher was for three months' rent. RP 16, 51, 54. Mr. Zain believed he had until the end of April to find alternate housing (or to

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[1] *See e.g.* Amy E. Halbrook, *Juvenile Pariahs*, 65 Hastings L.J. 1, 13 (2013); L. Chrysanthi, et al, *Net-Widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses*, 17 Widener L. Rev. 127, 149 (2011); Richard A. Paladino, *The Adam Walsh Act As Applied to Juveniles: One Size Does Not Fit All*, 40 Hofstra L. Rev. 269, 290-92 (2011).

[2] The present conviction is his fifth. He has also been convicted of possession of a controlled substance and bail jumping. CP 9.

[3] Although the property is referred to as a hotel, the manager and the judge also used the word "apartment" to describe the unit where Mr. Zain stayed. RP 16, 17, 67.

start paying rent at the Hudson Hotel Annex). RP 52. This was what he had been told upon his release from prison in January. RP 52.

In fact, hotel manager Brian Weather expected him to start paying rent on April 16th, three months from the date he moved in. RP 17. There is no indication that anyone notified Mr. Zain of this expectation, or explained what would happen if he didn't pay his rent by this date.

When Mr. Zain didn't make a payment on April 16th, Weathers tried to contact him. RP 17. Weathers went to Mr. Zain's apartment twice, and tried to call him once. RP 18. When he called, the person who answered the phone didn't speak English, and Weathers didn't leave a message.[4] RP 18.

On April 21st, Weathers went to the apartment to evict Mr. Zain. RP 18-21. He did not serve Mr. Zain with any paperwork. RP 25. According to Weathers, an eviction can be effectuated at the Hudson Annex simply by removing a person's property and changing the locks; no formal eviction notice or process is required. RP 15.

Weathers and another person removed Mr. Zain's property from the apartment and placed it in storage. RP 18-19. Mr. Zain's property filled two bags and a tub. RP 18-19. It consisted of clothing (10-12

[4] The prosecution did not ask Weathers what number he'd used to try and reach Mr. Zain. RP 17-18, 25. Mr. Zain provided his number, and testified that it had remained unchanged since his release from prison. RP 54.

outfits and three pairs of shoes) and tools Mr. Zain used in his job doing construction.[5] RP 53.

Weathers and his helper were able to move all the property in one truckload rather than in multiple trips. RP 19. After removing the property, Weathers checked Mr. Zain out on his computer, and changed the locks on the apartment. RP 18, 19-20. He did not ever notify Mr. Zain that he could no longer reside in the apartment. RP 25-26.

Ben Held continued to live in the apartment. At some point, he began paying increased rent so he could occupy it alone, without a roommate. RP 21-23. The record does not indicate when this occurred.

Mr. Zain had been on DOC supervision since his release in January. His probation officer, Terry Mathers, went to visit him on April 17. Mr. Zain was not there. RP 29. Mathers also left a phone message asking Mr. Zain to report by 4pm on the same day (April 17th). RP 31-32. Mathers visited again on April 21st at 7:30 a.m., but no one answered the door. RP 32, 36. He called a few more times, and had some difficulty leaving a message. RP 33.

Mr. Zain called back and left two messages on April 23rd. In his first message, he asked about entering treatment.[6] RP 55. Mathers then

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[5] Weathers recalled a duffel bag, another bag, and a tub. He knew that some of the items were clothing, but did not recall whether or not he and his helper moved tools or other belongings. RP 24.

called him and left a message telling him he had a warrant for his arrest. RP 33. Mr. Zain called back and left a second message, asking about the warrant.[7] RP 33. Mathers did not notify Mr. Zain he'd been evicted from the Hudson Hotel Annex. RP 27-36.

A civilian investigator visited the apartment on April 24th. She did not find Mr. Zain home at that time. RP 37-40.

On April 28th, Mr. Zain went to Lewis County for the day. He was arrested on the DOC warrant. RP 35, 52. He was released from custody on May 16th, and immediately went to the sheriff's department registration office. RP 56.

The state charged Mr. Zain with failure to register. CP 1. Mr. Zain waived his right to a jury, and stipulated that he'd previously been convicted of a sex offense and two prior failures to register. CP 4-5.

