

NO. 39424-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL VICK,

Appellant.

FILED  
 COURT OF APPEALS  
 DIVISION II  
 09 DEC 18 AM 11:33  
 STATE OF WASHINGTON  
 BY [Signature]  
 DEPUTY

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

APPELLANT'S OPENING BRIEF

JAN TRASEN  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

pm 12-11-09

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT ..... 1

B. ASSIGNMENTS OF ERROR..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

D. STATEMENT OF THE CASE..... 3

E. ARGUMENT ..... 7

    1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT MR. VICK’S CONVICTION FOR FAILURE TO REGISTER. .... 7

        a. Sufficient evidence must be presented to support each element of the crime charged. .... 7

        b. Mr. Vick’s arrival to register at 5:15 p.m. did not constitute a failure to comply with “normal business hours” pursuant to the statute. .... 9

        c. Even if Mr. Vick’s arrival at 5:15 p.m. was a violation of the registration statute, the State failed to prove that Mr. Vick acted knowingly when he was late to meet the detective..... 10

        d. Reversal and dismissal is the appropriate remedy.... 13

    2. RCW 9A.44.130(7) VIOLATES DUE PROCESS BY FAILING TO DEFINE OR GIVE PROPER NOTICE OF “NORMAL BUSINESS HOURS.” ..... 14

        a. The failure of the sex offender registration statute to give proper notice of “normal business hours” violates vagueness prohibitions. .... 14

        b. This Court must apply the rule of lenity where the statute is ambiguous. .... 16

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE .....	17
a. The trial court had the discretion to consider an exceptional sentence. ....	17
b. The court abused its discretion by failing to consider an exceptional sentence. ....	19
c. Mr. Vick's case must be remanded for resentencing.	21
F. CONCLUSION.....	21

TABLE OF AUTHORITIES

**Washington Supreme Court**

<u>City of Spokane v. Douglass</u> , 115 Wn.2d 171, 795 P.2d 693 (1990) .....	15
<u>MacKay v. MacKay</u> , 55 Wn.2d 344, 347 P.2d 1062 (1959) .....	20
<u>O'Day v. King County</u> , 109 Wn.2d 796, 749 P.2d 142 (1988).....	15
<u>Seattle v. Gellein</u> , 112 Wn.2d 58, 768 P.2d 470, 775 P.2d 448 (1989) .....	7
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971) .....	20
<u>State ex rel. Nielsen v. Superior Court</u> , 7 Wn.2d 562, 110 P.2d 645 (1941) .....	20
<u>State v. Ammons</u> , 136 Wn.2d 453, 963 P.2d 812 (1998) .....	16
<u>State v. Elliott</u> , 144 Wn.2d 6, 785 P.2d 440 (1990).....	20
<u>State v. Gore</u> , 101 Wn.2d 481, 681 P.2d 227 (1984).....	16
<u>State v. Grayson</u> , 154 Wn.2d 333, 111 P.3d 1183 (2005) .....	20
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	7
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	13
<u>State v. Hornaday</u> , 105 Wn.2d 120, 713 P.2d 71 (1986) .....	16
<u>State v. Porter</u> , 133 Wn.2d 177, 942 P.2d 974 (1997).....	20
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	8
<u>State v. Thomas</u> , 150 Wn.2d 666, 80 P.3d 168 (2003).....	16

### Washington Court of Appeals

<u>Mark v. Williams</u> , 45 Wn. App. 182, 724 P.2d 428 (1986) .....	9
<u>State v. Castillo</u> , 144 Wn. App. 584, 183 P.3d 355 (2008) .....	11, 12
<u>State v. Garcia-Martinez</u> , 88 Wn. App. 322, 944 P.2d 1104 (1997). .....	20
<u>State v. Knowles</u> , 46 Wn. App. 426, 730 P.2d 738 (1986).....	16
<u>State v. Lee</u> , 96 Wn. App. 336, 979 P.2d 458 (1999) .....	16
<u>State v. Vanderpool</u> , 99 Wn. App. 709, 995 P.2d 104 (2000).....	12

### United States Supreme Court

<u>Giacco v. Pennsylvania</u> , 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966) .....	14
<u>Grayned v. City of Rockford</u> , 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).....	14
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	7
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) .....	7
<u>Kolender v. Lawson</u> , 461 U.S. 352, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983) .....	15
<u>Smith v. Goguen</u> , 415 U.S. 574, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973) .....	14

### United States Constitution

Fourteenth Amendment .....	15
----------------------------	----

**Statutes**

RCW 9.94A.535(1)(b). ..... 18  
RCW 9.94A.535(1)..... 17  
RCW 9A.44.130(7)..... 17  
RCW 9A.44.130(7)..... 15  
RCW 9A.08.010 ..... 11

**Other Authorities**

Laws of 1990, ch. 3, § 401 ..... 9, 18

**A. SUMMARY OF ARGUMENT**

Mr. Vick's right to receive a fair trial was violated where the State failed to prove that he knowingly failed to register as a sex offender, when his good faith efforts to comply with the statute indicate that he was not knowingly out of compliance with his obligations.

