

No. 38189-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN D. FURTWANGLER,

Appellant.

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STATE OF WASHINGTON
BY DENNY

COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Sergio Armijo, Judge

APPELLANT'S OPENING BRIEF

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. Mr. Furtwangler's due process rights under Article I, § 3 and the Sixth and Fourteenth Amendments were violated when he was convicted of the crime of failing to register as a sex offender even though the prosecution failed to present sufficient evidence to prove all essential elements of the offense.

2. Appellant assigns error to Finding of Fact 26 in the bench trial findings and conclusions, which provides:

The court finds that the defendant used the house at 6210 S. Alder St. to change clothes, eat, and take a shower, not to live there.

CP 21.

3. Appellant assigns error to Finding of Fact 27 in the bench trial findings and conclusions, which provides:

The court finds that once Ms. Lawrence told the defendant that he was no longer welcome to live at 6210 S. Alder St., he was effectively a transient.

CP 21.

4. Appellant assigns error to the court's Conclusion of Law 3, which provides:

That STEVEN DOUGLAS FURTWANGLER is guilty beyond a reasonable doubt of the crime of FAILURE TO REGISTER AS A SEX OFFENDER, in that, on or about the 27th day of September, 2007, STEVEN DOUGLAS FURTWANGLER:

- A. had previously been convicted of a felony offense that required him to register as a sex offender;
- B. (1) knowingly failed to comply with the requirement of sex offender registration that the defendant send written notices of a change of address to the county sheriff within seventy two hours of moving to a new residence within the same county; OR

(2) knowingly failed to comply with the requirement that the defendant who had a fixed residence, send a signed written notice of where the defendant plans to stay to the sheriff of the county where the defendant last registered within forty-eight hours, excluding weekends and holidays, of ceasing to have a fixed residence; and

C. The acts occurred in the State of Washington.

CP 21-22.

5. The court erred in imposing an indeterminate sentence which was not authorized by the Sentencing Reform Act (SRA).

6. On its face, the sentence imposed exceeded the statutory maximum for the offense.

7. The court's delegation of authority to the Department of Corrections to ensure only a lawful sentence was served was in violation of the fundamental constitutional principle of separation of powers.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. To prove Mr. Furtwangler guilty of failing to register, the prosecution had to show, *inter alia*, that he knowingly failed to comply with registration requirements. The trial court entered findings that Furtwangler was guilty either for having moved to a new address without changing his registration or because he had become transient and failed to register as such.

a. Was there insufficient evidence to support the conviction under the "new address" theory, which was set forth in boilerplate language, where the prosecution presented no evidence that Furtwangler had moved anything or had a new address anywhere?

b. A person is not a transient under the statute unless

they have no “fixed residence.” To have a “fixed residence” under the statute does not require that the residence is permanent or even that the person has furniture or sleeps inside, so long as the address is where the person can regularly be found or contacted, such as if they receive messages and mail there and are there frequently, and so long as the person intends to return to that place and does not plan to leave on any definite date.

Mr. Furtwangler was registered at the address where he had lived and where his girlfriend and her family were living. All his belongings were there. He got his mail, including official court mail, at that address, gave the address out as his to the court, a school he was trying to get into and his family, his food in the refrigerator and freezer and a cupboard specifically designated for that use at the house. His clothes were all kept and washed there and he changed there. He ate his meals on the back porch there and kept his dog there. Although his girlfriend’s mother said he was not welcome inside and had gotten a no-contact order to keep him out, she knew of and allowed all of this use by him and he slept there regularly during the day, being let inside by his girlfriend. He also had no other place where he had anything stored and no other address, instead staying out and up at night. He was there nearly every day,

With all this evidence that the address was his “fixed residence” under the statute, did the court err in finding him guilty for failing to register as a transient?

3. Were Mr. Furtwangler’s due process rights violated when he was convicted of an offense despite the prosecution’s failure to present

sufficient evidence to support that conviction?

4. Under the Sentencing Reform Act (SRA), the trial court has a duty to enter a determinate sentence, which is a sentence which states “with exactitude” the specific length of the time imposed to be served both in custody and on community supervision. The sentence imposed in this case was for 33 months in custody, followed by anywhere from 36-48 months of community custody, but the court also ordered the Department of Corrections to adjust the sentence in unspecified ways in the future in order to ensure that Mr. Furtwangler’s total time in custody and on supervision did not exceed 60 months.

a. Was this sentence an improper, unauthorized indeterminate sentence?

b. Division One previously approved of this type of sentencing scheme but has since reversed itself, finding the scheme to be improper because the resulting sentence is indeterminate, the scheme does not comply with the plain duties of the sentencing court and the scheme is faulty because it does not ensure that legal sentences will be served, given the difficulties in tracking sentences imposed in this fashion and the penchant of DOC for not following explicit mandates such as those set forth by sentencing courts under the scheme. This Court has yet to reconsider in any published opinion its decision to follow the initial decision of Division One.

