SUPREME COURT NO. 93820-2

NO. 33416-3-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEVEN YOUNG,

Petitioner.

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

The Honorable Scott Gallina, Judge

PETITION FOR REVIEW

MARY T. SWIFT
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Steven Young asks this Court to grant review of the Court of Appeals' unpublished decision in State v. Young, No. 33416-3-III, filed September 13, 2016 (Appendix A). The Court of Appeals denied Young's motion for reconsideration on October 11, 2016 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. Is Former RCW 9A.44.130 (3)(a)(i) (2011) vague as applied to Young because it fails to specify with sufficient definiteness that Young must reregister as a sex offender at the same address after being released from incarceration for a community custody violation related to a subsequent sex offense and not the original sex offense that triggered the duty to register? Is former RCW 9A.44.130(3)(a)(i) (2011) ambiguous, requiring it to be construed in Young's favor under the rule of lenity?

2. The charging document alleged Young "knowingly failed to comply with any of the requirements of RCW 9A.44.130." Did this fail to provide Young sufficient notice of the charges against him when the State sought a conviction on inconsistent alternative means of failing to register as a sex offender?

C. STATEMENT OF THE CASE

On May 4, 2015, the State charged Young by amended information with failure to register as a sex offender (third or subsequent conviction) and escape from community custody. CP 19-21. Young was convicted of second degree child molestation on February 5, 2004, an offense that requires him to register as a sex offender. He was sentenced to 20 months confinement and 36 to 48 months of community custody. Ex. 1. Young was subsequently convicted of failing to register as a sex offender on October 1, 2007 (Ex. 4), September 3, 2008 (Ex. 5), and October 29, 2012 (Ex. 6). On the 2012 conviction, Young was sentenced to 14 months confinement and 36 months community custody. Ex. 6 at 4.

At a bench trial, the State argued there were three alternative ways Young failed to register as a sex offender between July and November 2014. RP 223-24; CP 25-26. First, the State asserted Young no longer physically resided at 611 7th Street in Clarkston, but had moved to Culdesac, Idaho, to live with his girlfriend, Sheila Hassett. Second, the State argued Young continued to reside at 611 7th Street, but was no longer living there lawfully because his sister had taken over the lease. Third, the State asserted Young continued to lawfully reside at 611 7th Street, but failed to reregister at that address when he was released from jail in August 2014, pursuant to State v. Watson, 160 Wn.2d 1, 154 P.3d 909 (2007). RP 223-25.

On November 25, 2013, Young registered with the Asotin County Sheriff's Office his fixed address of 611 7th Street, Clarkston, Washington. Ex. 2. Young rented the house from Marilyn Jones with his mother as a co-signer. RP 37-39, 46, 147. In July 2014, Young was on community custody for the 2012 failure to register conviction. RP 84-85. When he failed to report to DOC as part of his community custody, two community corrections officers (CCOs) went to his home on July 8. RP 74-75. One CCO testified they encountered several people at Young's residence who said Young no longer lived there. RP 95. Young's assigned CCO, Amanda Renzelman, also testified the two other CCOs spoke with three to four people at Young's residence who said he had moved. RP 75.

However, on July 23, Renzelman and CCO Michael Grimm went to 611 7th Street and found Young there. RP 76-77. Renzelman testified there were boxes of clothing in the laundry room, but the house was otherwise empty. RP 76-77, 98. Young informed Renzelman his home had been burglarized. RP 87. Young was arrested that day for violating the terms of his community custody. RP 98-99.

While Young was incarcerated, his mother and sister co-signed a new lease and his sister began renting the 611 7th Street house on August 2, 2014. RP 40-41. Jones never evicted Young or informed him he was

evicted, but claimed he was not allowed to be on the property because it would be illegal subleasing. RP 40-46, 173-74.

Young was released on August 11, 2014 and reported to DOC within 24 hours. RP 12, 68, 88. Renzelman was unavailable that day, so Young spoke with CCO Kevin Vogeler. RP 64-65. Vogeler testified Young said he was homeless, so Vogeler instructed him to report back to Renzelman within 48 hours. RP 64-65. Young did not report to Renzelman thereafter. RP 79-80, 189-91. A warrant issued for his arrest on September 2. RP 80.

On November 14, 2014, Corporal Rod Taylor, from the Nez Perce County Sheriff's Department, contacted Young walking down the street around 2:00 a.m. in Culdesac, Idaho. RP 52-53. Taylor testified Young said he was staying at 110 Ponderosa Loop in Culdesac and was looking for his lost dog. RP 54. Taylor did not ask Young how long he had been staying at Ponderosa Loop, but testified, "I took it he was living there." RP 56, 61. Taylor discovered Young had an outstanding warrant in Washington, so he arrested him and took him to the Nez Perce County Jail. RP 54-55. Young was then transferred to Asotin County Jail. RP 19.

