No. 95516-6
COA No. 49622-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN VALENCIA
Petitioner.

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

The Honorable Anne Hirsch
Cause No. 16-1-00970-4

RESPONSE TO PETITION FOR REVIEW

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2. Whether this case involves a significant issue of constitutional law that this Court should address.

B. STATEMENT OF THE CASE.

On November 16, 2016, the Appellant, Adrian Valencia, received his third conviction for violating his sex offender registration requirements. CP 86. He was initially designated as a sex offender following a 2010 conviction for attempted sexual abuse in the first degree. CP 87. As a result of the 2010 conviction, Valencia was required to comply with reporting and registration requirements under Washington law. *See* RCW 9A.44.130. These requirements mandated that Valencia report to the Thurston County Sheriff's Office (hereinafter "TCSO") on a weekly basis, and provide notification within ten days if he moved to another county or state. *See* CP 54.

Despite these requirements, Valencia failed to report on December 2, 2014, which was later counted as his first failure to register offense. Shortly thereafter, he became transient, and as a transient registered sex offender, Valencia was subject to different reporting guidelines. CP 82; RCW 9A.44.130(4)(a)(vi). The key

differences between reporting requirements for a transient sex offender versus a sex offender living at a fixed residence, is that the transient offender is required to keep a log of his whereabouts, and if he moves to another county or state, he must notify the sheriff's office within three days, whereas an offender staying at a fixed residence has ten days to provide notification. *Id.* In February, 2015, Valencia signed a new Sex Offender Registration Form (hereinafter "2015 Transient Registration"), reflecting his updated reporting requirements as a transient. CP 82. Then on March 18, 2015, he again failed to report as required, and in his most recent conviction, this was counted as his second failure to register offense. He was subsequently arrested, and pled guilty to two counts of failing to register as a sex offender. CP 87.

Upon his release from the Nisqually Jail, Valencia moved in with his sister who resided in Thurston County. RP 75-79. Because he was staying at a fixed residence, he was required to report within ten days if he moved to another county or state. CP 54. However, on May 5, 2016, Valencia moved out of his sister's house, again becoming transient. CP 55; RP 79. He reported this change to the TCSO, and signed a new Sex Offender Registration Requirements Form (hereinafter "2016 Transient Registration"),

which plainly stated that he was required to provide notification within three days if he moved to a different county or state. CP 55. Valencia initialed each clause of the form, and signed a section indicating that he had read the new requirements. CP 55.

On May 18, 2016, Valencia failed to report to his mandated weekly check-in.[1] According to Valencia's testimony, he then moved to Astoria, Oregon, on May 24 with the intent to relocate permanently. RP 77. It is undisputed that Valencia did not report within three days of this move. RP 85-92; Appellant's Brief at 4. Nine days later, Valencia returned to Thurston County, where he was arrested for unrelated reasons.[2] At the time of his arrest, Valencia had not attended his required weekly check-ins with the TCSO for more than three weeks.

Following his arrest, Valencia was charged with failure to register. RP 81. At his bench trial, Valencia argued that he was confused as to his reporting requirements, therefore he did not knowingly fail to register as required by RCW 9A.44.130. RP 82.

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[1] Valencia did call in lieu of reporting in person on the 18th, but was informed that in-person check-ins were required. RP 86-87. Valencia and Pamela McClure, of the TCSO, provided conflicting testimony as to whether he was told that his absence was excused for that week. RP 52, 87.

[2] Valencia testified that he had moved to Oregon permanently, but was back in Thurston County for a day at the time of his arrest. RP 77-78.

Nevertheless, based on the signed 2016 Transient Registration, the court found that Valencia had acted with the requisite knowledge. RP 106-07. In addition, the court held that Valencia's prior failures to register counted as two separate offenses for the purpose of calculating his offender score, and applying RCW 9A.44.132(1). RP 133.

In an part-published opinion, Division II of the Court of Appeals found that Valencia's two prior convictions occurred at different times and were not continuous, and specifically noted that same criminal conduct analysis and double jeopardy analysis are distinct inquiries in finding that the trial court did not abuse its discretion in ruling that Valencia's December 2014 offense and March 2015 offense did not encompass the same criminal conduct. Part-Published Opinion, No. 49622-4-II, Amended Petition for Review, Appendix at 1-14.