He testified at trial that he believed his voucher covered rent at the Hudson Hotel Annex through the end of April. RP 51-52. He kept all of his property there, and did not "start up" another residence elsewhere during the month of April.[8] RP 53. He testified that no one ever told him

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[6] The probation officer did not testify about this first message; however, the state did not dispute Mr. Zain's account of the call. RP 33, 59-60.

[7] Mr. Zain denied calling to ask about a warrant, and indicated he'd never received any messages from DOC. RP 54, 55.

[8] At the time of trial, he had lost all of his property because Weathers had disposed of it. RP 19, 53.

that rent became due on April 16th, or that he'd been evicted from the annex.[9] RP 53.

The prosecutor did not ask him whether he'd returned to the apartment after April 21st.[10] RP 50-56. Nothing in the record established where Mr. Zain had spent the night the majority of the week between April 21st and the 28th (when he was arrested).

The prosecution did not present the testimony of Mr. Zain's roommate, Ben Held. Nor did the state present any evidence showing that Held ordinarily kept the door to the apartment locked, or that he'd excluded Mr. Zain from the apartment. Nothing in the record established whether or not hotel rules permitted Held to have overnight guests, or what restrictions might apply.

In closing, defense counsel argued that the state had failed to prove that Mr. Zain knowingly violated his registration requirements. RP 62-63. Counsel pointed to the lack of evidence that Mr. Zain knew he'd been evicted from the apartment at any time prior to the end of April. RP 62-63.

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[9] The state did not introduce a rental agreement or other document showing the terms of Mr. Zain's occupancy.

[10] On direct examination, Mr. Zain did testify that he'd "been by" the annex between April 10th and April 28th. RP 52.

The court found Mr. Zain guilty of failure to register. RP 66. Although the state had charged Mr. Zain with violating his registration requirements in several different ways, the judge specifically based her verdict on his failure to comply with the procedures for those who lack a fixed residence. CP 1; RP 66-68.

The judge reasoned that Mr. Zain bore the burden of knowing whether or not he had a fixed residence, and that he lost his residence when the manager changed the locks. RP 66-68. She sentenced Mr. Zain to 50 months in prison. CP 7-20, 21.

At sentencing, the court did not conduct any inquiry into Mr. Zain's financial situation. RP 71-75. Mr. Zain had testified, at trial, that he received a housing voucher from the Department of Corrections. RP 51-52. Mr. Zain had been found indigent at the start of the case. CP 26. The court also found him indigent for purposes of appeal. CP 22-23. The court ordered him to pay $1,775 in legal financial obligations. CP 11.

Fauzi Zain timely appealed. CP 21. The Court of Appeals affirmed his conviction, and declined to reach his argument regarding the improper imposition of discretionary legal financial obligations. Opinion, pp. 1-2, 9-10.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the failure to register statute violates substantive due process because it burdens the right to travel and the right to freedom of movement. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

The constitution guarantees the fundamental right to travel and to freedom of movement.[11] *State v. J.D.*, 86 Wn. App. 501, 506, 937 P.2d 630 (1997); *Aptheker v. Sec'y of State*, 378 U.S. 500, 505, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964); *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 901, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986); U.S. Const. Amends. V, XIV; Wash. Const art. I, § 3. These rights encompass the right to travel within a state. *J.D.*, 86 Wn. App. at 506; *State v. Enquist*, 163 Wn. App. 41, 50, 256 P.3d 1277 (2011).

The right to travel is one of the few rights so fundamental that statutes burdening it are subject to facial overbreadth challenges. *Sabri v. United States*, 541 U.S. 600, 610, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (*citing Aptheker* 378 U.S. 500). A state law implicates the right to travel if it involves "any classification which serves to penalize the exercise of the right." *Soto-Lopez*, 476 U.S. at 903 (internal citations omitted).

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[11] Due process guarantees the right to travel; the right to freedom of movement is rooted in due process and the First Amendment right to freedom of association. *J.D.*, 86 Wn. App. at 506.

A statute that burdens the right to travel and to freedom of movement is subject to strict scrutiny. *Macias v. Dep't of Labor & Indus. of State of Wash.*, 100 Wn.2d 263, 273, 668 P.2d 1278 (1983); *J.D.*, 86 Wn. App. at 508. Such a statute cannot survive strict scrutiny unless 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); *J.D.*, 86 Wn. App. at 508.