Both Young and Hassett testified at trial. Hassett explained she lived at 611 7th Street with Young until he was arrested in July. RP 133-35. Hassett then broke up with Young, moved out, and took most of the furniture and household items with her to 110 Ponderosa Loop in Culdesac. RP 134-

35. Hassett verified they never received any eviction notices while they lived at 611 7th Street. RP 138. She testified Young returned to that address when he was released in August; "As far as I know he never moved out." RP 142. Hassett visited Young at the house in Clarkston after his release and he visited her in Culdesac a couple times. RP 142-45.

Young testified his home was burglarized in July and Hassett took everything else when she moved out, leaving his house empty. RP 183, 196. He explained he returned to 611 7th Street after being released from custody in August, and lived there with his sister. RP 177. He never received an eviction notice, so he had no reason to believe he was living there unlawfully. RP 197. Young further testified that on November 14, he rode out to Culdesac with a friend. RP 180.

The trial court addressed each of the State's three theories in its written findings and conclusions. CP 22-27. First, the court "decline[d] to decide whether the Defendant ceased residing at [611 7th Street, Clarkston, Washington] prior to his arrest on November 14, 2014." CP 25. Second, the court "decline[d] to decide whether the Defendant was lawfully allowed to reside at that address after August 1, 2014, and thereby utilize that address as a 'fixed residence' under the statute." CP 26. The court pointed to the conflicting testimony on both of these theories. CP 25-26.

On the third theory, however, the court concluded:

1. Regardless of whether the Defendant was or was not actually continuing to reside at or was lawfully allowed upon the premises of 611 Seventh Street, Clarkston after August 1, 2014, it is undisputed that on or about August 11, 2014, the Defendant was released from incarceration which was pursuant to his conviction in Asotin County Cause 12-1-00083-4 for Failure to Register as a Sex Offender (Third or Subsequent Conviction), a sex offense under RCW 9.94A.030(46). As such, he was required to register with the Asotin County Sheriff's Office upon release and certainly within seventy-two hours thereof. It is further undisputed that the Defendant did not register after his release on August 11, 2014.

2. The Defendant therefore failed to comply with the requirements of RCW 9A.44.130 when he failed to register with the Asotin County Sheriff's office after release from incarceration on August 11, 2014. The Defendant was aware of his obligation to register and had knowledge of the event (release) triggering his obligation to register, and further, the Defendant has been convicted of Failure to Register as A Sex Offender on three prior occasions. Finally, these acts occurred in Asotin County, Washington. The Defendant is therefore guilty beyond a reasonable doubt of Failure to Register as a Sex Offender (Third or Subsequent Conviction) in violation of RCW 9A.44.132(1)(b) as charged in Count 1 of the Second Amended Information.

CP 26.

At sentencing, Young asked for a lenient sentence because he was unaware of the duty to reregister upon release from custody:

> As I read the RCW and the duty to register forms I complied to it as I read it. I was unaware of State v. Watson, and, you know, nowhere in the duty to register or in the RCW does the word "re-register" appear. It only appears in State v. Watson. And I thought that by being at the address that I was registered at, I thought that I was in compliance.

RP 254. The court sentenced Young to 38 months confinement and 36 months of community custody. CP 31. Young timely appealed. CP 41.

The Court of Appeals rejected Young's arguments that the failure to register statute was vague and ambiguous as to whether it required him to reregister in his particular circumstances. Appendix A, at 4-8. The Court of Appeals also rejected Young's argument that the information was constitutionally deficient because it charged him with inconsistent alternative means of failing to register as a sex offender. Appendix A, at 8-10.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. FORMER RCW 9A.44.130 (3)(a)(i) (2011) IS AMBIGUOUS AND UNCONSTITUTIONALLY VAGUE AS APPLIED TO YOUNG.

Former RCW 9A.44.130(3)(a)(i) (2011) specifies "[s]ex offenders who committed a sex offense" and who "are in custody, as a result of that offense . . . must register at the time of release from custody." This Court has held this provision is not unconstitutionally vague in requiring sex offenders to reregister when they return to their original address after being released from custody based on a probation violation for their original sex offense that triggered the duty to register. Watson, 160 Wn.2d at 8, 11-12.

