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NO. 65669-4-I

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

REC'D  
JAN 20 2011  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MAURICE KUIT,

Appellant.

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

The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

*[Handwritten signature]*  
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A. ASSIGNMENTS OF ERROR

1. The court erred in finding substantial compliance is not a defense to failure to register as a sex offender.

2. The court erred in failing to instruct the jury on the defense of substantial compliance.

Issue Pertaining to Assignments of Error

The trial court rejected appellant's proposed jury instruction on the grounds that substantial compliance was not a defense to failure to register as a sex offender. Should this Court hold that substantial compliance is a defense and that appellant was entitled to jury instructions supporting his theory of the case?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Maurice Kuit with one count of failing to register as a sex offender. CP 1-2. The jury found Kuit guilty, and the court imposed a standard range sentence. CP 31, 42, 44. Notice of appeal was timely filed. CP 51.

## 2. Substantive Facts

Since his conviction for voyeurism in 2003, Kuit is required to register as a sex offender. 2RP<sup>1</sup> 29. He has moved many times since then, in part due to the difficulty of finding anyone willing to lease to him. 3RP 70-71. In 2008, he was convicted of failing to register, and in June 2009 he was serving a term of community custody pursuant to that conviction. 2RP 31, 95.

In September 2008, Kuit registered his address in Bellevue. 2RP 27. James Kemp, Kuit's landlord, testified he told Kuit to move out in May 2009. 2RP 128. The move-out was gradual, but by the second week of June, Kuit was no longer living there because two new renters had moved in. 2RP 127, 129-30.

Kuit spent most of the month of June incarcerated for violating his community custody by failing to participate in sexual deviancy treatment. 2RP 95. On June 27, he was released from jail and was obliged to register within 24 hours. 2RP 79.

On June 30, he met with his Community Corrections Officer (CCO) Iris Peterson at her office. 2RP 78. He told her he was sleeping in his office since being released from jail. 2RP 79. She informed him she would not

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<sup>1</sup> There are five volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Dec. 14, 2009; 2RP – Dec. 15, 2009; 3RP – Dec. 16, 2009; 4RP – Dec. 17, 2009; 5RP – June 4, 2010.

approve him living in his office and told him to make other arrangements. 2RP 79. Sometime shortly thereafter, Kuit left Peterson a message letting her know he was staying in a motel in North Bend. 2RP 80. On July 8, Kuit again contacted his CCO, told her he was staying with an acquaintance in Redmond, and gave her the address. 2RP 80. Peterson visited the address and verified Kuit was indeed living there and would not pose a risk to the community. 2RP 80. When Peterson visited Kuit at his work on July 30, 2009, he admitted he had not registered his current address. 2RP 83. Peterson then contacted Bellevue police to inform them of Kuit's failure to register. 2RP 84. Kuit registered that very afternoon. 2RP 84. Kuit was convicted of failing to register between June 27 and July 30, 2009. CP 41.

At trial, Kuit proposed a jury instruction on substantial compliance that read in full, "Substantial compliance is a defense to the reporting requirements of a state agency." CP 33. The court declined to give the requested instruction, stating, "I'm not going to instruct on substantial compliance because I'm convinced it's not an available defense under this statute." 4RP 23. Kuit registered a formal exception and repeated that exception again at the close of the trial. 4RP 24-25, 100.

C. ARGUMENT

KUIT WAS ENTITLED TO A JURY INSTRUCTION SUPPORTING HIS SUBSTANTIAL COMPLIANCE DEFENSE.

- a. Substantial Compliance Is a Defense to Failure to Register as a Sex Offender Because the Purposes of the Law Can Be Achieved Despite Procedural Imperfections.

“Washington courts have long upheld actions taken in substantial compliance with statutory requirements, albeit with procedural imperfections.” Bank of America, N.A. v. Owens, 153 Wn. App. 115, 129, 221 P.3d 917 (2009). Substantial compliance occurs when “the substance essential to every reasonable objective of the statute” has been satisfied. In re Application of Santore, 28 Wn. App. 319, 327, 623 P.2d 702 (1981).

