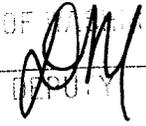


COURT OF APPEALS
DIVISION II

09 JUN 22 PM 2:00

STATE OF WASHINGTON
BY  DEPUTY

NO. 38779-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DARREN RONELL SMITH, JR., Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by finding that Mr. Smith “knew he had a duty to re-register his address within twenty-four hours of his release from custody but failed to do so.” CP 185.
2. The trial court erred by finding that Mr. Smith “knowingly” failed to comply with the registration statute. CP 185.
3. The trial court erred by finding that Mr. Smith was “in custody for his sex offenses” or “as a result of those sex offenses.” CP 185.
4. The trial court erred by convicting Mr. Smith of failure to register as a sex offender.
5. RCW 9A.44.130(4)(a)(i) is unconstitutionally vague as applied to the facts of this case because it does not give a reasonable person notice that his conduct violates the law.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 9A.44.130(4)(a)(i), defining the offense of failure to register, is vague as applied to the facts of this case--whether it requires re-registration where the offender is being released from incarceration due to a probation violation related to recent drug charges.

2. The State failed to prove Mr. Smith violated RCW 9A.44.130(4)(a)(i) where he was released from custody after incarceration due to a probation violation related to recent drug charges.

III. STATEMENT OF THE CASE

On February 8, 2008, police went to the house at 2002 Martin Luther King Way, Tacoma, to arrest the home's owner, Ezekiel Hampton. RP 86. While there, they found Darnell Smith sleeping in one of the bedrooms. RP 90. Believing Mr. Smith had an outstanding warrant, the officers placed Mr. Smith under arrest and, in the subsequent search of his person, found cocaine. RP 91.

Mr. Smith was charged with one count of failure to register as a sex offender and one count of unlawful possession of a controlled substance. CP 1.¹ The charges were bifurcated and Mr. Smith waived his right to jury trial on the failure to register charge, submitting to a bench trial. RP 12-13, CP 183-86. Following jury trial, Mr. Smith was convicted of unlawful possession of cocaine. RP 333. He was also

¹ Mr. Smith was acquitted on two other charges: unlawful possession of a firearm and unlawful possession of a controlled substance (marijuana). CP 2, RP 333.

convicted of failure to register. CP 183-86. He was sentenced within the standard range. CP 190-204. This appeal timely follows.

FACTS RELATING TO THE FAILURE TO REGISTER CHARGE:

Mr. Smith has one prior sex offense, a juvenile conviction for indecent liberties by forcible compulsion (cause #01-8-001139-9). CP 184. He has subsequently been convicted twice for failing to register (cause ##05-1-05025-1 and 07-1-02341-2). CP 184.

On November 27, 2007, Mr. Smith registered his address as 2002 Martin Luther King Way, Tacoma. CP 184.

On December 19, 2007, Mr. Smith submitted to a hearing for violating the terms of his release on the "Break the Cycle" program. CP 36. The hearing found three violations: failing to report to his CCO on November 26, consuming cocaine, and failing to comply with drug treatment. CP 36. Following this administrative hearing, Mr. Smith was sentenced to 60 days (dating back to his arrest on December 5). CP 36. The "Hearing and Decision Summary" lists five cause numbers on which Mr. Smith was serving community custody: #05-1-00393-8 (UPCS), #05-1-00681-3 (Failure to Register), #05-1-03480-9 (UDCS), #05-1-05025-1 (Custodial Assault), and #07-1-02341-2 (Failure to Register). CP 36, CP 20.

Mr. Smith was released from custody on January 25, 2008. CP 185. On February 8, 2008, he was arrested at the address he had registered: 2002 Martin Luther King Way, Tacoma. CP 185.

IV. ARGUMENT

ISSUE 1: RCW 9A.44.130(4)(A)(I), DEFINING THE OFFENSE OF FAILURE TO REGISTER, IS VAGUE AS APPLIED TO THE FACTS OF THIS CASE--WHETHER IT REQUIRES RE-REGISTRATION WHERE THE OFFENDER IS BEING RELEASED FROM INCARCERATION DUE TO A PROBATION VIOLATION RELATED TO RECENT DRUG CHARGES.

