NO. 33416-3-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

STEVEN YOUNG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ASOTIN COUNTY

The Honorable Scott Gallina, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. THE STATE HAS NOT CHALLENGED THE TRIAL COURT'S FINDINGS OF FACT SO THEY ARE VERITIES ON APPEAL.

The State complains that Young mischaracterizes its trial arguments and theories of prosecution. Br. of Resp't 9-10 & nn.5-6, 30-31. In describing the State's alternative trial theories, Young relied on the prosecutor's closing argument and the trial court's findings of fact. Br. of Appellant, 4 (citing RP 223-25; CP 25-26), 9-10 (discussing the trial court's findings). The State has not challenged the trial court's findings. They are therefore verities on appeal and can be relied on by this Court. State v. Afana, 169 Wn.2d 169, 176, 233 P.3d 879 (2010).

2. FORMER RCW 9A.44.130(3)(a)(i) (2011) IS, AT BEST, AMBIGUOUS AND, AT WORST, VOID FOR VAGUENESS.

In his opening brief, Young argued former RCW 9A.44.130(3)(a)(i) (2011) is unconstitutionally vague because it does not specify with sufficient definiteness that he needed to reregister upon release from jail for a community custody violation on a failure to register conviction, rather than the original sex offense that triggered the duty to register. Br. of Appellant, 12-19. At best, Young argued, the provision is ambiguous, so it must be interpreted in his favor under the rule of lenity. Br. of Appellant, 19-21.

In response, the State asserts the supreme court already held in State v. Watson, 160 Wn.2d 1, 154 P.3d 909 (2007), that the statute is not vague. Br. of Resp't, 13-14. The State argues Young "attempts to distinguish [Watson] by inserting an unstated limitation on the holding therein, claiming that Watson holds that only incarceration for the original sex offense triggers the obligation to register upon release." Br. of Resp't, 14. The State claims Watson contains no such limitation. Br. of Resp't, 14.

The State reads Watson in a vacuum. The Watson court interpreted former RCW 9A.44.130(3)(a)(i) (2011) as requiring sex offenders to register upon release from custody "if they were in custody 'as a result of' the sex offense that triggered the applicability of the statute." Watson, 160 Wn.2d at 8 (emphasis added). The State ignores this language.

The State also ignores the facts of Watson. Watson was released from custody for a probation violation on the original sex offense that triggered his duty to register. Id. at 4-5. The Watson court held the statute was not vague in requiring Watson to reregister upon release from custody because a probation violation "'relates back to the original conviction for which probation was granted.'" Id. at 8 (quoting State v. Eilts, 94 Wn.2d 489, 494 n.3, 617 P.2d 993 (1980)). Even in this context, the Watson court acknowledged "the legislature could have worded the sex offender registration statute more clearly." Id. at 9.

The facts of Young's case are different. He was no longer on supervision for the original 2004 sex offense that triggered his duty to register. Ex. 1. Instead he was on supervision for a 2012 failure to register conviction. Ex. 6. Young readily acknowledged in his opening brief that felony failure to register is a sex offense. Br. of Resp't, 17 (citing RCW 9.94A.030(46)(a)(v)). But failure to register is a separate offense from the original sex offense. Watson does not answer the question presented here—whether the statute is vague as to whether it requires reregistration in this even more attenuated circumstance.

Further, the Watson court expressly declined to decide whether the statute is ambiguous, because Watson failed to raise an independent ambiguity challenge. 160 Wn.2d at 12 n.4. The four-member dissent, though, did reach this issue and concluded the statute is ambiguous because its "silence cannot be said to clearly require Watson to reregister." Id. at 14 (Sanders, J., dissenting). The State does not get the benefit of an ambiguous statute; the accused does. State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 281 (2005).

This Court should hold that former RCW 9A.44.130(3)(a)(i) (2011) is unconstitutionally vague as applied to Young. At best, it is ambiguous. Either way, Young's conviction for failing to register must be dismissed. State v. Jenkins, 100 Wn. App. 85, 91-93, 995 P.2d 1268 (2000).

3. THE INFORMATION IS CONSTITUTIONALLY DEFICIENT BECAUSE IT CHARGED YOUNG WITH INCONSISTENT ALTERNATVE MEANS.

Young argued in his opening brief that the second amended information omits the essential element of the means by which Young failed to register: that is, by failing to reregister upon returning to the same address. Br. of Appellant, 22-26. The State asserts this argument should be rejected because the Washington Supreme Court already held that failure to register is not an alternative means crime in State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010).