Whether a statute is susceptible to substantial compliance is a question of law. Williamson, Inc. v. Calibre Homes, Inc., 147 Wn.2d 394, 398, 54 P.3d 1186 (2002). Because the trial court found Kuit was not entitled to an instruction as a matter of law, the standard of review is de novo. 4RP 23; State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Although Divisions Two and Three of this Court have rejected substantial compliance as a defense to failure to register,<sup>2</sup> Kuit urges this Court to consider the issue afresh. Because strict and technically precise compliance with the sex offender registration statutes is not essential to

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<sup>2</sup> State v. Prestegard, 108 Wn. App. 14, 28 P.3d 817 (2001); State v. Vanderpool, 99 Wn. App. 709, 995 P.2d 104 (2000).

achieving their purpose, this Court should hold that substantial compliance is a defense to a criminal charge of failing to register.

Vanderpool and Prestegard provide only scant analysis of the doctrine of substantial compliance and its application to sex offender registration. The Prestegard court considered a challenge to the constitutionality of the sex offender registration statute. 108 Wn. App. at 20-22. Because Prestegard misstated precedent and the recent amendments to the law, the court re-characterized the challenge as one of substantial compliance. Id. at 21-22. The court simply agreed with Vanderpool that a substantial compliance defense was not available because “it would defeat the statute’s legislative purpose of making sex offenders easy to locate.” Id. at 22.

The Vanderpool court’s rejection of the substantial compliance defense is non-binding dicta because it was unnecessary to the court’s decision. See, e.g., State v. Louthan, \_\_\_ Wn. App. \_\_\_, 242 P.3d 954, 965 (2010) (dicta is language unnecessary to the decision of a court); State v. Raleigh, 157 Wn. App. 728, 735, 238 P.3d 1211 (2010) (dicta unnecessary to the court’s holding is non-binding). The court begins its analysis by noting that there was no manifest constitutional error, and thus by failing to assert a substantial compliance defense at the trial court level, Vanderpool failed to preserve the issue for review. Vanderpool, 99 Wn. App. at 711.

Nevertheless, the court went on to note it was not persuaded by Vanderpool's briefing, which cited only one case involving a mechanic's lien. Id. at 712. The court explained the purpose of RCW 9A.44.130 is "to allow law enforcement agencies to protect their communities, conduct investigations and quickly apprehend sex offenders." Vanderpool, 99 Wn. App. at 712. The court reasoned that strict compliance was necessary to achieve this purpose and that a substantial compliance defense was inconsistent with the general rule that a good faith belief in the lawfulness of one's conduct is not a defense to a criminal charge. Id.

The Vanderpool analysis should be rejected for several reasons. First, this court should reject the Vanderpool court's assertion that strict compliance, in contrast to substantial compliance, is necessary to achieve the Legislature's purposes. On the contrary, the substantial compliance doctrine does not apply unless all reasonable purposes behind the statute are achieved. Santore, 28 Wn. App. at 327. Thus, by definition, if a person is found to have substantially complied with sex offender registration, the legislative purposes must have been accomplished. The substantial compliance doctrine merely excuses technical deficiencies, while preserving the Legislature's purposes intact and inviolate. Id.

Second, substantial compliance fits well in the sex offender registration context because sex offender registration is essentially regulatory

in nature. RCW 9A.44.130 was enacted to assist local law enforcement “by regulating sex offenders.” State v. Ward, 123 Wn.2d 488, 499, 869 P.2d 1062 (1994) (quoting laws of 1990 ch. 3 § 401) (emphasis added). The Legislature’s purpose was regulatory, not punitive. Id. at 500; State v. Clark, 75 Wn. App. 827, 832, 880 P.2d 562 (1994). The Legislature’s purpose in enacting RCW 9A.44.130 was to “assist local law enforcement agencies’ efforts to protect their communities by regulating sex offenders.” State v. Ward, 123 Wn.2d 488, 499, 869 P.2d 1062 (1994) (quoting laws of 1990 ch. 3 § 401) (emphasis added).

Substantial compliance doctrine is designed for situations in which the regulatory purpose of a law is satisfied even without strict compliance. In Bank of America, the court upheld a judgment that was essentially a lien even though it was not filed as required by statute. 153 Wn. App. at 136 (Cox, J., concurring). Because the lien was entered and recorded, but not filed, the court concluded the Bank was on notice and the lien was effective. 153 Wn. App. at 131.

