

62749-0

62749-0

NO. 62749-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOEL MCFARLANE,

Appellant.

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

The Honorable David Needy

APPELLANT'S REPLY BRIEF

VANESSA M. LEE
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED
STATE OF WASHINGTON
2009 SEP 25 PM 4:50

TABLE OF CONTENTS

A. ARGUMENT 1

 1. Factual Corrections..... 1

 2. Mr. McFarlane’s intent to return to Marblemount indicates that
 Diablo was not his residence.....4

 3. The term “residence” is unconstitutionally vague, as
 demonstrated by the substantial confusion in this case 6

B. CONCLUSION 8

TABLE OF AUTHORITIES

Washington Court of Appeals

State v. Pickett, 95 Wn.App. 475, 975 P.2d 584 (1999) 5

State v. Pray, 96 Wn.App. 25, 980 P.2d 240 (1999)..... 5

Other Authorities

Black's Law Dictionary (Sixth Edition 1990) 5

Webster's Third New International Dictionary (1981) 5

A. ARGUMENT.

1. Factual Corrections. Respondent misstates or mischaracterizes certain facts in the Reply Brief. First, Respondent states that when Mr. McFarlane called the Skagit County Sheriff's Office to inform them he was staying in Diablo, he did not provide a phone number. SRB at 3. However, he did provide his cell number, as he had done previously; presumably he was just as easily reached by this number in Diablo as in Marblemount, if not more so, since cellular reception is poor in the vicinity of his cabin. RP 21-22, 103, 106. He reasonably believed the number already provided would be sufficient.

Respondent also asserts:

When Mr. McFarlane was unable to make it back to his cabin due to snow conditions he called the Skagit County Sheriff's Office and left a message that he was going to be in Diablo due to snow. But, months went by and *the snow started to thaw, the roads were plowed and* Mr. McFarlane still never updated his residence address in Diablo with the proper authorities.

SRB at 17 (emphasis added). The record is clear that the snow on the logging road leading to the Marblemount cabin did not thaw and that road was not plowed at the time of Mr. McFarlane's arrest. RP 38. Respondent also fails to mention two critical facts: Deputy

Hamlin testified that the snow on the logging road was about a foot and a half deep, and a fallen tree blocked the road. RP 38-39.

There is no evidence that it ever became possible, during the relevant time period, for Mr. McFarlane to reach his cabin. Thus, Mr. McFarlane's situation did *not* change after he left the message saying he would be in Diablo due to snow.

Respondent claims that Skagit County deputies found the cabin "deserted with no sign of anyone having been there... for quite some time." SRB at 3, 17. In fact, Deputy Hamlin could not reach or even see the cabin itself (due to the snow and fallen tree) and thus could not have determined whether it appeared "deserted." RP 40. The court's own finding that Mr. McFarlane maintained dual residences necessarily implies that he had not "deserted" or abandoned the cabin. Moreover, the lack of tire tracks or foot prints in the snow does not indicate how long it had been since anyone had been on the logging road; although the deputy testified he believed it had not snowed for a couple of days, he thought it could have snowed recently. RP 41, 54. There is no other evidence regarding the weather conditions in Marblemount for the weeks preceding that "couple of days."

Similarly, there was no evidence Mr. McFarlane had been living in the Diablo house for “quite some time,” as Respondent asserts. SRB at 5. Respondent characterizes the presence of Mr. McFarlane’s “personal belongings” in Ms. Leben’s basement as significant proof that he resided there. However, the “personal belongings” in question were only radio equipment (some of which belonged to Ms. Lebens) and clothing. RP 101. There is *no* evidence regarding how much clothing he kept there, only that he got dressed when the deputies told him to. RP 32, 48. The State did not establish that Mr. McFarlane kept more than one change of clothes at Ms. Lebens’ house. There is no evidence that he moved any personal belongings from Marblemount to Diablo until after he was released from jail. At that point he *did* move his personal belongings – an affirmative act indicating his actual change of residence, which Respondent ignores.

Moreover, the presence of Mr. McFarlane’s girlfriend, Ms. Case, in Diablo is probative of nothing. Although Respondent groups her together with Mr. McFarlane’s personal belongings and asserts that he “moved her” to Diablo, it is undisputed that she never lived with him in Marblemount. RP 63. Therefore her presence in Diablo is not indicative of a shift in primary residence,

but merely provided another incentive for him to visit Diablo frequently. Second, Respondent ignores Ms. Lebens' uncontroverted testimony that Ms. Case stayed in Diablo separately from Mr. McFarlane, including on nights when he was not there. RP at 95. The State offers no evidence that they moved to Diablo together or resided there as a unit. He did not "have his girlfriend there" as Respondent claims; she lived there of her own volition. SRB at 18.

Respondent also states Mr. McFarlane stayed in Diablo for nine months, when in fact the court found it was only six. SRB at 13; FF 3.