Governmental intrusions into fundamental rights may not sweep unnecessarily broadly: "precision must be the touchstone of legislation affecting freedoms." *Aptheker*, 378 U.S. at 508, 514 (internal citation omitted). A statute is not narrowly tailored if there are reasonable alternatives that would achieve the state's purpose and place a lesser burden on constitutionally protected activity. *Soto-Lopez*, 476 U.S. at 909-10.

The sex offender registration requirements place a burden on the fundamental rights to travel and to freedom of movement. The statute requires that a person who is subject to the registration requirement register as a transient or at a fixed residence.[12] RCW 9A.44.130(1), (4),

[12] A person without a fixed residence must register as a transient and check in with the county sheriff once a week. RCW 9A.44.128(9); RCW 9A.44.130(5).

(5). Additional requirements apply when a sex offender attends or works at a school or institution of higher learning. RCW 9A.44.130(1)(b).

The purpose of the registration scheme "is to assist law enforcement agencies' efforts to protect their communities against reoffense by convicted sex offenders." *State v. Pray*, 96 Wn. App. 25, 28, 980 P.2d 240 (1999), *review denied*, 139 Wn.2d 1010 (1999). Assuming this is a compelling interest, the statute nonetheless violates substantive due process because it is not narrowly tailored to meet that aim. *Aptheker*, 378 U.S. at 508.

1. The failure to register statute is not narrowly tailored because it burdens fundamental rights without considering a person's "relevant characteristics."

Legislative discrimination affecting fundamental rights must be correlated to a person's "*relevant* characteristics." *Soto-Lopez*, 476 U.S. at 911 (italics in original). A statute is not narrowly tailored if it "excludes plainly relevant considerations" in its burden of a fundamental right. *Aptheker*, 378 U.S. at 514.

The failure to register statute is not narrowly tailored because it reaches people who are neither dangerous nor likely to reoffend.[13] It rests

[13] For example, the statutory scheme requires registration by people who have been convicted of nonviolent crimes. A high school junior who has *de minimis* consensual sexual contact with a freshman can be convicted of third-degree child molestation. RCW

on the assumption that any person convicted of a sex offense is dangerous to society.[14]

Studies have shown that people who commit sex offenses as juveniles, in particular, have very low recidivism rates. *See e.g.* Halbrook, 65 Hastings L.J. at 13; Chrysanthi, et al, 17 Widener L. Rev. at 149; Paladino, 40 Hofstra L. Rev. at 290-92. Nonetheless, Washington juveniles adjudicated for most sex offenses are required to register and face criminal prosecution if they do not.[15] RCW 9A.44.130(a)(1); RCW 9A.44.132.

The legislative assumption that all sex offenders pose a danger to society is not supported by empirical evidence. A prior sex conviction is not a proxy for dangerousness. Nonetheless, the registration scheme

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9A.44.089. Such a person would be required to register as a sex offender and could be criminally prosecuted for failing to do so. RCW 9A.44.130; RCW 9A.44.132.

[14] The Bureau of Justice Statistics has found that sex offenders are less likely to reoffend than people who commit other types of crimes:

"In comparison to the rearrest rate for drug offenders (41.2%), larceny-theft offenders (33.9%), and those who commit nonsexual assault (22%), sex offenders are relatively unlikely to be rearrested for another sex crime... Moreover, it appears that an individual is more likely to be the victim of a sex crime at the hands of a convict whose original crime was not a sex crime." Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 La. L. Rev. 509, 521 (2013) (citing Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, U.S. Dep't of Justice, Recidivism of Prisoners Released in 1994 (2002))

[15] Some juvenile sex offenders may later move for relief from registration requirements. RCW 9A.44.143. This does not alter the analysis regarding whether the sex offender registration scheme is narrowly tailored. First, a period of 24-60 months must pass before the juvenile will be eligible for relief. Second, a conviction for failure to register during this period will permanently eliminate the possibility of relief. RCW 9A.44.143.

criminalizes failure to register even by people who are not dangerous or at risk of reoffending. The statute is not precise enough to justify the burden it places on the fundamental rights to travel and freedom of movement.[16] *Aptheker*, 378 U.S. at 514.

The sex offender registration scheme is not narrowly tailored because it fails to consider the "plainly relevant consideration" of whether a person is actually dangerous or likely to commit future sex offenses. *Soto-Lopez*, 476 U.S. at 911; *Aptheker*, 378 U.S. at 514.

