

64727-0

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NO. 64727-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

SCOTT A. AVILLA,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. The State presented evidence that Defendant moved on December 1, 2008, from the Jim Creek residence where he was registered. Defendant admitted that during December 2008, he was temporarily living at his brother's in Marysville and at Marino Avenue in Everett. Defendant registered his new address on December 29, 2008, at Marino Avenue. Defendant was told at the time of his prior conviction that he was required to register as a sex offender. Defendant admitted that he had registered for the past seven years. Is there sufficient evidence to prove the defendant was guilty of failing to register as a sex offender?

2. The trial court meaningfully considered whether Defendant's history of compliance, the short period of failing to register, other court's reasons for granting exceptional sentences, and economic factors were grounds to impose a sentence under the standard range. The trial court specifically considered Defendant's request for more community custody and less confinement. Did the trial court abuse its discretion in not granting an exceptional sentence below the standard range?

II. STATEMENT OF THE CASE

Scott Avilla was previously convicted of voyeurism and failing to register as a sex offender. Avilla knew that he was required to register as a convicted sex offender and had moved six to eight times since 2001. 2RP 8, 48.

In June of 2008 Avilla moved his recreational vehicle (RV) to 13016 Jim Creek Road, Arlington, and registered with the Snohomish County Sherriff's Officer. Avilla had registered ten times prior to moving to Jim Creek Road. 2RP 11, 48, 51.

While residing at the Jim Creek Road address, Avilla paid rent to John Klein for June 2008 through November 2008. Avilla did not pay rent for December 2008. Avilla did not recall the exact date he moved his RV from Jim Creek Road, but stated it was sometime in late November 2008 or early December 2008. John Klein recalled that when he returned from eastern Washington in late November 2008, possibly the last day in November, Avilla's RV was gone from the Jim Creek Road address. Klein walked through the Jim Creek property and confirmed that all of Avilla's property was gone from that location. 2RP 22, 24-25, 31, 48, 52.

On December 10, 2008, Deputy Gausman attempted to verify Avilla's address on Jim Creek Road. Avilla was not there and

Klein stated that Avilla no longer lived at that location. When Deputy Gausman arrested Avilla on December 19, 2008, Avilla stated that he had finished moving five days ago and had a key to his girlfriend's apartment in his pocket. 2RP 33-35, 39-40.

Avilla stated that he decided to move in with a friend at 11525 Marino Avenue #2, Everett, and in late November or early December 2008 he moved his RV off the Jim Creek Road property and relocated the RV at his brother's in Marysville. Avilla returned to the Jim Creek Road address two times to pick up his mail after he moved the RV. During the month of December 2008, Avilla lived temporarily at his brother's in Marysville and part-time at the Marino Avenue address. Avilla registered his new address at 11525 Marina Avenue, #2, Everett, on December 29, 2008. 2RP 11-12, 52-53, 55.

On November 23, 2009, the court found Avilla guilty of failure to register as a sex offender. The trial court found that Avilla had been convicted of voyeurism and failing to register and was required to register as a sex offender pursuant to RCW 9A.44.130; that Avilla registered the address of 13016 Jim Creek Road, Arlington, WA, with the Snohomish County Sheriff's Office on June 2, 2008; that Avilla vacated that residence by December 1, 2008;

that Avilla registered the 11525 Marino Avenue address on December 29, 2009; and that nineteen days was well beyond the seventy-two hour window Avilla had to register under the law. The trial court found that there was no evidence that Avilla was confused about his registration requirement. CP 18.

On December 17, 2009, the court sentenced Avilla. Avilla had a standard sentencing range of 33 to 42 months incarceration and 36 months community custody. The court expressed interest in imposing a sentence below the standard range. Avilla requested that the court impose less confinement and more probation. The trial court found Avilla's history of compliance, failure to register for eighteen days, and economic factors were not a valid basis for an exception sentence down. The trial court imposed 33 months confinement and 27 months community custody. 3RP 2, 7, 13-14.

III. ARGUMENT

A. SUFFICENCE OF THE EVIDENCE.

1. Legal Standards.

When reviewing a challenge to the sufficiency of the evidence, the court determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006); State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). All reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Galisa, 63 Wn. App. 833, 838, 822 P.2d 303 (1992) *citing* State v. McKeown, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979).

2. The State Presented Sufficient Evidence That Defendant Knowingly Failed To Register When He Moved From The Jim Creek Residence.

It can be inferred that a sex offender is aware of his statutory obligations, and thus knowingly fails to comply with the sex offender registration statute, where there is evidence that the sex offender was informed about the registration requirements and had complied

with the statute several times before. State v. Castillo, 144 Wn. App. 584, 589-90, 183 P.3d 355 (2008); State v. Vanderpool, 99 Wn. App. 709, 713-14, 995 P.2d 104 (2000).

Defendant claims that he did not knowingly fail to register.

“Knowingly” means:

[1] he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
[2] he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010(1)(b). At his February 13, 2003, sentencing for Voyeurism and Failure to Register Defendant was informed of his requirement to register as a sex offender. Defendant had registered several times before. Defendant testified that he had registered since 2001 and had moved six to eight times. It was reasonable for the court to infer from this that he knew the registration requirements. Castillo, 144 Wn. App. at 590.