**B. ASSIGNMENTS OF ERROR**

1. The State presented insufficient evidence to convict Mr. Vick of failure to register as a sex offender.

2. The sex offender registration statute violates due process vagueness prohibitions, in its failure to give adequate notice of "normal business hours."

3. The trial court abused its discretion when it failed to consider an exceptional sentence below the standard range.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. To prove the element of knowledge for the crime of failure to register as a sex offender, the State must prove beyond a reasonable doubt that the defendant knowingly failed to register as a sex offender. Here, circumstances beyond Mr. Vick's control interfered with his compliance, although his behavior and actions demonstrated his intent to comply with the statute. Did the State fail

to prove he knowingly failed to register beyond a reasonable doubt, requiring reversal and dismissal? (Assignment of Error 1)

2. The sex offender registration statutes require a personal appearance at the county sheriff's office on a day specified, during "normal business hours." Since the concept of "normal business hours" varies widely by occupation, this term is unacceptably vague and provides inadequate notice, particularly where, as here, the sheriff was on duty until 6 p.m. that night in another part of the building. Is the sex offender registration statute thus void for vagueness as applied to Mr. Vick? (Assignment of Error 2)

3. The rule of lenity dictates that any ambiguities in the statute should have been construed liberally in favor of Mr. Vick. Here, where Mr. Vick appeared at the courthouse to register at a time when the sheriff was still working, but was not summoned by security staff, was it error to find that Mr. Vick was not reporting within "normal business hours" under the statute? (Assignment of Error 2)

4. When a court finds mitigating circumstances are established by a preponderance of the evidence, it may impose an exceptional sentence below the standard range. Must the sentence be vacated where the trial court abused its discretion by

failing to consider mitigating factors that would have permitted the court to impose a sentence below the standard range?

(Assignment of Error 3)

D. STATEMENT OF THE CASE

Michael Vick was aware that he had certain obligations as a Level II sex offender, and he was compliant with his obligations. RP 33-36.<sup>1</sup> He registered every 90 days with a detective at the local courthouse and attended a sex offender treatment program located conveniently near the same courthouse, in order to save transportation costs. RP 35-36. He maintained a fixed address and was making ends meet by doing odd jobs at the trailer park where he lived with his girlfriend. RP 16, 51, 53.

On September 16, 2008, the date he was required to register with the local authorities, Mr. Vick left his home with sufficient time to complete his registration obligations before attending his treatment program near the courthouse. RP 35-36, 54. According to the notification form Mr. Vick had received at his June appointment, he was required to register during “normal business hours” on September 16, 2008. RP 15; Ex. 2. Since Mr.

Vick had decided to combine his registration appointment with his evening treatment program, he left home at 4 p.m. RP 35-36, 54.

Unfortunately, Mr. Vick realized that his truck had a flat tire a few minutes from his home. RP 37. He walked two blocks to the local market, and since he had just enough change to make one call at the market's pay phone, he called the manager of the trailer park where he lived, whose number he had memorized.<sup>2</sup> RP 37.

The manager, Donald Burgess, who verified at trial that he had received this call from Mr. Vick, could not leave his post at the trailer park in the middle of the afternoon. RP 51. Soon, however, another friend came along, noticed Mr. Vick's distress, and helped him fix the tire. RP 38, 55. When this friend needed to leave for work, he sent his son back with the repaired tire, and Mr. Vick was finally able to depart for the courthouse as he had originally intended. RP 38, 55. By the time Mr. Vick was able to get back on the road, however, he was fifteen minutes late for his appointment,

---

<sup>1</sup> The verbatim report of proceedings consists of one transcript from April 20, 2009, and will be referred to as "RP." References to the file will be referred to as "CP." The sentencing hearing was conducted on June 10, 2009, and will be referred to as "2RP."

<sup>2</sup> Mr. Vick's cell phone had no minutes remaining, so he was unable to summon help from the roadside. RP 37. Mr. Vick testified that he had misplaced the detective's number, so he used the money he had to call the only person he knew who might help him reach his registration appointment on time. RP 39.

and he was informed by the security guards in the courthouse lobby that the detective had gone for the day. RP 39, 55-57.