2. The failure to register statute is not narrowly tailored because there is no "evidentiary nexus" between its purpose and effect.

To qualify as narrowly tailored, "there must be an evidentiary nexus between a law's purpose and effect." *J.D.*, 86 Wn. App. at 508. The Washington sex offender registration scheme is not narrowly tailored because it lacks an evidentiary nexus: evidence shows that it does not serve its stated goal of protecting the public. *Id.*

A Washington-specific study has found that the sex offender registration requirements have no statistically significant effect on recidivism. Nor do registration requirements increase public safety.

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[16] The statute could be made more precise. For example, the legislature could require registration only of those at risk to reoffend. In another context, the government uses actuarial instruments and other predictive tools to justify indefinite civil confinement. *See* RCW 71.09; *In re Det. of Kistenmacher*, 163 Wn.2d 166, 169 n. 2, 178 P.3d 949 (2008).

Walker Wilson, 73 La. L. Rev. at 523 (*citing* Donna D. Schram & Cheryl Darling Milloy, Wash. State Inst. for Pub. Pol'y, *Community Notification: A Study of Offender Characteristics and Recidivism* (1995)). Numerous other studies have reached the same conclusion. *Id.* at 523-24; *see also* J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161 (2011) (finding that sex offender registration may actually increase recidivism); Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & Econ. 207 (2011).

The Washington system of sex offender registration is not narrowly tailored. There is no "evidentiary nexus between [its] purpose and effect." *J.D.*, 86 Wn. App. at 508.

3. The Supreme Court should accept review.

The Supreme Court should accept review and hold that the failure to register statute violates substantive due process on its face. The statute impedes the rights to travel and freedom of movement, but is not narrowly tailored to meet a compelling state interest. *Aptheker*, 378 U.S. at 508, 514; *Soto-Lopez*, 476 U.S. at 909-10.

This case presents a significant issue of constitutional law that is of substantial public interest. It should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

B. The Supreme Court should accept review and hold that the state presented insufficient evidence to convict Mr. Zain of failure to register. This case presents a significant issue of constitutional law that is of substantial public interest and should be decided by the Supreme Court.

To obtain a conviction, the state was required to prove that Mr. Zain knowingly failed to comply with the requirements of former RCW 9A.44.130(5) (2014).[17] RCW 9A.44.132. This required proof that he knew he lacked a fixed residence.[18]

Mr. Zain believed he lived at the Hudson Hotel Annex, and that his rent was paid through the end of April. RP 51-52. Nothing in the record suggests that he knew he was at risk for eviction, that the eviction could take place without notice, or that the entire eviction could be accomplished over the course of five days.[19] RP 15, 18-21, 25.

Furthermore, no one asked Mr. Zain where he stayed after April 21st (when the manager changed the locks). RP 15, 50-56. Even if Mr. Zain moved from the annex, he may well have "lawfully and habitually" used another building "as living quarters a majority of the week," and thus

[17] Under the current statute, the relevant section is RCW 9A.44.130(6). *See* Laws of 2015, ch. 261, § 3.

[18] A fixed residence is "a building that a person lawfully and habitually uses as living quarters a majority of the week." RCW 9A.44.128(5).

[19] Nor did the state present testimony from Mr. Zain's roommate, Ben Held, to show that Mr. Zain stopped living at the apartment at the time he was formally evicted. Presumably, Mr. Held had the authority to allow Mr. Zain to stay on as a guest.

had a fixed residence within the meaning of the statute.[20] RCW 9A.44.128.

The Supreme Court should accept review and reverse Mr. Zain's conviction. No rational trier of fact could have found beyond a reasonable doubt that Mr. Zain lacked or ceased to have a fixed residence, or that he knew he'd been evicted. This case presents a significant question of constitutional law that is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3)(4).

C. The Supreme Court should accept review and hold that the trial court erred by ordering Fauzi Zain to pay discretionary legal financial obligations without inquiring into his ability to pay.

A sentencing court must make a particularized inquiry into an offender's ability to pay discretionary LFOs. *State v. Blazina*, 182 Wn.2d 827, 841, 344 P.3d 680 (2015). The obligation to conduct the required inquiry rests with the court. *Id.*

Because of this, the sentencing court "must do more than sign a judgment and sentence with boilerplate language." *Id.* Instead, the record must reflect the court's individualized inquiry. *Id.* The burden is on the prosecution to show an ability to pay. *State v. Duncan*, 180 Wn. App. 245, 250, 327 P.3d 699 (2014) *review granted.* (Wash. Aug. 5, 2015).