C. ARGUMENT.

1. The Court of Appeals decision properly distinguished the facts of this case from the facts of *State v. Green* and *State v. Durrett*. The decision upholding the trial court's ruling to count Valencia's prior offenses separately was correct.

This Court will accept review when the decision of the Court of Appeals conflicts with a decision of the Supreme Court, RAP 13.4(b)(1), conflicts with another decision of the Court of Appeals, RAP 13.4(b)(2), raises a significant question of law under the Washington or the United States Constitutions, RAP 13.4(b)(3), or involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). Valencia argues that the published portion of the Court of Appeals decision conflicts with the Court of Appeals decisions in State v. Green, 156 Wn.App. 96, 99-101, 230 P.3d 654 (2010) and State v. Durrett, 150 Wn.App 402, 410-11, 208 P.3d 1174 (2009). The decision did not conflict with the holdings of those cases because the facts of this case significantly differ from the facts in those matters.

A trial court's decision to count the offenses separately is reviewed under an abuse of discretion standard, *State v.* Aldana Graciano, 176 Wn.2d 531, 536, 295 P.3d 219 (2013) ("[W]e have repeatedly observed that a court's determination of same criminal conduct will not be disturbed unless the sentencing court abuses its discretion or misapplies the law."), and the facts show that the trial court was acting within its discretion when it made its ruling.

To begin, Valencia's two prior failures occurred on Dec. 2, 2014 and March 18, 2015; more than three months apart. CP 87. Under RCW 9.94A.589(1)(a),[3] Valencia bears the burden of proving that the offenses did not occur at the same time and place. Aldano Graciano, 176 Wn.2d at 538-41 ("[I]t is the defendant who must establish that crimes constitute the same criminal conduct."). While there is no black letter law for precisely how much time must pass before a court can consider acts to be separate criminal conduct, at the very least, a three month gap is long enough that the trial court cannot be said to have clearly abused its discretion. Because Valencia has not met his burden of showing that the acts occurred at the same time and place, the court of appeals properly found Valencia had not met his burden.

Perhaps more importantly though, in the intervening time period between Valencia's prior failures to register, he became transient, CP 82-83; a change of circumstances which the legislature found significant enough to merit its own separate statutory requirements. *See* RCW 9A.44.130(4)(a)(vi). As a result,

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[3] RCW 9.94A.589 (1)(a) ("Same criminal conduct, as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.").

he was required to sign the 2015 Transient Registration. CP 82-83. Thus, on Dec. 2, 2014, Valencia violated the requirements pertaining to sex offenders residing at a fixed residence, whereas, once he became transient, Valencia violated the separate requirements for transient offenders.[4] Critically, it was the signing of the 2015 Transient Registration which the trial court held to be an intervening act, and which formed the basis of the court's decision to count the failures to register as separate offenses. RP 133.

The Court of Appeals correctly distinguished this case from Durrett and Green because Valencia's prior convictions occurred at different times. The first offense occurred in December of 2014, when Valencia violating the reporting requirements under RCW 9A.44.130(4)(a)(iv) by not registering within three days of moving into the State. The second offense occurred when Valencia failed to report as a transient offender pursuant to RCW 9A.44.130(6)(b)

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[4] Distinguishing the present case from *Durrett*, in *Durrett*, the only intervening act was a two week period of compliance, leading the court to note that had the defendant not reported at all, he would have only been subject to one conviction. *Durrett*, 150 Wn. App. at 411. Here, the intervening act was much more significant, and because Valencia violated two separate statutory provisions, he could arguably have been convicted twice, regardless of whether he had ever reported in the intervening time period. Thus, again, *Durrett* cannot be considered controlling. *Green* is also cited by Valencia, but that case is similarly not controlling because it deals with no intervening acts whatsoever. *State v. Green*, 156 Wn.App. 96, 230 P.3d 654 (2010).

in March of 2015. Unlike Durrett and Green, Valencia violated two separate reporting requirements, not a repeating duty to register.

The Court of Appeals decision in this case does not conflict with prior precedent. There is no reason for this Court to grant review under RAP 13.4(b)(2).

