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February 19, 2014
Court of Appeals
Division III
State of Washington

NO. 31659-9-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

TOMMY AUSTIN ASHLEY, Appellant.

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. Is it clear from the plain language of RCW 9A.44.130 that a sex offender's release from jail for community custody violations requires registration?

2. Is the legislative intent contrary to the Defendant's interpretation of the sex offender registration statute such that the rule of lenity does not apply?

3. Has the State of Washington proven all of the elements of the crime of failing to register beyond a reasonable doubt?

II. STATEMENT OF THE CASE

The Appellant, Tommy Austin Ashley, was convicted of third degree assault with sexual motivation, a sex offense, on June 13, 2007 in Yakima County cause number 07-1-00909-0. RP 76, CP 63. As a result of this conviction, he was required to register pursuant to 9A.44.130. RP 65, 78. In 2009, he was convicted twice of failing to register as a sex offender. RP 108. He was released from prison in May, 2011. (Finding of Fact 10). After his release, he was on supervision with the Department of Corrections for his 2007 sex offense conviction. RP 118.

After release from prison in 2011, he was advised of his conditions of supervision, including the sex offender registration requirements. RP 65, 121. (Finding of Fact 11-12). In 2011, he complied with his registration requirement after being released, (Finding of Fact 15-16), but was very hostile when he reported, RP 111. However, Ashley told his

community corrections officer (CCO) that he did not think that he should be on supervision and that he wanted to be homeless. RP 65, 111.

His CCO, Officer Munguia, confirmed that he was living at 2802 Beaudry Road #56A in Yakima. RP 110. Ashley last registered this address on November 16, 2012. RP 135, 138 (Finding of Fact 40). Officer Mungia tried to contact Ashley on November 28, 2012 for a home visit but was not able to do so. (Finding of Fact 17-18). On November 29, 2012, Officer Mungia spoke to Ashley and told him that he needed to register as a sex offender and report in person to him. RP 115 (Finding of Fact 20). The Defendant did not do so and a warrant was issued. RP 115 (Finding of Fact 23, 24). The warrant was for failing to report to his CCO after being released from incarceration at the Yakima County jail. RP 69, 119.

Ashley was incarcerated on December 4, 2012 in Kittitas County on the DOC warrant under cause number 07-1-00909-0. RP 56, 67, 69. (Finding of Fact 5). He was released from the Kittitas County jail on December 19, 2012. RP 56. (Finding of Fact 5). Prior to his incarceration, Ashley had been told to register upon release if incarcerated for absconding from supervision. RP 121.

However, he did not register after being released from the Kittitas County jail on December 19, 2012. RP 70 (Conclusion of Law 12). He also did not report to his community corrections officer. RP 70. He was

supposed to report within one day of his release to Officer Munguia. RP 116.

On February 6, 2013, Ashley was pulled over by Sergeant Mark Lewis with the Moxee Police Department. RP 142 (Finding of Fact 49). Ashley was arrested in the trailer court at 2802 Beaudry Road. RP 143. There was no testimony presented at trial as to where the Defendant was actually residing between December 19 and his arrest on February 6, 2013. Officer Mungia did not know if Ashley had changed his address. RP 110.

On February 11, 2013, Ashley was charged with failing to register as a sex offender under 9A.44.132(1)(b), a class B felony. CP 3. The time period that he was charged with failing to register was "on, about, during, or between December 19, 2012 and December 30, 2012." Id.

After waiving a jury trial, a bench trial commenced. The State called four witnesses and the Defendant did not call any witnesses. RP 145 (Finding of Fact 4). Ashley was found guilty by bench trial on April 11, 2013. CP 72-80. The court found that he had a duty to register because he was being held on a violation relating back to his 2007 sex offense. (Finding of Fact 32). He was sentenced on April 24, 2013 to the top of the standard range, 57 months. CP 62-71. This appeal followed.