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[20] Of course, this would also trigger a duty to register under RCW 9A.44.130. However, the court did not find that Mr. Zain changed his residence address. RP 66-68. The judge's

Furthermore, a defendant's silence or a pre-imposition statement regarding employment should not be taken as proof of ability to pay. *Cf. Duncan*, 180 Wn. App. at 250 (noting most offenders' motivation "to portray themselves in a more positive light.") It is only after the court imposes a term of incarceration that an offender can make a meaningful presentation on likely future ability to pay, since the offense of conviction and the length of incarceration will affect that ability.

Following *Blazina*, the Supreme Court will remand any case in which the record does not reflect an adequate inquiry. *See, e.g., State v. Leonard*, ---Wn.2d---, ---P.3d ---, No. 90897-4 (Oct. 8, 2015); *see also State v. Rivas*, 355 P.3d 1117 (Wash. 2015).[21]

Fauzi Zain was found indigent at the end of trial. CP 22-23. Still, the court ordered him to pay $1,775 in legal financial obligations. CP 11. The court relied solely on boilerplate language in the Judgment and Sentence. CP 10. It did not conduct any particularized inquiry into Mr. Zain's financial situation at sentencing or at any other time. RP 1-75.

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verdict rested on her finding that he ceased to have a fixed residence. RP 66-68.

[21] Similar orders were also entered on August 5th in *State v. Cole*, No. 89977-1; *State v. Joyner*, No. 90305-1; *State v. Mickle*, No. 90650-5; *State v. Norris*, No. 90720-0; *State v. Chenault*, No. 91359-5; *State v. Thomas*, No. 91397-8; *State v. Bolton*, No. 90550-9; *State v. Stoll*, No. 90592-4; *State v. Bradley*, No. 90745-5; *State v. Calvin*, No. 89518-0; and *State v. Turner*, No. 90758-7.

Had the court considered the factors mandated by the Supreme Court in *Blazina*, the court would not have imposed discretionary LFOs. Mr. Zain's need for a housing voucher, his 50-month sentence, and the court's own order of indigency[22] would have weighed heavily against a finding that Mr. Zain had the ability to pay LFOs.

The Supreme Court should accept review, consider the merits of Mr. Zain's LFO claim, and remand the case for a hearing on Mr. Zain's ability to pay. *Blazina*, 182 Wn.2d at 841. The Court of Appeals decision conflicts with *Blazina*. RAP 13.4(b)(1).

VI. CONCLUSION

This case presents significant issues of constitutional law that are of substantial public interest. The Supreme Court should accept review under RAP 13.4(b)(3) and (4), reverse Mr. Zain's conviction, and dismiss the case.

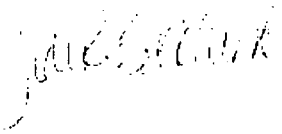
If the conviction is not reversed, the court should vacate the order imposing discretionary legal financial obligations and remand for a hearing to determine Mr. Zain's ability to pay. The Court of Appeals

[22] In fact, the *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* at 839 ("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs"). Mr. Zain was determined to be indigent at both the beginning and the end of the proceedings in trial court. CP 22-23; 26.

decision conflicts with the Supreme Court's decision in *Blazina*; review is therefore appropriate under RAP 13.4(b)(1).

Respectfully submitted December 23, 2015.

BACKLUND AND MISTRY



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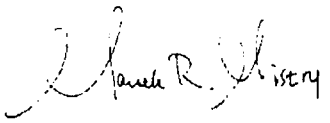

Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Fauzi Zain, DOC #857246
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

and I sent an electronic copy to

Cowlitz County Prosecuting Attorney
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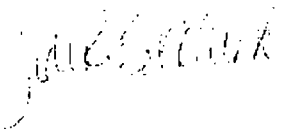
through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 23, 2015.