This is not what happened here. Young was no longer on supervision for the original 2004 sex offense that triggered his duty to register. Instead he was on supervision for a 2012 failure to register

conviction. He was then found guilty of failing to reregister when he returned to the same address after being released from incarceration for a community custody violation based on the 2012 conviction. Former RCW 9A.44.130 (3)(a)(i) (2011) is unconstitutionally vague and ambiguous as to whether it required Young to reregister under this circumstance.

a. The statute is unconstitutionally vague as applied.

The due process vagueness doctrine of the Fourteenth Amendment and article I, section 3 of the Washington Constitution require the State to provide citizens fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A statute is unconstitutionally vague if it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is proscribed. State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001).

Vagueness does not mean mere uncertainty; "'[s]ome measure of vagueness is inherent in the use of language.'" Watson, 160 Wn.2d at 7 (quoting Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 740, 818 P.2d 1062 (1991)). Instead, a statute fails to provide the required notice if it forbids conduct "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Watson, 160 Wn.2d at 7 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)).

Young was convicted of failing to register as a sex offender pursuant to former RCW 9A.44.130 (3)(a)(i) (2011), which states in relevant part:

> 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, . . . must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender. . . . 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.

(Emphasis added.) This requires "that convicted sex offenders must 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. The Watson court considered whether the statute was vague as to whether a sex offender must reregister after being released from custody for a probation violation on the original sex offense. Id.

Watson analyzed former RCW 9A.44.130 (4)(a)(i) (2006). In 2010, the legislature amended RCW 9A.44.130(4)(a)(i) to give individuals three business days to register upon release from custody instead of just 24 hours. Laws of 2010, ch. 267, § 2. In 2011, the legislature recodified this provision at RCW 9A.44.130(3)(a)(i). Laws of 2011, ch. 337, § 3. In 2015, the legislature again amended the statute to read:

> Sex offenders or kidnapping offenders who 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.

Laws of 2015, ch. 261, § 3.

The 2015 amendment deleted the "as a result of" language at issue in Watson. However, crimes must generally be prosecuted under the law in effect at the time they were committed. RCW 10.01.040; State v. Pillatos, 159 Wn.2d 459, 472, 150 P.3d 1130 (2007) (recognizing RCW 10.01.040 applies to substantive changes in the law). The law in effect at the time of Young's purported failure to register included the "as a result of" language, just as in Watson. Former RCW 9A.44.130 (3)(a)(i) (2011).

Watson was convicted of a sex offense that required registration. Watson, 160 Wn.2d at 4. When he was released from incarceration for that conviction into community custody, he registered an address in Graham, Washington. Id. Several months later, he was convicted of three community custody violations and served an additional 60 days in jail. Id. Upon release, he returned to the same address, but did not reregister as a sex offender. Id. at 5. He was subsequently convicted of failure to register. Id.

This Court explained that, because of the inherent vagueness of language, citizens may need to refer to other statutes and court rulings to

clarify the meaning of a statute. Id. at 8. Such sources are considered presumptively available to all. Id. Washington case law is clear that incarceration for probation violations "'relates back to the original conviction for which probation was granted.'" Id. (quoting State v. Eilts, 94 Wn.2d 489, 494 n.3, 617 P.2d 993 (1980)). It is therefore deemed punishment for the original crime. Id. at 8-9.

The Watson court agreed "the legislature could have worded the sex offender registration statute more clearly," but ultimately concluded:

> [T]he case law presumptively available to Watson explains in no uncertain terms that incarceration on probation violations is a result of the original conviction for which probation was granted. In this case, that means that Watson's 60 days in custody for violation of his community custody conditions were a result of his sex offense, triggering the requirement that he reregister upon release.

Id. at 9. This Court further explained reregistration serves the legislative purpose behind sex offender registration "by keeping law enforcement informed of the whereabouts of sex offenders who may reoffend." Id. at 10. This Court held the provision was not unconstitutionally vague under the circumstances. Id. at 11-12.

Young's circumstances are different and significantly more attenuated than Watson's. On February 2, 2004, Young was convicted of a class B felony sex offense that required him to register as a sex offender for at least 15 years. Ex. 1; RP 9; RCW 9A.44.140(2). He was sentenced to 20

months confinement with 37 days credit for time served and 36 to 48 months community custody. Ex. 1. Though Young had a continuing duty to register at the time of the current offense in 2014, community custody for the original sex offense had long ended.