III. ARGUMENT

A. The sex offender registration statute at RCW 9A.44.130 is unambiguous.

Questions of statutory interpretation are reviewed de novo. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131, cert. denied, 131 S. Ct. 318 (2010). The first step in interpreting a statute is to examine its plain language. Id. at 263. In doing so, "the court should assume that the legislature means exactly what it says." State v. McCraw, 127 Wn.2d 281, 288, 898 P.2d 838 (1995) (quoting Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 329, 815 P.2d 781 (1991)). Plain words do not require construction. Id., see also State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991) ("Words are given the meaning provided by the statute or, in the absence of specific definition, their ordinary meaning.") (quoting State v. Standifer, 110 Wn.2d 90, 92, 750 P.2d 258 (1988)).

The statute at issue is RCW 9A.44.130(3)(a)(i):

> (3) (a) Offenders shall register with the county sheriff within the following deadlines:
>
> (i) OFFENDERS IN CUSTODY. (A) **Sex offenders who committed a sex offense on, before, or after February 28, 1990, and who, on or after July 28, 1991, are in custody, as a result of that offense, of the state department of corrections,** the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, and (B) kidnapping offenders who on or after July 27, 1997, are in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, **must register at the time of release from custody with an official designated by the agency that has**

> **jurisdiction over the offender.** The agency shall within three days forward the registration information to the county sheriff for the county of the offender's anticipated residence. The offender must also register within three business days from the time of release with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation. The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register.

RCW 9A.44.130(3)(a)(i) (emphasis added).

At issue is whether the specific language "as a result of" is ambiguous or not. A statute's "[p]lain meaning 'is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" Gonzalez, 168 Wn.2d at 263 (quoting State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)). If the statute is unambiguous, upon reviewing its plain meaning, the inquiry is at an end. Id. Although a statute is ambiguous when it is susceptible to two or more reasonable interpretations, a statute is not ambiguous merely because different interpretations are conceivable. Gonzalez, 168 Wn.2d at 263.

Ashley argues that the plain language of the statute means *only* his release from prison on the underlying sex offense. However, the statute does not narrowly define release as only when one is being held on the underlying sex offense, and not on subsequent community custody violations related to that offense. The statute is worded more broadly than

that. It does not specify *what* exactly the person is in custody for. It only specifies that it is a *result of* the sex offense.

There is no definition in the statute for the phrase "as a result of." When a statutory term is undefined, the courts give that word its ordinary meaning, and may look to a dictionary for such meaning. Gonzalez, 168 Wn.2d at 263; see also State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991) ("'Words are given the meaning provided by the statute or, in the absence of specific definition, their ordinary meaning.'" (quoting State v. Standifer, 110 Wn.2d 90, 92, 750 P.2d 258 (1988)). The definition of the word "result" is "to proceed or arise as a consequences, effect, or conclusion." Merriam Webster's Collegiate Dictionary 999 (10th ed. 1994). As applied here, Ashley's incarceration on the community custody violations was a consequence of the 2007 sex offense.

Ashley essentially wants the court to read something into the statute that is not there—he wants the court to narrowly limit the *type* of custody that the registration statute applies to. But this is not a reasonable interpretation of the statute. As explained in State v. Tili, the proffered alternative interpretation must be *reasonable*. See 139 Wn.2d 107, 115, 985 P.2d 365 (1999). A reviewing court "[is] not obliged to discern an ambiguity by imagining a variety of alternative interpretations. W. Telepage, Inc. v. City of Tacoma Dep't of Fin., 140 Wn.2d 599, 608, 998 P.2d 884 (2000). Furthermore, the ability to argue two interpretations of a

statute does not necessarily render the statute ambiguous. State v. Taplin, 55 Wn. App. 668, 670, 779 P.2d 1151 (1989).