Should this Court continue to follow Division One and reject the now abrogated decision of that Court permitting the scheme used in this case?

Further, should this Court reject its previous acceptance of this scheme where the decision accepting the scheme simply followed the now overruled Division One decision without examining the plain language of the relevant statute, the serious separation of powers problem with the scheme and the fact that the scheme resulted in an improper, unauthorized indeterminate sentence?

5. Was the trial court's delegation of its duty to DOC, an executive branch agency, a violation of the constitutional mandate of separation of powers?

6. Under the SRA, the trial court is not authorized to impose a sentence greater than the statutory maximum. The statutory maximum for the offense is 60 months. The sentence the court imposed was for 33 months in custody plus 36-48 months of community custody, for a total sentence of between 69-81 months. Did the trial court err in imposing a sentence outside the statutory maximum in the first place, regardless whether it tried to ensure that a sentence outside that maximum was not served?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Steven D. Furtwangler was charged by information with Failure to Register as a Sex Offender. CP 1; RCW 9A.44.130.

After a motion before the Honorable Judge John R. Hickman on June 25, 2008, a bench trial was held before the Honorable Sergio Armijo on July 21, 2008, at the conclusion of which the judge found Mr.

Furtwangler guilty as charged. 1RP 1; RP 1¹; CP 18-22.

On August 15, 2008, Judge Armijo imposed a sentence of 33 months of “[a]ctual. . . total confinement,” followed by a “range” of community custody of from 36-48 months. SRP 8; CP 30-44.

Furtwangler appealed and this pleading follows. CP 14.

2. Testimony at the bench trial

Lonnie Lawrence testified that Steven Furtwangler, her daughter’s boyfriend, was living with Lawrence, her husband and her daughter at an address on South Alder in Tacoma in October of 2006 when Furtwangler, Lawrence and her husband got into an altercation. RP 6-7. As a result, because “there was fighting and arguing all the time,” on October 19th of that year, Lawrence got a restraining order against Furtwangler. RP 8. Lawrence said the order was for Furtwangler “not to come on the premises.” RP 8. Although Lawrence’s daughter kept trying to get her mother to change her mind and let Furtwangler “come back into the household” after that, Lawrence said no. RP 9. Even after the restraining order expired, Lawrence did not change her mind. RP 10.

Furtwangler, who was required to register as a sex offender, was registered at the South Alder address even after Lawrence said he could not live there and got the order. See CP 9-11; RP 36. He was later accused by the state of failing to properly register “on or about” September

¹The verbatim report of proceedings consists of three volumes, which will be referred to as follows:
the proceedings of June 25, 2008, as “1RP;”
the bench trial of July 21, 2008, as “RP;”
the sentencing proceedings of August 15, 2008, as “SRP.”

27, 2007. See CP 1.

Furtwangler testified that he stayed registered at the South Alder address in 2007 because he considered that his residence. RP 36. He said he thought of it as such because he ate all his meals there, had his clothes there, had all his possessions there, was there every day, received his mail there, and often slept there. RP 36-37, 40. That was the address he gave the courts to contact him. RP 37. It was the address he used for his efforts to get into schooling. RP 37. It was the address he gave friends and family as the place they could contact him. RP 37. It was also where he got phone messages. RP 38. He was contacted there in September of 2007 by his sister, the dean of the college he wanted to go to in order to get his GED and the social security office. RP 38, 47. At some point, when they got computer access in the “mother-in-law” apartment at the home, he was allowed to use the computer and did so to check his “My Space” page for contacts, as well as look things up on the internet. RP 39-40.

Lawrence admitted that Furtwangler got his mail at the home and that she allowed him to do that in the hopes he would get an income and get other housing. RP 9. Lawrence also conceded that Furtwangler used the address for mail from the court system for correspondence with the college he was trying to go to, having school records and other things sent there for that purpose. RP 9-11.

Furtwangler did not eat his meals inside or go inside when Lawrence was there. RP 9, 40-42. Instead, he would stay in the attached “mud room.” RP 17, 36-41. Lawrence admitted that Furtwangler would

go with Lawrence and her daughter to the food store and buy food for himself, which was then stored in the refrigerator or freezer in the house, or in a cupboard which was set aside for his use. RP 14-18, 41. The daughter made his meals in the oven or microwave in the home or brought the stuff out to Furtwangler in the mud room so he could make them himself. RP 41. Furtwangler testified that he shared his food, especially his ice cream, with Lawrence's mother-in-law and husband. RP 41.

Lawrence admitted that Furtwangler was at her house, at the back door, on a regular basis, to eat his meals. RP 9, 15. As long as he did not cause trouble or come into the house, she was fine with that. RP 9.

Furtwangler kept all of his possessions at Lawrence's home, including clothing, game systems and souvenirs. RP 14. Lawrence said she had told Furtwangler after the restraining order was entered that he needed to get the items out of her home, but they were still there at the time of trial. RP 15.

Lawrence admitted that Furtwangler's laundry was done at the home and that was where he would get his clothes when he needed to change clothes or get clean clothes. RP 15.