Instead Young was on community custody for a 2012 failure to register conviction. Ex. 6; RP 74. Felony failure to register is considered a sex offense. RCW 9.94A.030(46)(a)(v). Young was then arrested on July 23, 2014 for violating the terms of his community custody on the 2012 conviction and incarcerated until August 11, 2014. CP 23-26. The trial court expressly declined to decide whether Young ceased residing at 611 7th Street or whether he was living there unlawfully. CP 25-26. Rather, the court concluded Young "was required to register with the Asotin County Sheriff's Office upon release and certainly within seventy-two hours thereof." CP 26. This presumes that even if Young returned to the same registered residence, he needed to reregister as a sex offender.

But former RCW 9A.44.130(3)(a)(i) (2011) does not specify with sufficient definiteness that Young needed to reregister under these circumstances, particularly when read in conjunction with Watson. The statute contemplates registering upon release from custody when a sex offender is in custody "as a result of" the original sex offense that triggered

the duty to register. Watson held this also requires reregistering when released from custody for a probation violation on the original offense.

By contrast, the statute says nothing about reregistering upon release from custody for a subsequent sex offense that was not the original sex offense. Young's 2012 failure to register conviction was a separate conviction, filed under a separate cause number. Child molestation and failing to register are distinct crimes, penalized under different provisions of the criminal code. A failure to register conviction is not punishment for the original sex offense, but rather punishment for failing to comply with the statutory registration requirements.

A community custody violation for the 2012 offense does not relate back to the original offense, as did the community custody violation for the original sex offense in Watson. Reading the statute and reading Watson would not have put Young on notice that he needed to reregister the same address under these circumstances. In fact, Watson suggests Young did not need to reregister because he was not in custody as a result of the original 2004 sex offense. Former RCW 9A.44.130 (3)(a)(i) (2011) is therefore vague as applied to Young. This Court should grant review and so hold.

b. The statute is ambiguous, requiring it to be interpreted in Young's favor.

In addition to being unconstitutionally vague, the statute is ambiguous as to whether it requires reregistration when an individual is incarcerated for a subsequent sex offense, not the original sex offense that triggered the duty to register, as in Watson. The Watson court did not decide whether the statute was ambiguous, noting there was "no separate ambiguity challenge before us in this case." 160 Wn.2d at 12 n.4. Young assumes, arguendo, that the statute unambiguously requires reregistration upon release from a probation violation for the original sex offense that triggered the duty to register. See id. at 8 (noting this is "clear from the statute"). The statute is silent, however, as to whether an individual must reregister upon release from a probation violation for a subsequent failure to register offense.

The statutory language instead suggests the reregistration requirement attaches only when incarcerated "as a result of" the original sex offense. This was the linchpin in Watson. Washington law is clear that a probation violation is a continuation of the original offense. But a subsequent conviction for failure to register is a distinct offense. Young was charged with and pleaded guilty to failure to register under a different cause number. His 2012 conviction for failing to register was not a continuation of the original 2004 offense. The statute is ambiguous as to whether he was required to reregister in this circumstance.

The 2015 amendment to the statute demonstrates the ambiguity of the 2011 version. In 2015, the legislature removed the "as a result of language" and instead very plainly required sex offenders to register upon release from any custody: "Sex offenders . . . who are in custody . . . must register at the time of release from custody." Laws of 2015, ch. 261, § 3. This indicates the legislature recognized the ambiguity in former RCW 9A.44.130 (3)(a)(i) (2011) and intended to fix it.

Under the rule of lenity, ambiguous criminal statutes must be construed in the accused's favor.[1] State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 281 (2005). Former RCW 9A.44.130 (3)(a)(i) (2011) is susceptible to at least two reasonable interpretations. It is therefore ambiguous, triggering the rule of lenity and requiring it to be interpreted in Young's favor.

Young's conviction is based on an unconstitutionally vague and ambiguous statute. As such, this Court should grant review under RAP 13.4(b)(3), reverse Young's conviction for failure to register, and remand with instructions to dismiss the charge with prejudice.

---

[1] The four-member dissent in Watson believed the statute was both vague and "at worst . . . ambiguous." 160 Wn.2d at 14 (Sanders, J., dissenting). The dissent explained, "the statute does not say Watson must reregister after each release from custody nor reregister the same address for the same offense." Id. at 13. Further, "[a] person of reasonable understanding would certainly be forced to guess at the statute's silence to know he must register, again, even though his address is the same." Id. at 14. The dissent would therefore have applied the rule of lenity and construed the ambiguous statute in Watson's favor. Id.

2. THE INFORMATION CHARGING YOUNG WITH FAILURE TO REGISTER IS CONSTITUTIONALLY DEFICIENT BECAUSE IT ALLEGED INCONSISTENT ALTERNATVE MEANS.