“Residence as the term is commonly understood is 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). Based on this definition,

Washington courts have previously concluded that “even a temporary dwelling may be considered a ‘residence.’” State v. Pray, 96 Wn. App. 25, 29, 980 P.2d 240 (1999).

A sex offender need not intend that a place will be his or her permanent residence in order to trigger the registration requirements. Pray, 96 Wn. App. at 30. Therefore, an offender with a fixed residence must register the address at which he or she will be staying even if that location is only a temporary one, rather than a permanent one. Pray, 96 Wn. App. at 29-30.

The trial court found that Avilla moved from the Jim Creek Road address by December 1, 2008. The evidence presented at trial supported this finding. Avilla told his landlord, John Klein, that he planned to move in late November or early December 2008. Avilla’s RV and his other property were gone from the Jim Creek Road address when Klein returned from eastern Washington at the end of November 2008.

The trial court found that Avilla moved from the Jim Creek Road address to either Marysville or 11525 Marino Avenue in mid-December. The evidence presented at trial supported this finding. Avilla testified that during the month of December 2008, he lived temporarily at his brother’s in Marysville and part-time at the Marino

Avenue address. Avilla registered his new address, 11525 Marina Avenue, #2, Everett, on December 29, 2008.

Based on the evidence presented to the trial court, a rational trier of fact could have reasonably concluded that Avilla had moved from the Jim Creek Road address where he had been registered to a new residence by December 1, 2008, and that Avilla did not register a new residence within the 72 hour time limit.

B. TRIAL COURT'S DISCRETION TO IMPOSE AN EXCEPTIONAL SENTENCE.

“While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)(trial court did not consider whether a sentencing alternative was appropriate). A trial court abuses discretion when “it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.” Grayson, 154 Wn.2d at 342; *quoting* State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). A trial court may impose an exceptional sentence if it finds “substantial and compelling reasons” to justify departure from the standard range and if those reasons

are consistent with the purposes of the Sentencing Reform Act (SRA). State v. Davis, 146 Wn. App. 714, 719, 192 P.3d 29 (2008)(trial court did not abuse its discretion in imposing an exceptional sentence downward to stay within the statutory maximum); RCW 9.94A.535.

The present case is not similar to Grayson, 154 Wn.2d 333. In Grayson the trial court categorically failed to meaningfully consider whether a sentencing alternative was appropriate. In the present case the record clearly shows that the trial court meaningfully considered whether there were grounds to impose a sentence under the standard range. After considering the defendant's history of compliance, the fact that defendant's failure to register was only for eighteen days, the reasons other courts granted exceptional sentences during the prior year, economic factors and the defendant's specific request for more "probation" and less confinement, the court stated: "I want to make it abundantly clear that if there was any grounds for an exceptional down, this court would in fact give an exceptional down sentence." 3RP 13. The trial court meaningfully considered giving an exceptional sentence.

Nor is Davis, 146 Wn. App. 714, applicable. Davis pled guilty to failure to register as a sex offender. His standard sentencing range was 43 – 57 months incarceration and 36 – 48 months community custody. The court initially sentenced Davis to 43 months incarceration and 36 – 48 months community custody. Davis filed a motion to modify the sentence because the total period of incarceration and community custody exceeded the five year statutory maximum of 60 months. The trial court found that Davis required two full years of community custody so he would not continue to violate his requirement to register as a sex offender and imposed an exceptional sentence of 36 months confinement and 24 months community custody. The Court of Appeals in Davis held that the need to limit Davis' total sentence to the maximum term for the crime was a substantial and compelling reason for the trial court to impose an exceptional sentence down, and that the trial court did not abuse its discretion in apportioning the confinement and community custody terms as it did. The Court of Appeals affirmed the trial court on September 15, 2008. State v. Davis, 146 Wn. App 714.

In 2009 the Legislature enacted ESSB 5288, 2009 Wash. Laws chapter 375 (effective date July 26, 2009). Subsection 5

amended Community Custody addressing the issue of how the court is to apportion incarceration and community custody when the standard sentencing range exceeds the statutory maximum:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.701(8). The Legislature's intent is for the amendment to apply retroactively and prospectively:

This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after the effective date of this section.

2009 Wash. Laws chapter 375 § 20.

In the present case Defendant was sentenced on December 17, 2009. The trial court acted within its discretion in imposing a standard range sentence of 33 months incarceration and 27 months community custody. In accordance with the statute, the trial court reduced the term of community custody so that Defendant's combined term of confinement and community custody would not exceed the statutory maximum of 60 months. The trial court did not have discretion to reduce the term of incarceration below the standard range.

It is clear from the record that the court properly exercised its discretion by basing its decision upon information admitted, acknowledged or proved at trial or sentencing. The trial court clearly felt the standard range was not in proportion to the offense Avilla had committed, but could not find a justification for an exceptional sentence down and acknowledged that without such justification the trial court did not have discretion to impose a sentence below the standard range. There was no abuse of discretion in trial court's decision to not impose an exceptional sentence below the standard range.

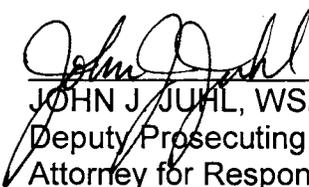
IV. CONCLUSION

For the reasons above, Defendant's appeal should be denied.

Respectfully submitted on July 7, 2010.

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