Furtwangler said he slept at the home often, including in September of 2007. RP 41-42. He would go inside and relax with his girlfriend, spend time with her and even finish his laundry in the home. RP 42. His puppies also lived there. RP 42. He did not sleep there at night but rather during the day. RP 47. At night he hung out with his uncles or sometimes went somewhere for drinks. RP 47. Furtwangler did not usually sleep during the day, because he was a "night owl." RP 48.

He would go to sleep in the morning, “chill” with his girlfriend, “get a few hours of sleep, go look for a job, come back, spend some more time,” eat lunch, spend some more time with his puppies, eat dinner and then go see his uncle at night. RP 48-49.

Lawrence first testified that Furtwangler was not supposed to get phone messages at the house. RP 12. She then admitted, however, that at one point before the restraining order was entered, there was a phone line there in Furtwangler’s name or in her daughter’s name, which Furtwangler used. RP 12-13. Once that was disconnected because of failure to pay, Lawrence and her husband had only cell phones and Furtwangler gave out those numbers as his message phone to people, including Thurston county. RP 12. Family members also called the home in order to reach Furtwangler. RP 13.

Lawrence conceded that Furtwangler’s family contacted him there because that was the only way they knew how to get ahold of him. RP 12-14. She was irritated about him using her phone and she said that, if someone called her number, she would tell them it was not Furtwangler’s message phone. RP 14. Ultimately she admitted that, if someone was trying to get ahold of Furtwangler prior to his arrest for allegedly failing to register, the only way they could do so would be “through [her] . . . residence.” RP 14.

Lawrence said she gave her daughter “the benefit of the doubt” that Furtwangler would “find his own place to live” after the restraining order was entered. RP 9. She also said she told Furtwangler she knew of somebody he could talk to about getting someplace else to live. RP 9.

Lawrence first testified that, as far as she knew, he never slept at the home after the order was entered. RP 10. A moment later, she said, “he had better not.” RP 10.

Lawrence admitted that she did not actually enforce the order to keep Furtwangler away from her home. RP 16. She said she did so because her daughter lives there and was dating him at the time. RP 16. Lawrence thought that Furtwangler was only there, “95 percent of the time,” when she and her husband were there. RP 18. When asked if Furtwangler was in the home when she was not there, Lawrence said he “[b]etter not be, or have been,” but admitted that she had “no idea” if he was inside when she was not around. RP 18.

Furtwangler said that he did not have anywhere else to sleep and had no residence anywhere else. RP 42. He did not have anywhere else he stored his clothes or food or dog. RP 43. He did not ever give anyone a different address to contact him at because he thought of the South Alder address as his home. RP 42-43. Furtwangler also said that he never intended to change his address from that address as his residence. RP 44, 48. He was aware of the no-contact order but, because he was allowed to be at the home and it was his current address, he believed that he was supposed to register that address regardless whether being there was a violation of a no-contact order, because he was required to register the address where he was “at.” RP 50-52.

The parties entered a stipulation that Furtwangler had previously been convicted of a felony sex offense and had been given notice that he had a duty to register as a sex offender. CP 9-11. A Pierce County

Sheriff's Department deputy testified about how a person who is required to register would do so. RP 20-24. The officer also said that Furtwangler had registered at Lawrence's address in July of 2003 after being "[t]ransient in Olympia" and had done so again when released from Thurston County jail on May 29, 2007. RP 22-28. Another officer testified that people who are required to register must reregister when they are released from jail. RP 32. That officer also said that, when someone moves, they have 72 hours to provide the new address if it is within the county, either by going to the police station or submitting a letter within that time. RP 34.

In finding Furtwangler guilty, the trial court focused on whether Furtwangler knew he was "not welcome there." RP 61. The court noted that Lawrence was "very strong" about not wanting Furtwangler in the house, then found that Furtwangler used the house to change his clothes, shower, eat and "sleep[] maybe one or two hours," but did not actually live inside. RP 61-62. Instead, the court said, Furtwangler "uses the house" and, although it was only a "technicality" that he was guilty of failing to register, "for all intents and purposes" Furtwangler was effectively a transient and should have registered as such. RP 62.

The court also found it "[e]qually important" that there was a no-contact order and that it was "a violation of the law" for Furtwangler to be there even though the family did not call the police on him. RP 62. The court said Furtwangler was "not supposed to be living there or staying there or frequenting there," stating the concern that he was breaking the law in doing so. RP 59-62. After again noting that there was only a

“technical violation” of the registration requirements, the court pronounced Furtwangler guilty. RP 62.

The court later entered written findings and conclusions in support of its decision. CP 18-22.