RCW 9A.44.130(4)(a)(i), the registration statute Mr. Smith was charged with violating, is unconstitutionally vague as applied to the facts of this case—where Mr. Smith was released from custody on a probation violation primarily related to drug charges, but where he was simultaneously in community custody on both sex and non-sex crime related charges. Mr. Smith could not reasonably understand under these circumstances that RCW 9A.44.130 required him to re-register. This issue was raised and argued below. CP 3-37, RP 5-10. The trial court denied Mr. Smith’s motion to dismiss the charges, finding that the statute was not unconstitutionally vague, based on *State v. Watson*, 160 Wn.2d 1, 154 P.3d 909 (2007). RP 10.

Due process requires that penal statutes be drawn with sufficient specificity so that persons of common understanding will be on notice of the activity prohibited by the statutes. *State v. Richmond*, 102 Wn.2d 242,

243, 683 P.2d 1093 (1984). The fundamental principal underlying the vagueness doctrine is that the Fourteenth Amendment requires citizens be afforded fair warning of proscribed conduct. *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992).

The constitutionality of a statute is a question of law that the courts review de novo. *State v. Shultz*, 138 Wn.2d 638, 643, 980 P.2d 1265 (1999). If the statute does not involve First Amendment rights, the courts evaluate the vagueness challenge by examining the statute as applied under the particular facts of the case. *Coria*, 120 Wn.2d at 163.

The challenger must show that either (1) the statute does not define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is proscribed, or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Coria*, 120 Wn.2d at 163.

The requirement of sufficient definiteness “protects individuals from being held criminally accountable for conduct which a person of ordinary intelligence could not reasonably understand to be prohibited.” *Coria*, 120 Wn.2d at 163. Accordingly, a statute is unconstitutional if it “forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application.” *Coria*, 120 Wn.2d at 163.

A law that is not vague on its face may nonetheless be vague as applied. *Bellevue v. Miller*, 85 Wash.2d 539, 541-42, 536 P.2d 603 (1975). The distinction between a vague-as-applied challenge and the contention of facial invalidity is explained in *Seattle v. Shepherd*, 93 Wn.2d 861, 865, 613 P.2d 1158 (1980):

A statute or ordinance is facially unconstitutional when its very language fails to adequately specify what activity is prohibited ... In such cases, the factual setting is irrelevant and courts will look to the face of the enactment to determine whether any conviction based thereon could be upheld.

A different analysis is employed where, as here, an ordinance is challenged as unconstitutionally vague as applied. In such cases, the factual setting of the case is critical.... Once the facts are ascertained, the court must determine whether the ordinance provides the defendant with “fair warning of the criminality of his own conduct,” ... and whether the statute presents the danger of an *ad hoc* determination of guilt resulting from inadequate statutory guidelines ...

(Citations omitted).

In this case, the statute carrying the unconstitutionally vague language is RCW 9A.44.130(4)(a)(i), which provides that:

Sex offenders who committed a sex offense on, before, or after February 28, 1990, and who, on or after July 28, 1991, ***are in custody, as a result of that offense***, . . . must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender.

(emphasis added).

The ambiguity in the statutory language makes it unconstitutionally vague as applied here and requires the application of the rule of lenity, construing the statute in the defendant's favor. *See State v. Martin*, 102 Wn.2d 300, 304, 684 P.2d 1290 (1984).

In *State v. Watson*, 160 Wn.2d 1, 12, 154 P.3d 909 (2007), the Court held that RCW 9A.44.130(4)(a)(i) was not vague as applied to the facts of that case—where Mr. Watson was released from incarceration, which was the result of violations of the terms of his release from custody on a sex offense.

But this case differs from *Watson* in one key respect. In *Watson*, the defendant's recent incarceration was clearly the result of a violation of the terms of his judgment and sentence in the sex offense.² The court reasoned that: "incarceration for probation violations 'relates back to the original conviction for which probation was granted.'" *Watson*, at 8, quoting *State v. Ellis*, 94 Wn.2d 489, 494 n. 3, 617 P.2d 993 (1980).