Had the legislature wanted to distinguish between different types of custody in terms of registration requirements, it very well could have delineating that in certain terms. The statute does not use the phrase, "as a result of the original conviction" or refer to an "initial sentence." As such, the legislature's use of the broad phrase "as a result of" does not create ambiguity. It is clear from the plain language of the statute that convicted sex offenders must register upon release from *any* type of custody that is "a result of" the sex offense. This triggers the applicability of the registration requirement. See State v. Watson, 160 Wn.2d 1, 5, 154 P.3d 909 (2007).

The registration requirement extends to incarceration for probation violations because they relate back to the original conviction for which probation was granted. Watson, 160 Wn.2d. at 8-9 (citing State v. Eilts, 94 Wn.2d 489, 494 n.3, 617 P.2d 993 (1980); State v. King, 130 Wn.2d 517, 522, 925 P.2d 606 (1996); State v. Whitaker, 112 Wn.2d 341, 342, 771 P.2d 332 (1989)). The incarceration is not merely the result of the violation, but is "deemed punishment for the original crime." Id. (citing State v. Prado, 86 Wn. App. 573, 578, 937 P.2d 636 (1997); State v. Dupard, 93 Wn.2d 268, 276, 609 P.2d 961 (1980) ("Parole revocation... is a 'continuing consequence' of the original conviction."); Standlee v. Smith, 83 Wn.2d 405, 407, 518 P.2d 721 (1974) ("Parole is revoked... as

part of the continuing consequences of the crime for which parole was granted."). Thus, case law supports the interpretation that jail time for probation violations is a result of the original conviction for which probation was granted. Id. at 9. This means that the release from custody for violations imposed on a sex offense triggers the requirement to register. See id.

In sum, the phrase "as a result of" is not ambiguous in the present context. Without a threshold showing of ambiguity, the court derives the statute's meaning from the wording of the statute itself, and does not engage in statutory construction or consider the rule of lenity. Geschwind v. Flanagan, 121 Wn.2d 833, 840-41, 854 P.2d 1061 (1993). Accordingly, because the statute is unambiguous, the rule of lenity is not available to the Defendant. See In re Pers. Restraint of Stenson, 153 Wn.2d 137, 149 n.7, 102 P.3d 151 (2004) (rule of lenity requires reviewing court to interpret only ambiguous criminal statutes in the defendant's favor).

B. Alternatively, the rule of lenity does not apply because legislative intent is contrary to the Defendant's interpretation of the statute.

Ambiguous statutes are interpreted in a reasonable manner, and courts should strive to seek out the intent of the legislative body. Human Rights Comm'n ex rel. Spangenberg v. Cheney Sch. Dist. 30, 97 Wn.2d 118, 121, 641 P.2d 163 (1982). The construction that best advances the overall intent of the legislature will be adopted. Hart v. Peoples Nat'l Bank, 91 Wn.2d 197, 203, 588 P.2d 204 (1978). This intent is determined

primarily from the language of the statute itself. Washington Pub. Util. Dists'. Utils. Sys. v. PUD, 1,112 Wn.2d 1, 6, 771 P.2d 701 (1989). Other familiar rules of statutory construction indicate that unlikely, absurd or strained results are to be avoided, and that where a statute is susceptible of more than one interpretation, one of which may render it unconstitutional, the court will adopt a construction which sustains the statute's constitutionality. State ex rel. Faulk v. CSG Job Ctr., 117 Wn.2d 493, 500, 816 P.2d 725 (1991).

The legislative purpose for registration requirements is served by requiring registration in situations such as this. When the legislature enacted the sex offender registration statute, RCW 9A.44.130, it made the following findings:

> 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. From this declaration, the "purpose behind sex offender registration is to assist law enforcement agencies' protection efforts." Watson, 160 Wn.2d at 9 (citing State v. Heiskell, 129 Wn.2d 113, 117, 916 P.2d 366 (1996)). It does so by keeping law enforcement

informed of the whereabouts of sex offenders who may reoffend. Id. at 10.