Under the federal and state constitutions, a defendant has the right to be informed of the charges against him, including the manner of committing the crime. U.S. CONST. amend. VI; CONST. art. I, § 22; State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). Furthermore, "[o]ne cannot be tried for an uncharged offense." Bray, 52 Wn. App. at 34. "The primary goal of a charging document is to give notice to the accused so that he or she can prepare an adequate defense, without having to search for the violated rule or regulations." State v. Armstrong, 69 Wn. App. 430, 433, 848 P.2d 1322 (1993). Merely citing to the pertinent statute and naming the offense is insufficient unless that name informs the defendant of each of the essential elements. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

Young was charged with felony failure to register as a sex offender, third or subsequent conviction. CP 19. RCW 9A.44.132(1) specifies: "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." Further, "[i]f a person has been convicted of a felony failure to

register as a sex offender . . . on two or more prior occasions, the failure to register under this subsection is a class B felony." RCW 9A.44.132(1)(b).

The amended information in this case accused:

> STEVEN K. YOUNG, Transient, of the crime of FAILURE TO REGISTER AS A SEX OFFENDER (FELONY) (Third or Subsequent Conviction), a crime committed as follows:
>
> That on or about and between the 8th day of July, and the 14th day of November 2014, in Asotin County, Washington, the Defendant, having previously been convicted of a felony level sex offense, being required to register pursuant to RCW 9A.44.130, and having been convicted in this state of a felony failure to register as a sex offender on two or more prior occasions, knowingly failed to comply with any of the requirements of RCW 9A.44.130.
>
> Contrary to RCW 9A.44.132(1)(b) . . . .

CP 19 (emphasis added).

"When a statute provides that a crime may be committed in alternative ways or by alternative means, the information may charge one or all of the alternatives, provided the alternatives are not repugnant to one another." Bray, 52 Wn. App. at 34; accord State v. Chino, 117 Wn. App. 531, 539, 72 P.3d 256 (2003).

In State v. Peterson, Peterson argued failure to register is an alternative means crime because it can be accomplished by failing to register (1) after becoming homeless, (2) after moving between fixed residences within a county, or (3) after moving from one county to another. 168 Wn.2d

763, 769-70, 230 P.3d 588 (2010). This Court rejected Peterson's argument and held failure to register is not an alternative means crime: "the failure to register statute contemplates a single act that amounts to failure to register: the offender moves without alerting the appropriate authority." Id. at 770.

But Peterson does not end the alternative means inquiry. In State v. Mason, the Court of Appeals clarified "Peterson dealt only with the requirements of former RCW 9A.44.130 that required registration after moving, i.e., former RCW 9A.44.130(5)(a) and .130(6)(a)." 170 Wn. App. 375, 382, 285 P.3d 154 (2012). The Mason court cautioned that applying "Peterson's narrow factual circumstances to other factual circumstances leads to results contrary to the statutory language." Id. at 381. Specifically, RCW 9A.44.130 "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."[2] Id.

Between the charging document and trial, the State advanced four alternative theories to support the charge. First, the information alleged Young was a transient. CP 19. This informed Young the State would be

[2] See, e.g., RCW 9A.44.130 (1)(b)(i)-(ii) (registered sex offenders must notify county sheriffs of their enrollment in and intent to attend certain public or private schools or institutions of higher education); RCW 9A.44.130(5)(b) (transient registered sex offenders must report weekly to the county sheriff); RCW 9A.44.130(6) (registered sex offenders applying to change their legal name must submit a copy of the application and a subsequent order granting the name change, if any, to the county sheriff and state patrol).

proceeding under the theory that Young was homeless, triggering the registration requirements for those who lack a fixed residence. RCW 9A.44.130 (5). At trial, the State advanced three more mutually exclusive theories: that Young returned to the same address but failed to reregister; that Young returned to the same address but was living there unlawfully; and that Young moved to Idaho. See RP 225 (arguing Young failed to register "on either of those three alternatives, alternative means"). It is factually impossible that Young could have failed to register in all four ways.

Under Peterson, failing to register as a homeless person and failing to register upon moving to a new address are not alternative means of committing the crime. However, returning to the same address after being released from custody then failing to reregister does not involve the act of moving without registering, at issue in Peterson. See Watson, 160 Wn.2d at 10 (explaining that failing to reregister does not involve moving to a new community, but simply returning to the same community). Therefore, failing to reregister, as Young was convicted of, is an alternative means of committing the crime.

