

NO. 71262-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

E. L.-D.,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY, JUVENILE
DIVISION

The Honorable Linda C. Krese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The information was defective because it omitted an essential element of the crime.

Issue Pertaining to Assignment of Error

A charging document must properly notify a defendant of the charges against him by including the essential elements of the crime. Is reversal required because the information failed to allege the reporting deadline for the crime of failure to register?

B. STATEMENT OF THE CASE

The state charged E.L.-D., a juvenile, with failing to register as a sex offender. CP 1. The trial court found E.L.-D.'s statements to his probation counselor admissible. CP 5, RP (10/22) 25-26. The court also found E.L.-D guilty as charged. CP 3-7; RP (11/21) 8.

C. ARGUMENT

THE REPORTING DEADLINE IS AN ELEMENT OF THE CRIME OF FAILING TO REGISTER AND THE INFORMATION IS DEFECTIVE IN FAILING TO INCLUDE IT.

E.L.-D.'s conviction for failure to register as a sex offender must be reversed because the charging document does not set forth the reporting deadline, which is an essential element of the crime.

The State charged E.L.-D. as follows:

That the respondent, having been convicted on or about the 30th day of March, 2011, of a sex offense, to wit: Rape of a Child in the First Degree, being required to register pursuant to RCW 9.94A.130, and having registered as residing at a fixed residence, did, on or about the 2nd day of July, 2013, cease to reside at that residence and did knowingly fail to provide *timely written notice* to the county sheriff's office; proscribed by RCW 9A.44.132, a felony.

CP 43-44 (emphasis added).

A charging document is constitutionally defective under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The purpose of the "essential elements" rule is to apprise the defendant of the charge against him and allow defense preparation. Id.

When E.L.-D. must report is an essential element of the crime. According to RCW 9.94A.130(4)(a), "If any person required to register pursuant to this section changes his or her residence address within the same county, the person must provide . . . signed written notice of the change of address to the county sheriff within three business days of moving."

E.L.-D. was convicted of violating RCW 9A.44.132(1)(a)(i), which provides in pertinent part: "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."

Under this statutory scheme, a person cannot be convicted for failing to report to the county sheriff during some unspecified period of time. The statute sets forth specific timeliness requirements that must be complied with in order to avoid conviction.

An element "'is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)), 163 Wn.2d 1007 (2008). The failure to comply with the reporting deadline is necessary to establish the illegality of the registration offense. The failure to report on a day specified by the county sheriff's office is therefore an essential element of the crime that needed to be set forth in the charging document.

In concluding the deadlines in the failure to register statute are not alternative means, the Court of Appeals in State v. Peterson also concluded they are not elements of the crime. State v. Peterson, 145 Wn. App. 672, 678, 186 P.3d 1179 (2008). The Supreme Court, however, did not follow the Court of Appeals' analysis. State v. Peterson, 168 Wn.2d 763, 771, 772, 230 P.3d 588 (2010). The Supreme Court recognized the

alternative means question and the elements question are different and should be analyzed separately. Id. at 771.

The Court noted "[c]ommon sense suggests the statutory deadline is part of the State's burden of proof." Id. at 771 n.7 (not deciding question but noting it would be insufficient for the State to prove failure to register within 24 hours of relocating when the statutory deadline is 72 hours); cf. State v. Castillo, 144 Wn. App. 584, 588, 183 P.3d 355 (2008) (in deciding sufficiency of evidence issue, "State must show that Mr. Castillo (1) changed his residence on or after August 8, 2006, (2) knowingly failed to provide written notice of the change of his address to the Yakima County sheriff's department within 72 hours of moving, and (3) had previously been convicted of a sex offense that required registration.").

The elements of a crime are commonly defined as "[t]he constituent parts of a crime — [usually] consisting of the actus reus, mens rea, and causation — that the prosecution must prove to sustain a conviction." Peterson, 168 Wn.2d at 772 (quoting State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009) (quoting Black's Law Dictionary 559 (8th ed. 2004))).

To sustain E.L.-D.'s conviction, the court found, and needed to find, that E.L.-D. "did register at a fixed address but only or about July 2,

2013, ceased to reside at that residence, and . . . knowingly failed to provide *timely written notice* to the county sheriff's office." CP 7 (emphasis added). The charging document, which used the same language, did not specify that "timely" meant within 72 hours. CP 1. The charging document thus omits an essential element of the crime.

Statutes will not be construed in a way that leads to unlikely, absurd, or strained results. State v. Ammons, 136 Wn.2d 453, 457, 963 P.2d 812 (1998). One of the things required by the statute is that those obligated to register must do so within a certain deadline and that the failure to do so constitutes a per se violation. RCW 9A.44.130(4)(b) and (6)(b).

Absurd results follow in related contexts if the deadline is not an element of the crime. RCW 9A.44.130(4)(a), for example, requires notification of a county sheriff within 72 hours of moving. A person could fail to notify the sheriff within 24 hours of moving and yet still be found guilty of failing to register if the 72 hour deadline is not an essential element of the crime. See Peterson, 168 Wn.2d at 771 n.7 (it would be insufficient for the State to prove failure to register within 24 hours of relocating when the statutory deadline is 72 hours).

Where, as here, the adequacy of an information is challenged for the first time on appeal, the court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

The information did not allege E.L.-D. failed to register within 72 hours to the county sheriff. CP 36. The information is deficient because it lacks the reporting deadline, which is an element of the crime.

A charging document need not include the exact words of a statutory element; words conveying the same meaning and import are sufficient. Kjorsvik, 117 Wn.2d at 108. The charging document at issue here contains no words conveying the deadline element of the crime.

"If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185

(1995). Because the necessary element of *when* E.L.-D. must report is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse E.L.-D.'s conviction. McCarty, 140 Wn.2d at 425.

D. CONCLUSION

For the above reasons, this Court should reverse E.L.-D.'s conviction and remand for a new trial.

DATED this 10 day of April, 2012.

Respectfully submitted,

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v.)	COA NO. 71262-4-I
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)	
Appellant.)	

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 10TH DAY OF APRIL 2014, 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 AND/OR VIA EMAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF APRIL 2014.

x *Patrick Mayovsky*