But how is a "reasonable person" to apply the "relate back" rule to this case? According to the court's findings, Mr. Smith was in custody "for violating the terms of his 'Breaking the Cycle' program," relating to his recent drug offense. CP 184. He was taken into custody for violating

² "In this case, that means that Watson's 60 days in custody for violation of his community custody conditions were a result of his sex offense, triggering the requirement that he reregister upon release." *Watson*, at 9.

this program in the following ways: “(1) Failing to report to his community Corrections Officer on 11-26-07; (2) Consuming cocaine on 11-26-07; and (3) Failing to comply with the BTC treatment on 11-29-07.” CP 36, 184. The “Hearing and Decision Summary” lists five cause numbers, apparently because Mr. Smith was on community custody simultaneously for all five.³ But, on the face of it, Mr. Smith’s custody “relates back” to his drug charge, the first cause number listed in the “Hearing and Decision Summary” because the grounds for violation relate to the BTC program—a drug diversion program. See CP 36. None of the facts relate specifically to the sex charge, only to the drug charge. The allegation report made by the CCO does not state which judgment and sentence was violated by Mr. Smith, only stating generally that: “According to the Judgment and Sentences listed above, the Court ordered Mr. Smith to complete 12 to 18 months of community custody.” CP 21-22. Further, there is nothing in this administrative violation paperwork that warns Mr. Smith that his release after the 60 day jail term would trigger his registration requirements. CP 19.

³ The “Hearing and Decision Summary” lists five cause numbers: #05-1-00393-8 (UPCS), #05-1-00681-3 (Failure to Register), #05-1-03480-9 (UDCS), #05-1-05025-1 (Custodial Assault), and #07-1-02341-2 (Failure to Register). CP 36, CP 20.

Under the facts of this case, neither Mr. Smith nor any other “reasonable person” would understand that he “was being released from incarceration that was due to violation of their probation for a sex offense,” triggering the re-registration requirement of RCW 9A.44.130(4)(a)(i). *See State v. Watson*, 160 Wn.2d at 12. Therefore, this statute is unconstitutionally vague as applied here and Mr. Smith’s conviction for failure to register must be reversed.

ISSUE 2: THE STATE FAILED TO PROVE MR. SMITH VIOLATED RCW 9A.44.130(4)(A)(I) WHERE HE WAS RELEASED FROM CUSTODY AFTER INCARCERATION DUE TO A PROBATION VIOLATION RELATED TO RECENT DRUG CHARGES.

In the alternative, if the court does not find that RCW 9A.44.130(4)(a)(i) is unconstitutionally vague, Mr. Smith’s conviction for failure to register should still be dismissed because the State failed to prove that Mr. Smith was “in custody as a result of [the sex] offense,” triggering the re-registration requirement.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a

reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Mr. Smith was charged with violating, RCW 9A.44.130(4)(a)(i), which provides that:

Sex offenders who committed a sex offense on, before, or after February 28, 1990, and who, on or after July 28, 1991, ***are in custody, as a result of that offense***, . . . must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender.

(emphasis added), CP 1.

In this case, even according to the trial court's findings, Mr. Smith was in custody "for violating the terms of his 'Breaking the Cycle' program." CP 184. There is no evidence that he had violated the terms of his release on a sex offense. When the court listed five offenses on the top of the Hearing Summary, this simply stated that Mr. Smith was on community custody on all simultaneously. There are no facts in the record to support a finding that Mr. Smith specifically violated the terms of his release on a sex offense and therefore there is insufficient evidence to support the court's finding that he was actually released from custody "for his felony sex offenses." CP 185. And, because Mr. Smith was actually residing at the address he had registered at the time of his arrest, there is no other evidence that he violated the registration statute. Therefore, Mr.

Smith's conviction for failure to register must be reversed for lack of evidence.

V. CONCLUSION

Mr. Smith's conviction for failing to register is unconstitutional because as applied to the facts of his case, a reasonable person would not know that he was required to re-register upon release from incarceration on probation violation related to drug charges. In the alternative, the conviction is not supported by sufficient evidence because the State failed to prove that Mr. Smith was incarcerated as a result of sex charges.

DATED: June 19, 2009

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CERTIFICATE OF SERVICE

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