This exposes the charging document's constitutional deficiency. The State charged Young with knowingly failing to comply with any of the requirements of RCW 9A.44.130, but then sought a conviction on inconsistent alternative means. Young could not have moved without

registering (either by becoming homeless or moving to a new home) *and* returned to his original registered address. An information may not charge an individual with inconsistent alternative means. Bray, 52 Wn. App. at 34.

The information is missing the essential element of the manner in which Young failed to register (or reregister, according to the trial court's single finding). Prejudice is therefore presumed and dismissal of Young's conviction without prejudice is the property remedy. State v. McCarty, 140 Wn.2d 420, 425-26, 998 P.2d 296 (2000). This Court's review is therefore warranted under RAP 13.4(b)(3), as a significant question of constitutional law, and to clarify its holding in Peterson.

E. CONCLUSION

For the aforementioned reasons, Young respectfully asks this Court to grant review under RAP 13.4(b)(3).

DATED this 10th day of November, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorneys for Petitioner

Appendix A

FILED
SEPT 13, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. STEVEN K. YOUNG, Appellant.	)	No. 33416-3-III
	)	UNPUBLISHED OPINION

KORSMO, J. — Steven Young appeals his convictions for failure to register as a sex offender and escape from community custody. We reject his substantive challenges and affirm the convictions, but remand for resentencing.

FACTS

Mr. Young was convicted in 2004 of second degree child molestation. He subsequently was convicted of failure to register as a sex offender in 2007, 2008, and 2012. Upon release from custody for the final conviction, Mr. Young was required to serve 36 months of community custody.

In November 2013, Mr. Young registered his address for the purposes of the registration statute as 611 Seventh Street in Clarkston. Mr. Young stayed in this residence until July 2014. In July, he was taken into custody for violating his community custody conditions, and served 20 days in jail as a sanction.

Mr. Young was released on August 11, 2015. While in jail, his rental agreement at 611 Seventh Street was transferred to his sister. While Mr. Young met with the Department of Corrections (DOC) immediately after his release, he did not meet with them after that, or reregister his status as a sex offender at any particular address. Investigation at his prior address suggested he no longer lived there.

An arrest warrant issued for Mr. Young's failure to register as a sex offender. Mr. Young was ultimately arrested in Idaho and extradited to Washington. The State charged Mr. Young with failure to register as a sex offender in violation of RCW 9A.44.132(1) and escape from community custody in violation of RCW 72.09.310.[1] The information stated the failure to register charge as follows:

> I, . . . in the name and by the authority of the State of Washington, accuse STEVEN K. YOUNG, *Transient*, of the crime of FAILURE TO REGISTER AS A SEX OFFENDER (FELONY) (Third or Subsequent Conviction), a crime committed as follows:
>
> > That on or about and between the 8th day of July, and 3rd day of September 2014, in Asotin County, Washington, the Defendant, having previously been convicted of a felony level sex offense,

[1] Mr. Young also was charged with, but acquitted of, witness tampering.

> being required to register pursuant to RCW 9A.44.130, and having been convicted in this state of a felony failure to register as a sex offender on two or more prior occasions, *knowingly failed to comply with any of the requirements of RCW 9A.44.130.*
>
> Contrary to RCW 9A.44.132(1)(b).

Clerk's Papers (CP) at 8 (emphasis added).

Mr. Young waived his right to a jury trial and proceeded to bench trial. Various theories of liability were argued at trial, but the court expressly found Mr. Young guilty of the failure to register offense for not registering upon his release from jail. CP at 26. The court also found Mr. Young guilty of escape from community custody. In imposing sentence, the court added one point to the offender score on each count because Mr. Young committed the crimes while on community custody. The court imposed concurrent terms of 38 months for the registration offense and 4 months for the escape.

Mr. Young timely appealed to this court.

ANALYSIS

This appeal challenges the failure to register statute, alleging both that it is unconstitutionally vague and/or ambiguous. He also challenges the sufficiency of the charging document and the scoring of the escape count. We combine, and consider first, his challenges to the statute before reviewing his remaining allegations.

Failure to Register Statute

Mr. Young argues the statute is vague and ambiguous because a person released from jail following a community custody violation would not understand that he had an obligation to again register with authorities. The Washington Supreme Court had already resolved these arguments against his position.

Well settled law governs both arguments. With respect to the vagueness claim, this court reviews de novo whether a statute is constitutional because the issue presents a question of law. *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005). Similarly, this court applies de novo review to the interpretation of a statute—another question of law. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

A defendant may only bring a vagueness challenge to the statute as it was applied to his particular case. *City of Spokane v. Douglass*, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). A statute is unconstitutionally vague if either (1) the statute fails to define an offense with sufficient definiteness that a person of ordinary intelligence would be able to understand the conduct that is proscribed, or (2) the statute could lead to arbitrary or discriminatory enforcement. *See State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001).