2. Under well settled law, Valencia's prior convictions were not the same criminal conduct and did not constitute double jeopardy, therefore, there is no reason for this Court to consider this matter as a significant constitutional question.

Same criminal conduct analysis and double jeopardy analysis are separate inquiries;

> "The two analyses are similar. Under double jeopardy analysis, we determine whether on act can constitute two convictions. Under the same criminal conduct analysis, we determine whether two convictions warrant separate punishments. Even though they may be separate, albeit similar, analyses, a determination that a conviction does not violate double jeopardy does not automatically mean that it is not the same criminal conduct."

State v. Chenoweth, 185 Wn.2d 218, 222, 370 P.3d 6 (2016).

"A double jeopardy violation does not occur simply because two adverse consequences stem from the same act." In re Pers. Restraint of Mayner, 107 Wn.2d 512, 521, 730 P.2d 1321 (1986). Double jeopardy is violated in this context only when it results in punishment the legislature did not intend. State v. Cole, 117 Wn.

App. 870, 875, 73 P.3d 411 (2003). The first inquiry then is whether the legislature expressly authorized punishment for the two crimes. State v. Freeman, 153 Wn.2d 765, 771-72, 108 P.3d 753 (2005). If that intent is not obvious, then the court applies the test articulated in Blockburger v. United States, 284 U.S. 299, 304, 52 C. Ct. 180, 76 L. Ed. 306 (1932). Freeman, 153 Wn.2d at 772. That test analyzes the statutory elements, not the facts of the case itself. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). The offenses must be the "'same in law and in fact.'" State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). Double jeopardy is not violated if each offense requires proof of a fact that the other offense does not. Gocken, 127 Wn.2d at 100-01.

When two crimes contain different legal elements, there is a "strong presumption" that the legislature intended separate punishments. Further indicators of legislative intent can be found when the two statutes are located in different chapters of the criminal code and when they address different purposes. Cole, 117 Wn. App. at 875.

Applying the analysis for double jeopardy, which has been accepted in this state, Valencia's prior convictions were based on

two different provisions in the RCW. Though they were two different provisions within the same chapter of the RCW, the requirement that a sex offender register within three days of moving into the State addresses a different concern than the requirement that a sex offender who has registered as transient report weekly to the Sheriff's office. The two offenses require different proof of fact and therefore would not constitute double jeopardy.

The analysis for same criminal conduct applies to calculating an offender score. When calculating an offender score, RCW 9.94A.589(1)(a) provides that all "current and prior convictions [should be treated] as if they were prior convictions for the purpose of the offender score," but recognizes the exception that "*if the court enters a finding that some or all of the current offenses encompass the same criminal conduct* then those current offenses shall be counted as one crime." RCW 9.94A.589(1)(a) (emphasis added).

The "same criminal conduct" "means two or more crimes that require the same criminal intent, involve the same victim, and are committed at the same time and place." All of these elements must exist in order for a court to make a finding of same criminal conduct. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733

(2000); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Courts narrowly construe this analysis and a trial court's finding on the issue is reviewed under an abuse of discretion standard. Porter, 133 Wn.2d at 181 (1997); State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004); Haddock, 141 Wn.2d at 110; State v. Tili, 139 Wn.2d 107, 122-23, 985 P.2d 365 (1999). Abuse occurs if the trial court "arbitrarily counted the convictions separately." Haddock, 141 Wn.2d at 110.

Here, the Court of Appeals correctly found that the trial court did not abuse its discretion in ruling that the Valencia's two prior convictions did not constitute same criminal conduct. As argued above, Valencia's first prior offense occurred when he did not register within three days of moving into the State. His second offense occurred months later, when he registered as transient and then failed to report weekly as required. The two offenses had different intent and occurred at different times. They did not constitute same criminal conduct.

D. CONCLUSION.

The Court of Appeals decision in this case does not conflict with the prior decisions of State v. Durrett and State v. Green. The

decision properly applied the existing law as to double jeopardy and same criminal conduct and there is not a significant issue of constitutional law that this Court needs to address. As such, the State respectfully requests that this Court deny Valencia's Petition for Review.

Respectfully submitted this 13 day of April, 2018.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Response to Petition For Review on the date below as follows:

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

Dated this 13th day of April, 2018, at Olympia, Washington.

Cynthia Wright

CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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