Finally, Respondent refers to Mr. McFarlane's "argument" that he was maintaining dual residences. SRB at 13, 17. This is not "argument," but simply reiteration of the trial court's oral findings. RP 133-34, 137.

The effect of Respondent's mischaracterizations is to paint the case as more simple and clear-cut than it actually is. In fact, as the trial court itself recognized, this is an extremely close case.

2. Mr. McFarlane's intent to return to Marblemount indicates that Diablo was not his residence. Respondent dismisses the import of Mr. McFarlane's intent, stating he "may have wanted to

return to the cabin someday, but his stay in Diablo was much more than a temporary sojourn – he had moved in his clothing and his girlfriend to his new abode in Diablo and had spent numerous nights there for at least five consecutive months.” SRB at 17-18.

But intent is central to this Court’s definition of “residence.”

the place where a person lives as either a temporary or permanent dwelling, *a place to which one intends to return*, as distinguished from a place of temporary sojourn or transient visit.”

State v. Pickett, 95 Wn.App. 475, 478, 975 P.2d 584 (1999), citing

Webster's Third New International Dictionary 1931 (1981)

(emphasis added). And:

Personal presence at some place of abode with *no present intention of definite and early removal and with purpose to remain for undetermined period ... but not necessarily combined with design to stay permanently.*

State v. Pray, 96 Wn.App. 25, 29, 980 P.2d 240 (1999), quoting

Black’s Law Dictionary at 1308-09 (Sixth Edition 1990) (emphasis added).

Both Pickett and Pray are illustrative. Pickett, a homeless man who mainly slept in city parks, did not “intend to return” to the places where he slept, so those locations were not his residences. Pickett, 95 Wn. App. at 479-80. Pray, on the other hand, did intend

to stay indefinitely at the two motels he stayed at, until he found a permanent residence. Pray, 96 Wn. App. at 30. Mr. McFarlane, unlike Pickett and Pray, had a specific residence to return to and intended to return to his home in Marblemount as soon as he was able. Thus, whether or not Mr. McFarlane intended to return to Marblemount as soon as he was able was not a trivial matter but one of the central questions.

3. The term “residence” is unconstitutionally vague, as demonstrated by the substantial confusion in this case.

Respondent argues the term “residence” is not unconstitutionally vague because the average person can ascertain what it means: “where someone is personally present; an abode.” SRB at 16. This phrase does nothing to clarify the confusion in this question. “Abode” is no more than a synonym for “residence,” offering no greater specificity. The phrase “where someone is personally present” is clearly insufficient, since one can be “personally present” anywhere. The principal confusion in this case concerns the length of time that transforms a guest to a resident. At what point should Mr. McFarlane have known he was required to register? Respondent has offered nothing to settle this question. In fact, Respondent cannot, because the term is too vague.

The closest Respondent comes to proposing a definition is to argue

Mr. McFarlane's acts of living, sleeping, working and keeping his personal belongings in a home other than the one in which I is registered is clearly conduct that speaks to his residence being other than the one in which he notified authorities about.

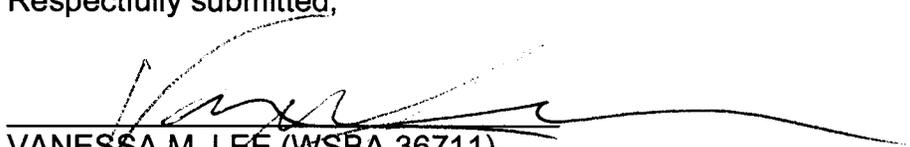
SRB at 17. But Mr. McFarlane had worked at Ms. Lebens' house in Diablo for years prior to this period. RP 80. As discussed above, the "personal belongings" he kept there appear to be limited to some radio equipment and at least one change of clothing. Since neither of these factors is significant in this case, Respondent's definition would seem to hinge entirely on where the offender sleeps. But Mr. McFarlane had occasionally slept at Ms. Lebens' house for years. RP 84. Was he always required to register at that address? Or did he trigger the requirement by staying a certain number of nights? If so, how would he know? The obvious presence of these questions, and Respondent's inability to answer them, demonstrates again that the term is unconstitutionally vague. Mr. McFarlane, the sheriff's employee with whom he spoke, the deputies who arrested him, and the prosecutor who charged him were all forced to guess whether he was required to register, since the term itself offered no guidance.

B. CONCLUSION.

For the reasons stated above and in the opening brief, Mr. McFarlane respectfully requests this Court find the evidence insufficient, reverse the conviction, and dismiss the charge or in the alternative, find RCW 9A.44.130(5)(a) void for vagueness and dismiss his conviction.

DATED this 25th day of September, 2009

Respectfully submitted,



VANESSA M. LEE (WSBA 36711)
Attorney for Appellant
Washington Appellate Project-91052