The courts presume a statute is constitutional; the challenger bears the heavy burden of proving the statute is unconstitutionally vague. *Douglass*, 115 Wn.2d at 178.

The ultimate question is whether the statute provides the proper notice of what is a crime. A statute does not provide the required notice when it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926). However, some amount of vagueness comes automatically with the use of language. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 740, 818 P.2d 1062 (1991). Thus, a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. *State v. Watson*, 160 Wn.2d 1, 7, 154 P.3d 909 (2007).

A statute is only ambiguous if it is reasonably susceptible to multiple interpretations. *State v. McGee*, 122 Wn.2d 783, 787, 864 P.2d 912 (1993). In that event, the rule of lenity requires that "the court must adopt the interpretation most favorable to the criminal defendant." *Id.*

The essence of Mr. Young's two arguments is that the statute does not clearly apply to someone who leaves the jail after serving a community custody sanction, leaving it vague or, at best, ambiguous. In this, he argues the position of the dissent in *Watson*. *See* 160 Wn.2d at 12-16 (Sanders, J., dissenting). However, the *Watson* majority opinion governs this case.

RCW 9A.44.130 sets out the registration requirements for sex offenders.[2] It defines the registration requirement upon release from custody:

> Any adult or juvenile residing . . . in this state who has been found to have committed or has been convicted of *any sex offense* . . . shall register with the county sheriff for the county of the person's residence. . . . When a person required to register under this section is in custody of the state department of corrections, . . . or a local jail . . . *as a result of a sex offense* . . . the person shall also register *at the time of release from custody* with an official designated by the agency that has jurisdiction over the person.

RCW 9A.44.130(1)(a) (emphasis added). The statute thus requires three elements: first, the person must have been convicted of "any sex offense;" second, the person must have been "in custody . . . as a result of a sex offense;" and, third, the person must have failed to register "at the time of release from custody." *Id.*

Case law further clarifies the "as a result of" language. In *Watson*, the court held that an offender released after a community custody violation is being released "as a result of a sex offense" under the statute. 160 Wn.2d at 8-9. Watson was charged with failure to register as a sex offender because he did not register upon his release from a community custody violation stemming from his original offense of child molestation.

---

[2] The parties disagree over the appropriate section that applies here. Mr. Young refers to subsection 3(a)(i), which defines the "deadlines" within which a person must register. RCW 9A.44.130(3)(a)(i) (giving the released offender three days to register). The State in turn refers to subsection (1) which defines the duty to register. RCW 9A.44.130(1)(a). Both statutes, however, use identical language in requiring the offender to register. *Compare* RCW 9A.44.130(1)(a), *with* RCW 9A.44.130(3)(a)(i). Thus, the distinction is insignificant.

Id. at 4-5. He argued that the statute was unconstitutionally vague. *Id.* at 5, 6. The court disagreed, reasoning: "Incarceration for probation violations relates back to the original conviction for which probation was granted." *Id.* at 8 (internal quotation marks omitted). It then applied the same reasoning to community custody violations and concluded Mr. Watson had been in custody for a sex offense when he was serving the sanction for violating the community custody resulting from the molestation conviction. *Id.* at 8-9. As the case law was presumptively available to the defendant, the statute was not vague and the release from custody triggered a new obligation to register. *Id.* at 11-12.

Watson expressly rejected the vagueness challenge Mr. Young presents here. *Watson's* construction of the statute also is controlling on the claim of ambiguity.[3] But, even if *Watson* did not control, the claim is without merit. Mr. Young argues the statute is ambiguous because it is not clear whether or not the "sex offense" referred to in the statute is the *original* sex offense prompting the registration requirement or any subsequent sex offense. The statute's meaning is plain. It specifically requires a person to register when they are released "as a result of *a sex offense*." RCW 9A.44.130(1)(a) (emphasis added). The phrase "a sex offense" means simply any sex offense. The statute does not say "the *original* sex offense," and it certainly does not say, "the sex offense that *first* prompted the person's requirement to register," as Mr. Young wishes. An appellate

[3] Although not expressly addressed by the majority, the ambiguity argument was addressed by the *Watson* dissent. *Id.* at 14.

court "will not add language to a clear statute." *Wash. State Coal. for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 904, 949 P.2d 1291 (1997).

The statute is not vague as to Mr. Young's conduct and it is not ambiguous. Both contentions are without merit.