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APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

December 1, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FAUZI BIN ZAIN, Appellant.	No. 47368-2-II UNPUBLISHED OPINION

SUTTON, J. – Fauzi Bin Zain appeals his bench trial conviction for failure to register as a sex offender.[1] He argues that (1) the evidence was insufficient to support his conviction because it failed to prove that he lacked a fixed residence or knew that he lacked a fixed residence, (2) the trial court failed to hold a proper hearing before allowing him to remain partially handcuffed during the bench trial, (3) defense counsel provided ineffective assistance by failing to object or request a hearing on the restraint issue, (4) the sex offender registration statute, RCW 9A.44.130,[2] is unconstitutional on its face because it imposes an undue burden on the right to travel and freedom of movement, and (5) the trial court imposed legal financial obligations (LFOs) without making findings on his current or future ability to pay. We hold that (1) the evidence was sufficient to support the conviction, (2) the trial court's failure to hold a hearing before allowing Zain to remain partially handcuffed was harmless, (3) Zain fails to establish that any alleged deficient

[1] This was his third conviction, having had at least two prior convictions for failing to register.

[2] The legislature amended RCW 9A.44.130 in 2015. Laws of Washington 2015, ch. 261, § 3. These changes are not relevant here. Accordingly, we cite to the current version of the statute.

performance by defense counsel was prejudicial, (4) the sex offender statute is not an unconstitutional restriction on the right to travel or freedom of movement, and (5) Zain cannot challenge his LFOs on appeal because he failed to raise the issue below. Accordingly, we affirm.

FACTS

Because of a previous adjudication of guilt for a sex offense, Zain was required to register as a sex offender. On January 16, 2014, upon his release from a correctional facility, Zain registered at a residential hotel, the Hudson Hotel Annex, using a housing voucher from the Department of Corrections (DOC). This voucher was good for three months. Zain registered this address with the Cowlitz County Sheriff's Office on January 16.

When Zain's rent became due on April 16, the hotel manager was unable to locate Zain to contact him about the rent in person or by phone. On April 21, the manager removed Zain's belongings[3] from the apartment, changed the lock, and "checked him out" of the hotel. Verbatim Report of Proceedings (VRP) at 17. The manager discarded Zain's belongings when no one claimed them after 30 days.

Zain's community corrections officer (CCO) and an investigator hired by the sheriff's office were also unable to locate Zain at the hotel or contact him directly by phone between April 17 and 28. On April 28, the CCO learned that Zain was in the Lewis County jail. Zain did not notify the sheriff's office of any address change or that he no longer had a fixed address.

[3] Zain's belongings consisted of "a couple bags and . . . one blue Tupperware tub." Verbatim Report of Proceedings at 18.

The State charged Zain with failing to register between April 10 and April 28, 2014. Zain waived his right to a jury trial and stipulated to his prior sex offenses and to two prior failure to register convictions.

Before the bench trial started, defense counsel advised the trial court that Zain was in handcuffs and asked that the handcuffs be removed or one hand released so Zain could take notes. The trial court asked the corrections officer present in the courtroom if Zain could "have one hand," and the corrections officer responded that he "was told no." VRP at 5-6. When the trial court told the officer that if this was a security issue, the court would "need to know more," the corrections officer conferred with someone on his radio and told the trial court that he could release one hand. VRP at 6. After determining that Zain was right handed, the officer released that hand. There was no further discussion of any restraints.

The State presented testimony from a sheriff's office clerk responsible for sex offender registration address changes, the hotel manager, Zain's CCO, and the investigator. Their testimony was consistent with the facts described above. In addition, the hotel manager testified that Zain did not move back into the room after the lock was changed on April 21 and that he (the manager) was not required to formally evict a resident because this was a hotel.

Zain was the sole defense witness. He testified that he started living at the hotel on January 16, but that he believed the voucher paid his rent through the end of April. But Zain also testified that the voucher was good for three months' rent.

When defense counsel asked Zain if he had been to the hotel between April 10 and 28, he responded, "I'd been by there." VRP at 52. Zain denied having moved to another residence or

having become homeless during this time, and he testified that he was never told that he had been "evicted" from the hotel. VRP at 53.

In an oral ruling,[4] the trial court found Zain guilty of failure to register as a sex offender. Specifically, the trial court found that Zain had "knowingly fail[ed] to send his change of address to the Cowlitz County Sheriff within three business days of ceasing to have a fixed residence and having last registered with the Cowlitz County Sheriff, did knowingly fail to report weekly to the Cowlitz County Sheriff." VRP at 66. The trial court's oral ruling focused on the fact that the housing voucher was good for only three months, so Zain had to pay rent starting April 16. The trial court also noted that it was Zain's responsibility to ensure he had a fixed residence and that the registration form had advised him that he was responsible for reporting within three days once he lacked a fixed residence.