Mr. Vick called the detective early the next morning to explain what had happened with his flat tire and left a message. RP 40. He received an immediate call back from the detective, who told him to come to the courthouse right away. RP 40. He arrived in less than an hour, and explained everything that had happened to him the day before. RP 40.

Despite his best efforts to comply with his registration obligations, Mr. Vick was prosecuted for knowingly failing to register as a sex offender. CP 60-62.

At trial, Mr. Vick testified to his efforts at compliance, including his decision to combine his trips to town for the registration and the sex offender course to save transportation costs. RP 33-48. He also discussed how important it is to register, and his methods for helping himself to remember, such as circling the dates on his calendar, and keeping the registration notice near his "pay board" where he hangs his keys. RP 34. Mr. Vick's girlfriend, Sandra Schoon, and Donald Burgess both testified, verifying the timing of the flat tire incident. RP 51-57.

Detective Borden testified for the State that he had departed from the training room area of the courthouse at 5 p.m. on September 16, 2008. RP 21. He noted, however, that he had remained working at his office until approximately 6 p.m. that evening; thus, he was still at the courthouse when Mr. Vick had arrived at 5:15 p.m. RP 20. The detective also stated that Mr. Vick would have needed to obtain the assistance of security guards in order to contact him after 5 p.m. RP 21-22.<sup>3</sup> Detective Borden testified that Mr. Vick had, indeed, called at 7:50 a.m. the morning after the missed appointment, and had appeared in his office, as instructed, in less than an hour. RP 23, 24.

Regardless of Mr. Vick's efforts to comply, the jury convicted him of knowing failure to register as a sex offender. CP 30.

Following Mr. Vick's conviction, the trial court allowed Mr. Vick to remain at liberty for almost two months, pending sentencing. RP 98. During this time, he continued with his registration and his parole obligations. 2RP 6.

---

<sup>3</sup> The State also called a courthouse security guard, Kristen Allen, to verify that Mr. Vick had appeared on September 16, 2008 at 5:15 p.m. or 5:20 p.m. as he had claimed, but she was not able to recall that date with any certainty, stating, "No. I'm not going to say he was or wasn't." RP 64.

On June 10, 2009, Mr. Vick appeared for sentencing, and his counsel filed a motion for imposition of an exceptional sentence below the standard range. CP 28-29; 2RP 2. Despite Mr. Vick's substantial compliance with the statute, the trial court stated, "I don't have a lot of discretion. I'm not allowed to ignore the statute and ignore the will of the Legislature..." 2RP 7.

The court sentenced Mr. Vick to 14 months incarceration. 2RP 8. Mr. Vick appeals. CP 1-14.

#### E. ARGUMENT

##### 1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT MR. VICK'S CONVICTION FOR FAILURE TO REGISTER.

a. Sufficient evidence must be presented to support each element of the crime charged. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Seattle v. Gellein, 112 Wn.2d 58, 62, 768 P.2d 470 (1989).<sup>4</sup> When the sufficiency of the evidence is challenged,

---

<sup>4</sup> On a challenge to the sufficiency of the evidence, this Court must decide whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all of the essential elements of failure to register as a sex offender beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Id.

To convict Mr. Vick of failure to register as a sex offender, the State was required to prove that he knowingly failed to comply with the requirement that he register in person with the sheriff. RCW 9A.44.130(7)(a). The sex offender registration statute provides, in relevant part:

(1)(a) Any adult or juvenile residing whether or not the person has a fixed residence ... in this state who has been found to have committed or has been convicted of any sex offense ... shall register with the county sheriff for the county of the person's residence...

(7) All offenders who are required to register pursuant to this section ... must report every ninety days, in person, to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff's office, and shall be during normal business hours ...

(11)(a) A person who knowingly fails to comply with any of the requirements of this section is guilty of a class C felony if the crime for which the individual was convicted was a felony sex offense as defined in subsection (10)(a) of this section...

RCW 9A.44.130 (emphasis added). The purpose of the sex offender registration statute is to assist law enforcement agencies'

efforts to protect their communities against reoffense by convicted sex offenders. Laws of 1990, ch. 3, § 401. It is that purpose which guides our interpretation and application of the statute.

b. Mr. Vick's arrival to register at 5:15 p.m. did not constitute a failure to comply with "normal business hours," pursuant to the statute. What specific business hours are considered "normal" is an issue defined and interpreted through caselaw. For example, in Mark v. Williams, the appellant challenged a search warrant which had been executed against his pharmacy. 45 Wn. App. 182, 188, 724 P.2d 428 (1986). The warrant was required to be served during "normal business hours," which were from 10 a.m. to 6 p.m., but the warrant was served at 6:20 p.m. 45 Wn. App. at 188. The court upheld the validity of the warrant, simultaneously finding not only 6 p.m. – but also 6:20 p.m. – to be "normal business hours." Mark v. Williams, 45 Wn. App. at 188.