D. ARGUMENT

1. MR. FURTWANGLER’S DUE PROCESS RIGHTS WERE VIOLATED WHEN HE WAS CONVICTED EVEN THOUGH THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ESSENTIAL ELEMENTS OF THE CRIME

Under the state and federal due process clauses, the prosecution must prove every essential element of a charged crime, beyond a reasonable doubt. See State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Sixth Amend.; Fourteenth Amend.; Article I, § 22. This burden is only met if, viewing the evidence in the light most favorable to the prosecution on appeal, any rational trier of fact would have been convinced that the prosecution had proven all the essential elements of the crime, beyond a reasonable doubt. See Jackson, 443 U.S. at 334. Failure to meet that burden compels not only reversal but reversal and dismissal with prejudice. State v. Smith, 155 Wn.2d 496, 504-505, 120 P.3d 559 (2005).

In this case, the conviction should be reversed, because there was insufficient evidence to prove all of the essential elements of the offense.

Mr. Furtwangler was charged with failure to register as a sex offender. CP 1. That offense is defined in RCW 9A.44.130, the registration statute. RCW 9A.44.130(11) makes it a class C felony when a

person who was previously convicted of, *inter alia*, a felony sex offense, “knowingly fails to comply with any of the requirements” of RCW 9A.44.130. RCW. 9A.44.130(11).

The essential elements of the failure to register offense are therefore 1) a prior conviction for an offense requiring the offender to register, 2) a failure to comply with a requirement of the registration statute, and 3) that the failure was done “knowingly.” See, e.g., State v. Peterson, 145 Wn. App. 672, 186 P.3d 1179 (2008).

Here, the parties stipulated that Mr. Furtwangler was required to register. CP 9-11. The only question was whether he had knowingly failed to register as required under the statute.

The prosecution failed to prove that part of its case, beyond a reasonable doubt, because Furtwangler was in compliance with the registration requirements. RCW 9A.44.130 sets forth all of the various requirements with which registrants must comply. The overarching requirement is that a person who is residing in the state and has been found, *inter alia*, to have committed a felony sex offense must register with the sheriff of the county where they reside within a specific time. RCW 9A.44.130(1)(a). This requirement applies “whether or not the person has a fixed residence” and the registrant is required to provide the sheriff with information such as their name, date of birth, offense and “complete residential address.” RCW 9A.44.130(3)(a). If the person does not have “a fixed residence,” in addition to the usual registration requirements they are required to provide the sheriff with, *inter alia*, information on “where he or she plans to stay.” RCW 9A.44.130(3)(b).

RCW 9A.44.130 also provides requirements for keeping registration information current. See RCW 9A.44.130(5) requires a person required to register to notify the local sheriff of any change of address within a specific time. If a person required to register “lacks a fixed residence,” they are required to provide written notice to the local sheriff of the county where they last registered within 48 hours “after ceasing to have a fixed residence.” RCW 9A.44.130(6). In addition, a person who “lacks a fixed residence” is required to report in person, weekly, to the local sheriff of the county of registration. RCW 9A.44.130(6)(b).

In finding Mr. Furtwangler guilty here, the trial court concluded that Furtwangler was “for all intents and purposes” a “transient” and should have registered as such. RP 62. The court’s written findings reflected this belief, declaring that, “once Ms. Lawrence told the defendant that he was no longer welcome to live at” the South Alder address, “he was effectively a transient.” CP 18-21. The court concluded that Furtwangler had therefore violated the statute by failing to “send a signed written notice of where the defendant plans to stay to the sheriff of the county where the defendant last registered within forty-eight hours, excluding weekends and holidays, of ceasing to have a fixed residence.” CP 21.

But the court’s findings and conclusions also declared that Mr. Furtwangler was guilty, in the alternative, for having failed to “send written notice of a change of address to the county sheriff within seventy two hours of moving to a new residence within the same county[.]” CP 21-22.

This conclusion was completely unsupported by the evidence or the trial court's findings. There was no evidence whatsoever that Mr. Furtwangler had moved to a "new residence." RP 1-52. The prosecution did not introduce anything indicating a different place where Mr. Furtwangler was residing or even argue that there was such a specific place. RP 1-52. Nor did the trial court make any findings that Furtwangler was now residing at a different address. See CP 18-22.

Instead, the question at trial was whether Mr. Furtwangler was still residing at the South Alder address, given that he was not supposed to, according to Mrs. Lawrence and her no-contact order. See RP 52-62. The conclusion that Mr. Furtwangler was guilty based upon failing to reregister within 72 hours of having moved to "a new residence" does not withstand review.

The court's other finding of guilt, based on the conclusion that Mr. Furtwangler had "effectively become transient" when he was told he was not welcome at the South Alder address and when the no-contact order was entered and that he had thus failed to properly register under the transient registration requirements was also in error. The court's focus was on whether it believed Mr. Furtwangler "lived" at the house and whether he was *supposed* to live there, given the no-contact order. See RP 61-62; CP 18-22.

But the question under RCW 9A.44.130 was *not* where Mr. Furtwangler lived or was supposed to live; the question was whether he had registered at the place which was his "fixed residence" as that term is defined for the purposes of RCW 9A.44.130. It is only when someone

“lacks a fixed residence” or “ceas[es] to have a fixed residence” that they are required to report under the transient reporting provisions of the statute. See RCW 9A.44.130(6).