Charging Document

Mr. Young next argues the charging document did not properly state a crime because it did not identify the means by which he committed the failure to register. This challenge fails because the crime is not an alternative means offense. This argument, too, is controlled by Washington Supreme Court precedent.

A defendant has the constitutional right to be informed of the charges against him. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). This requires that the charging document include each essential element of the charged offense; merely citing to the appropriate statute is insufficient. *Id.* The rationale for this rule is that the defendant must be informed of the allegations so he or she can properly prepare a defense. *State v. Simon*, 120 Wn.2d 196, 198, 840 P.2d 172 (1992). Further, the statutory manner or means of committing a crime is an element that the State must include in the information. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

Mr. Young did not challenge the sufficiency of the charging document below. This changes our inquiry: where the information goes unchallenged below, an appellate court must "liberally construe the language of the charging document in favor of

validity." *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). By liberally construing the document in favor of the State, the defendant is prevented from "sandbagging," i.e. not mentioning the alleged defect until after the State has rested and can no longer amend the information. *Id.* at 161-162. The court applies a two-part test when construing the information: "(1) do the necessary elements appear in any form, or by fair construction, on the face of the document and, if so, (2) can the defendant show he or she was actually prejudiced by the unartful language." *Id.* at 162. However, if the necessary elements are *not* found, the court presumes prejudice and reverses without prejudice to the filing of a new information. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

The challenged language from the information, detailed more fully previously, alleged Mr. Young "knowingly failed to comply with any of the requirements of RCW 9A.44.130." He argues the information was improper because it did not adequately inform him of which alternative means the State would be pursuing and some of the alternatives are inconsistent. The short answer is that his alternative means argument was rejected in *State v. Peterson*, 168 Wn.2d 763, 230 P.3d 558 (2010). Mr. Young notes a subsequent case gave *Peterson* a narrow reading, citing to *State v. Mason*, 170 Wn. App. 375, 285 P.3d 154 (2012).

Whatever merit there may or may not be in *Mason*'s reading of *Peterson*, this case squarely falls under *Peterson*. There the defendant "failed to provide timely notice of his

whereabouts under any of the statutorily defined deadlines after vacating his registered address." 168 Wn.2d at 772. In other words, because the defendant provided no registration whatsoever, the particular residency status did not need to be proved. Mr. Young is in the same position. He provided no address to local authorities and headed to Idaho, thus not registering in any manner. Broadly construing this charging document, it was more than adequate under *Peterson*.

If Mr. Young needed more information concerning the State's charging theory, he was free to seek a bill of particulars. CrR 2.1(c). However, the charging document did expressly state that Mr. Young knowingly failed to register. Under the facts of this case, it did not need to do any more. It was sufficient.

Offender Score Calculation

Lastly, Mr. Young correctly argues that the offender score was improperly calculated on the escape from community custody count. We recently decided this issue in his favor in *State v. Baker*, 194 Wn. App. 678, ___ P.3d ___ (2016). There we concluded the legislature did not intend trial judges to add a point to the offender score for escape from community custody due to the fact that the offender was on community custody at the time of the offense.

Although the matter is probably moot given the four month sentence for this offense is being served concurrently with the lengthier term on the failure to register count, we note that Mr. Young did request a remand for sentencing in the event he

prevailed with this argument. We accordingly remand the matter for resentencing on the escape from community custody charge. Mr. Young is free to waive resentencing if he does not desire to return to Clarkston.

Affirmed in part and remanded in part.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, C.J.

Siddoway, J.

Appendix B

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

STATE OF WASHINGTON, Respondent, v. STEVEN K. YOUNG, Appellant.	)	No. 33416-3-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of September 13, 2016 is hereby denied.

PANEL: Judges Korsmo, Fearing, Siddoway

FOR THE COURT:

GEORGE FEARING
Chief Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

November 10, 2016 - 2:39 PM

Filing Petition for Review

Transmittal Information

Filed with Court: Supreme Court

Appellate Court Case Number: Case Initiation

Trial Court Case Title:

The following documents have been uploaded:

- PRV_20161110143641SC961684_0966_Petition_for_Review.pdf
  This File Contains:
  Petition for Review
  The Original File Name was State v. Steven Young.33416-3-III.Petition.pdf

A copy of the uploaded files will be sent to:

- bnichols@co.asotin.wa.us
- swiftm@nwattorney.net
- cliedkie@co.asotin.wa.us

Comments:

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net
Filing on Behalf of: Mary Swift - Email: swiftm@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20161110143641SC961684