In the instant matter, the sheriff's representative, Detective Borden, was working until 6 p.m. on September 16, 2008, keeping similar business hours to the appellant in Mark v. Williams, 45 Wn. App. at 188; RP 21-22. The detective's true working hours seem to be inconsistent with the "normal business hours" enforced on Mr. Vick. Likewise, Mr. Vick's time of appearance at the courthouse at

5:15 p.m. (fifteen minutes after “closing”), is almost identical to the timing of the search warrant in Mark v. Williams at 6:20 p.m., which was upheld by the court. 45 Wn. App. at 188.

At trial, the detective was asked by defense counsel what occurred after he left his post in the training room at 5 p.m. to return to his office in another part of the courthouse until 6 p.m.:

Q: At 5:00, I assume you closed the doors to the training room?

A: Yes.

Q: How would my client know you were still there?

A: I'm not sure he would know.

RP 30 (emphasis added). Mr. Vick's 5:15 p.m. appearance at the courthouse on September 16, 2008 was not a violation of his registration requirements; he was simply given incorrect information by the security guards, who informed him at 5:15 p.m. that the detective had gone for the day. RP 39. Any violation, which is not conceded, was de minimus.

c. Even if Mr. Vick's arrival at 5:15 p.m. was a violation of the registration statute, the State failed to prove that Mr. Vick acted knowingly when he was late arriving to meet the detective. Under RCW 9A.44.130(11)(a), a person violates the sex

offender registration statute if he knowingly fails to comply with the requirements of the statute. Assuming without conceding that Mr. Vick did fail to comply, the evidence shows that he did so unknowingly.

The law requires that the defendant “knowingly” fail to register. Under RCW 9A.08.010(1)(b), a person knows or acts knowingly or with knowledge when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

The testimony at trial showed that Mr. Vick knew his reporting obligations on September 16, 2008. He explained that he circles the date on his calendar and posts his registration notice on the “pay board” right next to his keys. RP 34. The undisputed testimony concerning the flat tire which caused his tardiness was supported by three witnesses and established he did not knowingly violate the statute. RP 37-38, 51-57.

Mr. Vick’s case is unlike State v. Castillo, where the Court of Appeals found sufficient evidence that the defendant had knowingly changed his residence and failed to properly register.

144 Wn. App. 584, 590, 183 P.3d 355 (2008). There, the State presented convincing evidence that the defendant had knowingly failed to register, based on his prior history of proper registrations, both with a fixed address and as a transient. Id. at 589-90.

Likewise, in State v. Vanderpool, where the defendant argued that he did not knowingly violate the registration requirements because he could not understand them, the Court of Appeals inferred the requisite knowledge from the defendant's prior registrations as well as testimony from authorities who had explained the relevant portions of the statute to him. 99 Wn. App. 709, 713-14, 995 P.2d 104 (2000).

These situations may be distinguished from Mr. Vick's conduct, where his failure to register was not based upon any subterfuge, attempt at deception, or even a claimed failure to understand -- but upon a simple failure of machinery.

Mr. Vick's behavior, before and since September 16, 2008, provides valuable context for his assertion that he was not knowingly in violation of the statute. Other than his apparent tardiness on this particular date, due to circumstances beyond his control, he was in full compliance with his obligations, and had never missed appointments, treatment sessions, parole

appointments, or had any other trouble with supervision. 2RP 6.

Mr. Vick's lack of knowledge was clear from his statement at sentencing:

I just – the finding of this is just really baffling me. I mean I had a – I had a flat tire on my vehicle and I was 15 minutes late. I haven't missed an appointment since then. My parole officer put me on weekly check-ins on the kiosk. I've made every day since then now that I'm employed. I've been going through therapy so I can be more employed to be able to do more work, and I'm just finishing up on that. Things happen.

2RP 6. Because the State did not and could not prove that Mr. Vick acted knowingly, the court erred in convicting Mr. Vick of the offense.

d. Reversal and dismissal is the appropriate remedy.

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt that Mr. Vick knowingly failed to register as a sex offender on September 16, 2008, the judgment may not stand. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). This Court should reverse Mr. Vick's conviction and dismiss the charge against him.