A person does not meet those standards simply because they are not physically staying all the time inside a home. To understand when someone “lacks a fixed residence” and is therefore transient, it is helpful to start with the reason for the addition of the transient provisions in the first place. Those provisions were written into the statute in response to State v. Pickett, 95 Wn. App. 475, 975 P.2d 584 (1999). See Laws of 1999, 1st Sp. Sess., ch. 6, § 1-2; State v. Stratton, 130 Wn. App. 760, 766, 124 P.3d 660 (2005). In Pickett, Division One held that there was no registration requirement for homeless offenders, because they did not, in fact, have a “residence.” See Pickett, 95 Wn. App. at 476. A person who is homeless does not have a “residence,” the Court noted, so the statute requiring registration of a “residence” did not apply to those who were homeless. Id; see State v. Bassett, 97 Wn. App. 737, 740, 987 P.2d 119 (1999).

In reaching its conclusion in Pickett, Division One stated that it was up to the Legislature to amend the registration statute if it wanted to require homeless convicted sex offenders to register their whereabouts with local law enforcement, and this Court later agreed. Pickett, 95 Wn. App. at 480; see Bassett, 97 Wn. App. at 740 n. 6. In response, the 1999 Legislature amended the statute, specifically stating its intent to respond to Pickett and add language to require that all offenders who would fall under the registration requirements are required to do so even if they are homeless, or, as the Legislature described them, lacking “a fixed

residence.” See Laws of 1999, 1st Sp. Sess., ch. 6, § 1.

The Legislature, however, did not define either “residence” or “fixed residence.” See RCW 9A.44.130; Stratton, 130 Wn. App. at 760; State v. Pray, 96 Wn. App. 25, 980 P.2d 240, review denied, 139 Wn.2d 1010 (1999). Instead, it has been up to the courts to decide what meaning to give those terms. In Pray, supra, the Court addressed the definition of the term “residence” in response to the defendant’s argument that he was not required to register in Bellingham after abandoning his home in King County and staying in three different places, temporarily, for about 10 days. 96 Wn. App. at 26. The defendant claimed that he had not “moved” to Bellingham because he had not established a “residence” there as that term is defined under the statute. 96 Wn. App. at 26.

Division One disagreed. 96 Wn. App. at 29. Although RCW 9A.44.130 did not define “residence,” the Pray Court looked at dictionary definitions and noted that they defined “residence” as including temporary places of abode and places where one had no “design to stay permanently.” 96 Wn. App. at 29. Rejecting the idea that a residence must be “permanent” in order to trigger the registration requirements, the Court held that, instead, a “residence” included places the defendant was at temporarily, if he intended to return to that place and did not plan to leave “on any definite date.” 96 Wn. App. at 29. The Pray Court looked at Pickett and noted that, in contrast to the defendant in Pray who had no idea where he would be at any point in time and thus “could not give the sheriff an address where he could be contacted,” the defendant in Pickett knew the places he was staying and intended to stay at each of them on the

relevant days, until he found a permanent residence. Pray, 96 Wn. App. at 29. As a result, those temporary arrangements were “residences” under the statute and the defendant was therefore required to register each one with the local sheriff. 96 Wn. App. at 29-30.

In Stratton, supra, this Court similarly addressed the definition of “residence” under the statute but looked at it in the context of whether a person living in his car lacked a “fixed residence” and had to register under the transient provisions added after Pickett. After registering at the address of a home he was buying, the defendant defaulted on the purchase. 130 Wn. App. at 760. He moved everything out of the home and surrendered the keys. 130 Wn. App. at 760. He made arrangements, however, to be allowed to have his mail still delivered there and to use the “telephone box” attached to the house for internet services. 130 Wn. App. at 762-63. He also parked the car in which he slept in the driveway of the home at night fairly “regularly.” Id.

Officers looking for Stratton saw a “for sale” sign in the yard at the house and noted there was no furniture or belongings inside. 130 Wn. App. at 763. When they knocked on the door several times, no one answered. Id. As a result, Stratton was charged with failure to register. Id. The trial court found that Stratton was “transient” because he was living in the car “outside his previous residence.” Id. The court therefore concluded that Stratton had violated the registration requirements of RCW 9A.44.130 and was guilty of failing to register, as charged. Id.

On review, this Court reversed. First, the Court noted that, in interpreting the undefined term “fixed residence” contained in the statute,

it was tasked with the requirement of giving “effect to the intent and purpose of the legislature in creating the statute.” 130 Wn. App. at 764, quoting, Am. Cont’l. Ins. Co. v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004) (citations omitted). That intent was to provide authorities with information on how to contact a registrant, in order to keep track of him and use that information in protecting their community. Stratton, 130 Wn. App. at 765. The Court also looked at the standard dictionary definitions of “residence,” which were ambiguous about whether a “residence” had to be a place within a building or not. Stratton, 130 Wn. App. at 765. Because the purpose of the registration statute was to “provide[] law enforcement agencies with an address where they can *contact* a sex offender,” and because of the ambiguity, the Court held, a “fixed residence” *could* include a place where the person does not actually live or even have possessions, so long as it was a place where the authorities could contact the registrant by mail, phone or in person at times. 130 Wn. App. at 764-65.