The trial court sentenced Zain on July 31, 2014. Although there was no discussion during the sentencing hearing about the LFOs or Zain's current or future ability to pay LFOs, the judgment and sentence included $1,775 in mandatory and discretionary LFOs. The judgment and sentence contained a boilerplate finding on Zain's ability to pay LFOs, stating,

> The court has considered the total amount owing, the defendant's past, present, and future ability to pay [LFOs], including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the [LFOs] imposed herein.

CP at 10.

[4] There are no written findings of fact and conclusions of law in the record before us. Although a trial court is required to enter written findings of fact and conclusions of law following a bench trial, we may decide issues raised on appeal in the absence of written findings and conclusions if, as is the case here, the record is sufficient to facilitate review. CrR 6.1(d); *State v. Otis*, 151 Wn. App. 572, 577, 213 P.3d 613 (2009).

Zain appeals his conviction and LFOs.

ANALYSIS

I. SUFFICIENCY

The trial court found that Zain did not have a fixed residence after April 21. Zain argues that the State failed to present evidence sufficient to prove that he (1) lacked a fixed residence, or (2) knew he lacked a fixed residence. Br. of Appellant at 18. We disagree.

When reviewing a sufficiency of the evidence claim, we ask whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014). Because credibility determinations are for the trier of fact and are not subject to review, *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), we defer to the trier of fact's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992), *abrogated on other grounds by In re Pers. Restraint of Cross*, 180 Wn.2d 664, 681 n. 8, 327 P.3d 660 (2014).

Under RCW 9A.44.130(5)(a) and (b), any person who is required to register under the sex offender registration statute must notify the county sheriff of his address change within three business days of moving. Similarly, under RCW 9A.44.130(6)(a), a person lacking a fixed residence must provide written notice to the county sheriff within three business days after ceasing to have a fixed residence.

The evidence showed that (1) when Zain registered at the hotel on January 16, he used a housing voucher that was good for three months, (2) Zain knew the voucher was good for three

months of rent, (3) the housing voucher expired April 16, (4) the hotel manager removed Zain's property from his room and changed the lock on April 21, (5) Zain did not claim his property or move back into the room after April 21, and (6) Zain did not notify the sheriff's office of any change in address or residential status. Viewed in the light most favorable to the State, this evidence established that Zain could not have resided at the hotel as of April 21. This coupled with the fact that there was no evidence that Zain had moved to another location and Zain's testimony denying having moved to another residence in April, was sufficient to allow the trial court to find that Zain did not have a fixed residence after April 21. Thus, Zain's argument that the evidence was insufficient to show that he lacked a fixed residence fails.

Furthermore, viewed in the light most favorable to the State, this evidence was sufficient to establish that Zain knew he no longer had a fixed residence. Zain admitted that he was aware the housing voucher was good for only three months and the manager testified that Zain did not move back into the hotel after the locks were changed on April 21.[5] Thus, Zain's argument that the evidence was insufficient to show that he did not know he lacked a fixed residence also fails.

II. RESTRAINTS

Zain next argues that the trial court violated his federal[6] and state[7] due process rights because the trial court did not conduct a hearing to determine whether the restraint of one of his

[5] Because we view the evidence in the light most favorable to the State, the fact that Zain testified that he believed the voucher was good through April, despite knowing that the housing voucher was good for only three months, is irrelevant here.

[6] U.S. Const. amend. XIV.

[7] Wash. Const. art. I, § 3.

hands during the bench trial was necessary nor did the trial court consider a less restrictive alternative. This argument fails.

A criminal defendant is entitled to be free from restraints at trial except under extraordinary circumstances. *State v. E.J.Y.*, 113 Wn. App. 940, 951, 55 P.3d 673 (2002). "'Restraints are viewed with disfavor because they may abridge important constitutional rights, including the presumption of innocence, privilege of testifying in one's own behalf, and right to consult with counsel during trial.'" *State v. Turner*, 143 Wn.2d 715, 725, 23 P.3d 499 (2001) (quoting *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981)). But "'[i]t is [also] fundamental that a trial court is vested with the discretion to provide for courtroom security, in order to ensure the safety of court officers, parties, and the public.'" *Turner*, 143 Wn.2d at 725 (quoting *Hartzog*, 96 Wn.2d at 396). In cases involving potential, but not actual, misconduct by the defendant, the trial court "'must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury. That discretion must be founded upon a factual basis set forth in the record.'" *State v. E.J.Y.*, 113 Wn. App. 940, 951, 55 P.3d 673 (2002) (quoting *Hartzog*, 96 Wn.2d at 400).