In Bank of America, the court noted the filing requirement was enacted to make the clerk’s job easier, much like in this case the sex offender registration requirements are designed to ease the job of law enforcement in protecting the community and investigating crime. Bank of America, 153 Wn. App. at 129; Ward, 123 Wn.2d at 500. Where that underlying purpose

can be met without strict compliance, the substantial compliance doctrine is appropriately applied. When a person keeps the State informed of his or her address such that local law enforcement is notified, the regulatory purpose has been achieved and the statute has been substantially complied with.

Third, there is no indication the Legislature intended to penalize all but the strictest compliance with the sex offender registration statutes. When the Legislature wants to ensure strict compliance with a statute, it knows how to make that clear. See, e.g., RCW 51.14.020 (“only letters of credit issued in strict compliance with the rules shall be deemed acceptable”); RCW 69.41.080 (“The board shall promulgate rules to regulate the purchase, possession, and administration of legend drugs by such societies and agencies and to insure strict compliance with the provisions of this section.”); RCW 69.50.320 (“The board may adopt rules to ensure strict compliance with the provisions of this section.”). No such language is found in the sex offender registration statutes. RCW 9A.44.130; RCW 9A.44.132.

Finally, Washington courts have applied substantial compliance doctrine even in the context of statutes that are to be strictly construed. See Santore, 28 Wn. App. at 326-27; In re Detention of A.S., 138 Wn.2d 898, 901, 927, 982 P.2d 1156 (1999). In Santore, the court found substantial compliance even though the language of the adoption statutes is

mandatory and, being in derogation of the common law, adoption statutes are to be strictly construed. 28 Wn. App. at 326-27. Similarly, involuntary commitment statutes are to be strictly construed because of the inherent and significant liberty interests at stake. A.S., 138 Wn.2d at 911. Nevertheless, in A.S., involuntary commitment orders were upheld due to substantial compliance with the statutes governing the petitions. Id. at 901, 927.

Because the purposes of sex offender registration can be achieved without technically precise compliance, this Court should reject the limited analysis in Vanderpool and Prestegard and hold that substantial compliance is a defense to the charge of failing to register.

b. The Substantial Compliance Instruction Was Warranted Because Kuit Achieved the Purposes of Sex Offender Registration by Keeping His Community Corrections Officer Informed of His Address.

In general, a defendant is entitled to have the jury fully instructed on the defense theory of the case. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000); State v. Ginn, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005). When a proposed jury instruction correctly states applicable law and is supported by sufficient evidence, a party is entitled to have the jury instructed as requested. Ginn, 128 Wn. App. at 878. It is reversible

error for the trial court to refuse a proposed instruction so long as these prerequisites are met. Id.

Because the trial court did not believe substantial compliance was a defense, it did not consider or decide whether Kuit presented sufficient facts to support instructing the jury on that defense. Sufficient evidence to give a proposed instruction exists if a rational trier of fact could find the facts necessary to support the instruction. State v. Vinson, 74 Wn. App. 32, 37, 871 P.2d 1120 (1994). When determining if the evidence supports an instruction, courts view the evidence in the light most favorable to the requesting party. Fernandez-Medina, 141 Wn.2d at 455-56; Ginn, 128 Wn. App. at 879. Thus, the appropriate inquiry is whether, when viewed in the light most favorable to Kuit, a reasonable juror could have found substantial compliance.

The substantial compliance doctrine allows courts to “give legislative commands a rational interpretation founded upon their design.” Williamson, Inc. v. Calibre Homes, 147 Wn.2d 394, 401, 54 P.3d 1186 (2002). Substantial compliance means “actual compliance in respect to the substance essential to every reasonable objective of the statute. It means a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted.” Santore, 28 Wn. App. at 327; see also James v. County of Kitsap, 154 Wn.2d 574, 588, 115 P.3d 286

(2005) (quoting Santore, 28 Wn. App. at 327); Andrews Fixture Co. v. Olin, 2 Wn. App. 744, 472 P.2d 420 (1970) (substantial compliance with contractor registration statutes). What constitutes substantial compliance with a statute depends on the facts of each particular case. Santore, 28 Wn. App. at 327 (citing Trussell v. Fish, 202 Ark. 956, 154 S.W.2d 587, 590 (1941)).