As a result, because Stratton could be reached at the empty home by mail, phone or in person in the evenings when he parked his car there, this Court held, Stratton had properly registered his address as the address of the home and thus had not failed to comply with the registration requirements. 130 Wn. App. at 765.

Notably, in reaching this conclusion, this Court rejected the idea that Stratton was required to register as a person without a “fixed residence” who was a “transient,” despite the trial court’s finding. 130 Wn. App. at 766. A person only met that definition, this Court held, if

they were like the defendant in Pickett, who had been kicked out of his former address, had all his possessions removed and was sleeping on streets and in public parks at night, not knowing where he would be at any given point in time. Stratton, 130 Wn. App. at 766. In contrast, this Court pointed out, Stratton was not moving from park to park or street to street but rather got mail at the address where he was registered, had phone service there and intended to return there daily, with no departure date in mind. 130 Wn. App. at 766. Because Stratton was “abiding” at the address on a regular basis and because the place Stratton intended to be was not “subject to change or fluctuation” all the time as was the defendant’s location in Pickett, this Court concluded that the empty home was still Stratton’s “fixed residence” under RCW 9A.44.130 and Stratton’s conviction was therefore reversed.

Similarly, here, Mr. Furtwangler was still registered at the place which was his “fixed residence”- the South Alder address- even though, like Stratton, he was not living inside. His clothes were kept there. He ate his meals there. He did his laundry there. He stored his food there, not only in the refrigerator and freezer inside but also in a pantry specifically designated for his use. He got his mail there, including official court mail. He slept there often during the day, had his puppy there and spent time with his girlfriend there, usually every day.. He kept all his worldly possessions there. And he often received and made phone calls there, giving the number there as his contact number although his doing so frustrated Lawrence, who did not want her cell phone to be used for that purpose.

Further, it is undisputed that Furtwangler never gave anyone a different address at which to contact him. Even Lawrence admitted that Furtwangler's own family reached him through the South Alder street address. And Furtwangler testified that he thought of the South Alder address as his home, never intended to change his address from that one, considered that his residence and had no intention of residing anywhere else. RP 43-48. Unlike in Pray, here Mr. Furtwangler knew where he would be much of the day, nearly every day - the South Alder address. And like in Stratton, Mr. Furtwangler's registration address was, in fact, the address at which he could be contacted by mail, often by phone and also in person, should the authorities so choose.

Thus, regardless whether Lawrence believed Furtwangler was not "residing" at her home as that term is understood by a lay person, the South Alder address was, in fact, Furtwangler's "fixed residence" as that term is defined under the statute and this Court's decision in Stratton. As a result, Mr. Furtwangler did not knowingly fail to register as required in RCW 9A.44.130, and the prosecution did not prove all the essential elements of the crime. Reversal and dismissal is required.

2. THE SENTENCE IMPOSED WAS AN IMPROPER INDETERMINATE SENTENCE WHICH EXCEEDS THE STATUTORY MAXIMUM FOR THE OFFENSE ON ITS FACE AND IS IN VIOLATION OF THE CONSTITUTIONAL MANDATE OF THE SEPARATION OF POWERS

In the alternative, this Court should reverse and remand for resentencing, because the trial court imposed an improper indeterminate sentence which exceeded the statutory maximum for the offense and the

trial court's delegation of authority to ensure that only a lawful sentence was ultimately served was a violation of the fundamental constitutional principle of the separation of powers.

The Sentencing Reform Act (SRA) limits the discretion of the sentencing court in significant ways. See, e.g., Wahleithner v. Thompson, 134 Wn. App. 931, 941, 143 P.3d 321 (2006). Under the SRA, a trial court “only possesses the power to impose sentences provided by law.” See In re the Personal Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). One of those limits is that, under the SRA, any sentence a trial court imposes for a felony must be “determinate” when the offender is not being sentenced as a “persistent offender.” See State v. Ames, 89 Wn. App. 702, 710, 950 P.2d 514, review denied, 136 Wn.2d 1009 (1998). Another limit is that a court may not “impose a sentence providing for a term of confinement or community supervision, community placement or community custody which exceeds the statutory maximum for the crime[.]” RCW 9.94A.505(5); see State v. Armendariz, 160 Wn.2d 106, 119, 156 P.3d 201 (2007).

In this case, the sentencing court imposed a sentence which was indeterminate and which, on its face, exceeded the statutory maximum for the offense. Failure to register is a Class C felony. RCW 9A.44.130(11). As such, the statutory maximum for the offense is 60 months. RCW 9A.20.021(1)(c). Thus, under RCW 9.94A.505(5), the total term of confinement plus community custody or supervision the court was authorized to impose was 60 months.