However, "[a] claim of unconstitutional shackling is subject to harmless error analysis." *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Thus, such "error does not require reversal unless it is shown that the use of restraints substantially affected the trial court's fact finding." *E.J.Y.*, 113 Wn. App. at 952 (citing *Hutchinson*, 135 Wn.2d at 888).

The State appears to concede that the trial court did not make an adequate record of why it allowed Zain to remain partially handcuffed during the trial, and we agree.[8] But Zain does not offer any argument that having his one hand partially handcuffed affected the trial court's fact finding ability, and no such issue is apparent in the record. Nor does he assert that it affected his ability to consult with counsel, testify, or otherwise participate in his bench trial, and the record does not reflect any such impairment.[9] Further, the likelihood of prejudice was greatly reduced because there was no jury. *See E.J.Y.*, 113 Wn. App. at 952. Thus, we hold that Zain does not establish that his being partially handcuffed substantially affected the trial court's fact finding and this argument fails.

Zain also argues that defense counsel provided ineffective assistance because he failed to object to the use of restraints and failed to request a hearing on the restraints. But because, as discussed above, Zain does not establish prejudice, this argument also fails.[10] *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (to establish ineffective assistance of counsel, appellant must show both deficient representation and that this deficient performance was prejudicial).

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[8] We note that although in situations like this, which involve bench trials and accommodations to allow the defendant to participate in his defense, the use of certain restraints will frequently be harmless. But the trial court should still conduct the proper inquiry and analysis before allowing a defendant to remain restrained.

[9] Instead, Zain asserts that prejudice is presumed. But even if prejudice is presumed, the State may overcome this presumption if the error was harmless beyond a reasonable doubt. *State v. Clark*, 143 Wn.2d 731, 775, 24 P.3d 1006 (2001).

[10] We also note that the record does not contain the facts that would be necessary for us to determine whether the trial court would have ordered that Zain not be restrained if defense counsel had made such an objection.

III. RIGHT TO TRAVEL

Zain next argues that the sex offender registration statute is facially unconstitutional because it imposes an undue burden on the right to travel and freedom of movement and is not narrowly tailored. We rejected this identical claim in *State v. Smith*, 185 Wn. App. 945, 952-56, 344 P.3d 1244, *review denied*, 183 Wn.2d 1011 (2015). Although Zain filed his opening appellate brief on January 7, 2015, and we did not file *Smith* until February 18, 2015, Zain has not presented argument in a reply or any supplemental briefing demonstrating that we should not follow *Smith*. Accordingly, under *Smith*, this argument fails.

IV. LFOs

Finally, Zain challenges his LFOs, arguing that the trial court failed to make the necessary findings on his ability to pay and invites us to exercise our discretion and address this issue despite his failure to object to the LFOs at sentencing. We decline this invitation.

When an appellant fails to raise an issue below, we may refuse to review it. RAP 2.5(a). In *State v. Blazina*, our Supreme Court reaffirmed that appellate courts in this state may decline to review the imposition of discretionary LFOs where the defendant failed to object to the imposition of LFOs at sentencing. 182 Wn.2d 827, 832-33, 344 P.3d 680 (2015).

In May 2013, we issued *State v. Blazina*, wherein we declined to review the trial court's imposition of discretionary LFOs because the defendant did not object at sentencing. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), *remanded by* 182 Wn.2d 827 (2015). Thus, by May 2013, defendants were on notice that they must object to the imposition of LFOs in order to preserve the error for appellate review. Because Zain was sentenced in July 2014, well after May 2013, and he did not object to the trial court's imposition of LFOs at sentencing, we decline

his invitation to review this issue for the first time on appeal. *See State v. Lyle*, 188 Wn. App. 848, 852, 355 P.3d 327 (2015).

We affirm Zain's conviction and LFOs.

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.

SUTTON, J.

We concur:

WORSWICK, P.J.

LEE, J.

BACKLUND & MISTRY

December 23, 2015 - 7:34 AM

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