The purpose of sex offender registration is to help law enforcement protect the public by making sex offenders easy to locate. Prestegard, 108 Wn. App. at 20 (citing Vanderpool, 99 Wn. App. at 712). The stated legislative intent behind requiring registration is to assist local law enforcement in protecting their communities. Laws of 1990, chapter 3, § 401. The legislature found that efforts to investigate crime and apprehend sex offenders who commit sex offenses were often hampered by lack of information. Id. The purpose of registration is to assist in those endeavors: conducting investigations and quickly apprehending offenders. Id.

Kuit's conduct in notifying his CCO of his address achieved those purposes. 2RP 78-84. Any local law enforcement officer wanting to question or apprehend Kuit, need only contact his CCO, a simple enough step, not significantly more difficult than checking the sex offender registrations. The ease of communication between the CCO and local law enforcement is demonstrated by the facts of this case, wherein Kuit admitted

to his CCO that he did not register and she immediately notified law enforcement. 2RP 84. Particularly when viewed in the light most favorable to Kuit, a rational juror could have found Kuit substantially complied with the law because the statutory purposes were achieved.

This case is similar to cases where a party substantially complied by delivering notice to the wrong party because the correct party was certain to receive notice. See, e.g., Black v. Dep't of Labor & Indus., 131 Wn.2d 547, 555, 933 P.2d 1025 (1997) (claimant's service of notice of appeal on assistant attorney general assigned to represent Department in his case substantially complied with requirement that service be made on Department through its director); Matter of Saltis, 94 Wn.2d 889, 895-96, 621 P.2d 716 (1980) (petition delivered to Department of Labor and Industries rather than to the "director" of the Department as required by statute); Vasquez v. Dep't of Labor & Indus., 44 Wn. App. 379, 384, 722 P.2d 854 (1986) (petition served upon an attorney instead of the "party"). Kuit substantially complied because, by notifying his CCO, he essentially ensured that law enforcement would have notice of his whereabouts, even if he provided that notice to the wrong party.

Kuit made a far stronger showing of substantial compliance than the defendants in Prestegard and Vanderpool. Prestegard argued local law enforcement could have found his address on a sheriff's report from an arrest

that occurred the day he moved. Prestegard, 108 Wn. App. at 17-18, 22. As the court reasonably noted, “Requiring law enforcement officers to search through crime reports to locate sex offenders would be contrary to RCW 9A.44.130.” Id. at 22. In this case, no searching would have been required. One call to Kuit’s CCO would have revealed his location.

Vanderpool’s substantial compliance argument was even weaker. He moved from Spokane to Benton County without registering, but then was arrested in Benton County shortly after arrival. Vanderpool, 99 Wn. App. at 712. He argued he substantially complied with the statute because Benton County knew where he was (in their jail). Id. By contrast, Kuit took affirmative steps to keep his CCO informed of his whereabouts. 2RP 78, 80.

Kuit kept his CCO informed of his whereabouts, and his CCO notified local law enforcement when he did not register. 2RP 78, 80, 83. On these facts, particularly when viewed in the light most favorable to Kuit, the purposes of the sex offender registration law were achieved, and Kuit was entitled to have the jury instructed on this defense. Ginn, 128 Wn. App. at 878.

D. CONCLUSION

Kuit was entitled to a jury instruction on substantial compliance because the purposes of sex offender registration were met through his substantial compliance. Kuit therefore requests this court reverse his conviction and remand for a new trial.

DATED this 20<sup>th</sup> day of January, 2011.

Respectfully submitted,

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65669-4-1
	)	
MAURICE KUIT,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20<sup>TH</sup> DAY OF JANUARY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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JAN 20 11 11 19  
CLERK OF COURT  
JAN 20 11 11 19

**SIGNED** IN SEATTLE WASHINGTON, THIS 20<sup>TH</sup> DAY OF JANUARY 2011.

x *Patrick Mayovsky*