The sentence imposed here did not comply with this requirement.

The court ordered Mr. Furtwangler to serve 33 months of “[a]ctual. . . total confinement,” followed by a “range” of community custody of from 36-48 months. CP 37-38. The sentence imposed was therefore 69-81 months, in excess of the 60 month maximum the court was permitted to impose.

In recognition that the sentence exceeded the statutory maximum, the sentencing court attempted to remedy the error by writing on the judgment and sentence that the “[t]otal time in custody and on community custody [is] not to exceed [the] statutory maximum of 60 months.” CP 37-38. This is a procedure that Division One approved in State v. Sloan, 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004), overruled by State v. Linderud, 147 Wn. App. 944, 197 P.3d 1224 (2008), in light of its decision in State v. Vanoli, 86 Wn. App. 643, 655, 937 P.2d 1166, review denied, 133 Wn.2d 1022 (1997), which held that it was proper to assume that DOC would release someone from community custody at the appropriate time without exceeding the statutory maximum, depending upon how much “good time” they earned. This Court adopted the Sloan procedure as sufficient to ensure that a defendant did not serve more than the statutory maximum in State v. Vant, 145 Wn. App. 592, 186 P.3d 1149 (2008).

There are several reasons, however, why this procedure was neither proper nor sufficient and why Sloan, Vanoli and Vant do not control. First, in adopting the procedure in Sloan and in reaching its conclusion in Vanoli, Division One ignored the fundamental doctrine of statutory interpretation that a statute must be interpreted to give effect to the plain meaning of its language. See Sloan, 121 Wn. App. at 221-22; Vanoli, 86 Wn. App. at 654-55; Armendariz, 160 Wn.2d at 110 (noting this rule of

interpretation). But the plain language of the earlier version of the statute involved in Vanoli and the current statute, RCW 9.94A.505(5), states that a court “may not *impose*” a sentence exceeding the statutory maximum for the offense, not that a defendant must not ultimately *serve* more than that maximum. RCW 9.94A.505(5) (emphasis added); see former RCW 9.94A.120(11) (using the same language). Thus, like other provisions of the SRA, RCW 9.94A.505(5) and its former incarnation serve to limit the trial court’s authority in entering the original sentence, rather than providing a limit on the time the defendant will eventually end up serving. In accepting the remedy contained in Sloan as proper, this Court engaged in no independent analysis of the statute but simply cited to the holding of Sloan and adopted it in whole cloth, thus making the same mistake as Division One in Sloan and ignoring the fact that the statutory language specifically refers to the sentence the court is authorized to *impose*, not the sentence the defendant will eventually *serve*. See Vant 145 Wn. App. at 606.

Second, in Sloan, Vanoli and Vant, the defendants did not raise the very serious problem that the sentences, as imposed, were not statutorily authorized by the SRA because they were indeterminate. See Vant, 145 Wn. App. at 605-606; Sloan, 121 Wn. App. at 221-22; Vanoli, 86 Wn. App. at 654-55. But as the Supreme Court has declared and the SRA requires, determinate sentences are mandated, must be imposed at the time of the original sentencing and are “generally not subject to change” under the SRA, once they are imposed. State v. Shove, 113 Wn.2d 83, 85, 776 P.2d 132 (1989). This is because, under the SRA, sentences are “based

primarily on considerations of the seriousness of the crime of conviction and the prior criminal history,” both of which are usually known at the time of the original sentencing. 113 Wn.2d at 85, quoting, D. Boerner, *Sentencing in Washington* § 4.1, at 4-1 (1985). It is only in “specific, carefully delineated circumstances” that the SRA allows modification of sentences after they have been imposed. Shove, 113 Wn.2d at 85.

A sentence is only “determinate” when it

states with exactitude the number of actual years, months, or days of total confinement, or partial confinement, of community supervision, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation.

RCW 9.94A.030(18). The sentence imposed here did not meet this standard, because the trial court left the actual sentence up to the Department of Corrections to later decide, rather than imposing it at the time of the sentencing.

But nothing in the SRA permits the sentencing court to delegate its authority for determining the sentence to an executive branch agency, DOC, in this situation - nor is such a delegation constitutional permissible. The doctrine of “separation of powers” has been described by our Supreme Court as “one of the cardinal and fundamental principles” of both the state and federal constitutional system. State Bar Ass’n v. State, 125 Wn.2d 901, 908-909, 890 P.2d 1047 (1995). Under that doctrine, the powers reserved for one branch of government may not be delegated to another. See, e.g., State v. Sansone, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005). DOC is granted authority to decide the actual length of a sentence when the sentence imposed is one of the very limited number of indeterminate

sentences permitted to be imposed for certain sex offenses. See RCW 9.94A.712. But this is not such a case. By imposing a sentence in excess of the statutory maximum and leaving it to DOC to amend the sentence in order to ensure it is lawful, the trial court effectively delegated its sentencing authority to DOC. See State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008) (such a sentence “allows the Department of Corrections (DOC) to determine sentence length, which is not authorized by the Sentencing Reform Act”).