In so arguing, the State makes the precise mistake the court of appeals has since cautioned against. In State v. Mason, the court explained that applying the Peterson holding too broadly "leads to results contrary to the statutory language." 170 Wn. App. 375, 381, 285 P.3d 154 (2012), review denied 176 Wn.2d 1014, 297 P.3d 708 (2013). The failure to register statute "clearly and expressly establishes multiple circumstances that trigger the registration requirement that do not involve moving from one residence to another (or to none) without notice." Id. For instance, the statute requires registered sex offenders to notify their county sheriff when they accept employment at an institution of higher learning. Id. (citing former RCW 9A.44.130(1)(b)(iii) (2011)). Even if dicta, the Mason court's reasoning is sound and should not be ignored. Furthermore, the supreme court denied

review in Mason. The State's overly simplistic view of failing to register should be rejected.

On appeal, the State continues to assert ever-shifting theories of how Young failed to register. See Br. of Resp't, 29-32. For instance, the State claims "[t]he operative fact to be proved by the State at trial was that the Appellant was no longer lawfully residing at the residence at 611 Seventh Street." Br. of Resp't, 32. But the State does not now get the benefit of this unproven "fact." The trial court expressly "decline[d] to decide whether the Defendant ceased residing" at 611 7th Street and "decline[d] to decide whether the Defendant was lawfully allowed to reside at that address after August 1, 2014." CP 25-26. As discussed, the State does not challenge these or any other findings. Instead, the trial court concluded only that Young failed to reregister upon his release from custody. CP 26.

Further, the State's continued attempt to assert alternative theories amplifies Young's argument that the charging document did not give him sufficient notice of the means by which he failed to register. This Court should accordingly dismiss Young's conviction without prejudice because the charging document is constitutionally deficient.

4. YOUNG'S CHALLENGE TO HIS MISCALCULATED OFFENDER SCORES CAN BE RAISED FOR THE FIRST TIME ON APPEAL.

In his opening brief, Young established that the trial court miscalculated his offender scores by erroneously including an extra point for committing the current offenses while on community custody when he was also penalized for escape from community custody. Br. of Appellant, 27-32. In response, the State asks this Court to "decline to accept review of this unpreserved issue," pointing out that Young did not object to his offender score below. Br. of Resp't, 35. The State emphasizes the case law specifies "illegal or erroneous sentences may be challenged for the first time on appeal." Br. of Resp't, 36 (emphasis added by State) (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

The State's argument misconstrues the word "may" and should be rejected. Of course a criminal defendant need not challenge an erroneous sentence on appeal, but he certainly may do so. For instance, a savvy appellate defender would be wise not to challenge an erroneous sentence or an offender score miscalculation that benefited her client. It would be quite absurd for the appellate courts to specify erroneous sentences must be challenged for the first time on appeal. "May" is permissive from the appellant's perspective, not the court's.

The Washington Supreme Court in Ford recognized a well-established exception to RAP 2.5(a) that illegal or erroneous sentences may be challenged for the first time on appeal. 137 Wn.2d at 477-78 (citing numerous cases); see also State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015) (explaining the Ford exception). Such errors "command review as a matter of right." Blazina, 182 Wn.2d at 833. The justification for this rule is it "bring[s] sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court." Ford, 137 Wn.2d at 478 (quoting State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993)).

The supreme court recently reiterated in a unanimous decision that unpreserved sentencing errors "may be raised for the first time upon appeal because sentencing can implicate fundamental principles of due process if the sentence is based on information that is false, lacks a minimum indicia of reliability, or is unsupported in the record." State v. Jones, 182 Wn.2d 1, 833, 338 P.3d 278 (2014). "Errors in calculating offender scores" fall within the Ford exception to RAP 2.5(a). Blazina, 182 Wn.2d at 833. The State has pointed to no case where a Washington court has declined to review such an issue. This Court should accordingly address the merits of Young's offender score challenge.

B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should reverse Young's conviction for failure to register as a sex offender. This Court should also remand for resentencing because Young's offender scores are incorrect.

DATED this 17th day of March, 2016.

Respectfully submitted,

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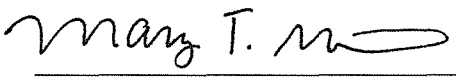

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Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 17th day of March, 2016, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 17th day of March, 2016.

X Patrick Mayovsky