As explained by the Washington State Supreme Court:

> This purpose is served by requiring sex offenders to register their address when they are first released and requiring reregistration when they move. However, it is also served by requiring reregistration when they are released from jail after violating their probation on the sex offense. Registration at such a time informs law enforcement that a potentially dangerous offender is returning to a residence in their area, which enables law enforcement to take any precautions necessary to protect their community. This information does not lose its usefulness to law enforcement simply because, as in this case, the offender can still be found at the same address registered prior to incarceration. It still informs law enforcement of a change in the sex offender's whereabouts—from jail or prison to the previously registered address—and notifies law enforcement of the presence of a potential danger.

160 Wn.2d at 11. The Watson court noted that "just as local law enforcement needs to know when a sex offender moves to its community, it needs to know when a sex offender returns to the community." Id. The purpose behind the registration statute is served when law enforcement is alerted that someone is back in the community. Consequently, the offender remains obligated to reregister upon return to his residence. Id.

Ashley argues that registration is meaningless when an offender does not change his address after being released. In this case, he argues that his address remained unchanged. However, that fact is not in the record as the Defendant did not call any witnesses to attest to that. The

evidence at trial was that Officer Munguia was not able to reach the Defendant at his address, (Finding of Fact 17-18), and that the Defendant did not report as directed, RP 70. Officer Munguia further testified that he did not know if the Defendant's address had changed after December 19. RP 110. Registration would certainly not be meaningless in this situation. Furthermore, there is no exception to the statute that exempts one from registering when his or her address remains the same after incarceration.

The rule of lenity only requires an interpretation of an ambiguous statute in the defendant's favor absent legislative intent to the contrary. State v. Mandanas, 168 Wn.2d 84, 87-88, 228 P.3d 13 (2010). In this case, there is legislative intent to the contrary. The legislative history supports the interpretation that Ashley was required to register upon his release from the Kittitas County jail. As such, the rule of lenity does not require reversal of the Defendant's conviction.

C. The State of Washington has proven all the elements of failing to register beyond a reasonable doubt.

A challenge to the sufficiency of the evidence is ordinarily reviewed for substantial evidence. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that a finding is true. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). In a review for substantial evidence, this court views all evidence and reasonable inferences in a light most favorable to the State. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Credibility determinations are not

subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The appellate court defers to the trier of fact on issues of conflicting testimony, witness credibility, and overall weight of the evidence. Id. at 874-75.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, review denied 119 Wn.2d 1003, 832 P.2d 487 (1992).

Here, there was substantial evidence to support all of the elements of the crime charged, failure to register as a sex offender. The definition of the crime is as follows: "A person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130." RCW 9A.44.132. Here, it was uncontested that he did not register after his release. The only issue is whether he had a duty to register under RCW 9A.44.130. As argued

above, the State proved beyond a reasonable doubt that he had a duty to register after being released.

The Defendant argues that Ms. Ross's testimony shows that the State failed to prove all the elements of the crime. Her testimony was that with DUI sentences under 30 days, there is no requirement to report in person at the Sheriff's Office. (Finding of Fact 44-47). She clarified that this was not applicable to community custody violations on a sex offense. (Finding of Fact 48). When viewing her testimony in the light most favorable to the State, her testimony does not negate any of the elements in this case. Her testimony was limited to DUI cases and is irrelevant to the facts of this case.

IV. CONCLUSION

The sex offender registration requirement is not ambiguous. The plan language of the statute is clear. Ashley was required to register upon his release from incarceration and failed to do so. Alternatively, legislative intent is contrary to the Defendant's interpretation of the statute and the rule of lenity does not apply. The State proved all of the elements beyond a reasonable doubt. The conviction should be affirmed and this appeal dismissed.

Respectfully submitted this 19th day of February, 2014,

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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on February 19, 2014, by agreement of the parties, I emailed a copy of Respondent's Brief to Thomas Kummerow at wapofficemail@washapp.org.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th day of February, 2014 at Yakima, Washington.

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