Linerud, supra, is instructive. In that case, as here, the defendant was convicted of failing to register as a sex offender and the standard range sentence of 43-57 months combined with the mandatory 36-48 months of community custody exceeded the 60-month statutory maximum for the offense. See CP 37-38; Linerud, 147 Wn. App. at 946-47. In Linerud the trial court noted on the judgment and sentence that the total time served “could not exceed the statutory maximum,” as did the court here. See CP 37-38; Linerud, 147 Wn. App. at 946. On appeal in Linerud the defendant challenged the sentence both as improperly exceeding the statutory maximum even with the notation, and as improperly indeterminate as imposed. 147 Wn. App. at 948.

After considering both legal and policy arguments, Division One agreed, overruling its previous decision in Sloan. The Court noted that in Sloan the defendant had not raised the issue that an improper indeterminate sentence was imposed when the court order a sentence exceeding the statutory maximum but noted on the judgment and sentence that the defendant should not serve more than the maximum sentence.

Linerud, 147 Wn. App. at 948. Next, the Linerud Court noted that the SRA does not allow DOC the authority to calculate an inmate's total time served and ensure that it does not exceed the statutory maximum. 147 Wn. App. at 949. Instead, the Court found, determining how long the sentence *imposed* will be is the function of the trial court, which must, under the SRA, impose a determinate sentence; "a sentence that states, with exactitude, the total time of confinement and community supervision." 147 Wn. App. at 949-50.

As a result, the Court concluded, a court may not *impose* a sentence which exceeds the statutory maximum, regardless whether DOC can determine that an inmate will earn early release time or can release an inmate from community custody at some point during the standard range. Id. Put another way, a trial court "may not sentence a defendant to a term that, on its face, exceeds the statutory maximum and leave to the DOC responsibility for ensuring that the sentence is lawful." Id.

Thus, the Linerud Court recognized that it is the trial court's responsibility to impose a lawful sentence in the first place, regardless whether another branch of the government might choose not to enforce an unlawful sentence. It is the trial court's duty to impose a sentence which meets the requirements of the SRA. By imposing a sentence which violated RCW 9.94A.505(5), the trial court imposes a sentence which is "invalid on its face" and must be set aside. Linerud, 147 Wn. App. at 950.

In addition, in Linerud, the Court noted the unacceptable risk created by the procedure it had set forth in Sloan. Because the language limiting the sentence actually served to the statutory maximum is

handwritten on the judgment and sentence, it can easily “be overlooked or get lost through repeated photocopying.” Linerud, 147 Wn. App. at 950. More troubling is the possibility that DOC will not, in fact, adjust the sentence to comply with the law. As Division One noted, there are numerous cases in which DOC has been found by courts to have ignored its duties or mandates. 147 Wn. App. at 951. For example, in In re Personal Restraint of Dutcher, 114 Wn. App. 755, 761-62, 60 P.3d 635 (2002), the DOC was statutorily required to evaluate an inmate’s plan for community custody but ignored that requirement based upon a policy it had created. In In re Personal Restraint of Mattson, 142 Wn. App. 130, 137-40, 177 P.3d 719 (2007), the DOC was statutorily required to allow sex offenders to transfer to community custody if they presented a suitable proposed release plan and residence, but ignored that requirement, again based upon its own policy to categorically deny the requests of certain offenders it deemed not appropriate for such release. And in In re Personal Restraint of Listrap, 127 Wn. App. 463, 472-74, 111 P.3d 1227 (2005), again, DOC refused to follow statutory requirements regarding the release of certain inmates, instead crafting a policy which deprived those inmates of the opportunities the Legislature chose to provide.

Based upon these precedents establishing DOC’s penchant for failing to comply with statutory requirements regarding release of inmates, the Linerud Court found it highly concerning that the procedure it had adopted in Sloan left the legality of the sentence a person served up to DOC’s willingness to properly amend the sentencing term. Linerud, 147 Wn. App. at 951. The Court concluded that the procedure it had set forth

in Sloan was simply insufficient and improper and its decision in Sloan should be overruled. Id.

Thus, the Court which decided Sloan has now recognized the limitation of its own reasoning and reached a different conclusion based upon an argument with which it was not presented in Sloan. This Court should not continue to follow a Division One precedent which Division One has itself abandoned as improper. This Court's decision in Vant, which did not consider how the procedure in Sloan improperly permitted imposition of an unauthorized indeterminate sentence and which did not consider the very serious issues of separation of powers and the risk that DOC will not, in fact, ensure that only lawful sentences are served, should be abandoned by this Court just as Division One has done with Sloan. Reversal and remand for imposition of a sentence which is actually within the statutory maximum for the offense is required.

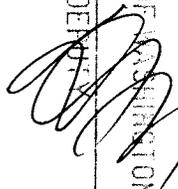
CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Steven D. Furtwangler, DOC 811565, Stafford Creek Corr. Center, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 16th day of March, 2009.


KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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