2. RCW 9A.44.130(7) VIOLATES DUE PROCESS BY FAILING TO DEFINE OR GIVE PROPER NOTICE OF "NORMAL BUSINESS HOURS."

a. The failure of the sex offender registration statute to give proper notice of "normal business hours" violates vagueness prohibitions. The vagueness doctrine of the due process clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Id. at 108-09. A "statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites "unfettered latitude" in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973); Giacco v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The vagueness doctrine is most concerned with ensuring the existence of minimal guidelines to govern enforcement. Kolender v. Lawson, 461 U.S. 352, 358, 75

L.Ed.2d 903, 103 S.Ct. 1855 (1983); O'Day v. King County, 109 Wn.2d 796, 810, 749 P.2d 142 (1988).

The due process clause of the Fourteenth Amendment requires that citizens be afforded a fair warning of proscribed conduct. Persons alleging that a statute is unconstitutionally vague must prove that the statute either: (1) fails to sufficiently define the offense so that people of “common intelligence can understand what conduct is proscribed, or (2) fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). Because persons of common intelligence cannot agree on what “normal business hours would be, depending on the nature and location of the business, the statute is necessarily vague.

Here, the sex offender registration statute does not define or give notice of the specific requirements for registration beyond “normal business hours.” RCW 9A.44.130(7). Since the concept of “normal business hours” varies widely by occupation and demographics, this term is unacceptably vague and provides inadequate notice. Here, the detective was actually on duty until 6 p.m. that evening. RP 20-21. However, when Mr. Vick arrived to register, the detective was not summoned to the courthouse lobby,

but Mr. Vick was simply told to go home because it was after 5 p.m.  
RP 39, 55-57.

The failure of the sex offender registration statute to specifically define “normal business hours” thus violates due process vagueness prohibitions.

b. This Court must apply the rule of lenity where the statute is ambiguous. Where a criminal statute is ambiguous, the rule of lenity requires courts to construe the statute liberally in favor of the accused and against the State. See, e.g., State v. Hornaday, 105 Wn.2d 120, 127, 713 P.2d 71 (1986); State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). The policy behind the rule of lenity is to place the burden squarely upon the Legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are. State v. Knowles, 46 Wn. App. 426, 432, 730 P.2d 738 (1986).

A statute is ambiguous, and therefore subject to the rule of lenity, if it is susceptible to two or more reasonable interpretations. State v. Lee, 96 Wn. App. 336, 341, 979 P.2d 458 (1999). The meaning of a statute is a question of law reviewed de novo. State v. Thomas, 150 Wn.2d 666, 670, 80 P.3d 168 (2003) (citing State v. Ammons, 136 Wn.2d 453, 456, 963 P.2d 812 (1998)).

RCW 9A.44.130(7) states that sex offender registration must be conducted in person. It further requires a specific date, and then requires it occur during “normal business hours.” RCW 9A.44.130(7).

If the Legislature intends that “normal working hours,” indeed, be considered 8 a.m. until 5 p.m., it must clearly and unequivocally say so. The current wording of the statute does not clearly warn individuals of the guidelines they must follow in order to stay in compliance with the registration statute. Applying the rule of lenity, this Court must construe the statute in Mr. Vick’s favor, and find that his arrival at 5:15 p.m. was within “normal business hours,” under the meaning of the statute.

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE.

a. The trial court had the discretion to consider an exceptional sentence. When a court finds mitigating circumstances are established by a preponderance of the evidence, a court may impose an exceptional sentence below the standard range. RCW 9.94A.535(1). One of the mitigating factors a court may consider, for example, is whether “before detection, the defendant compensated, or attempted to compensate, the victim of the

criminal conduct for any damage or injury sustained.” RCW 9.94A.535(1)(b). The principle of this mitigating factor would justify an exceptional downward sentence here, had the court only exercised the discretion with which it was empowered.

Here, although there was no victim, per se, appellant’s behavior “before detection” clearly indicates that he attempted to substantially comply with his statutory obligations, even before he knew that charges would be filed against him. As failure to register is a victimless crime, it is appropriate to examine the purpose of the sex offender registration statute, which was enacted to assist law enforcement agencies’ efforts to protect their communities against reoffense by convicted sex offenders. RCW 9A.44.130; Laws of 1990, ch. 3, § 401.

Mr. Vick’s tardiness on September 16, 2008 did not frustrate the goals of law enforcement; nor did Mr. Vick’s tardiness put anyone at risk. Once his flat tire was repaired, Mr. Vick reported to the courthouse as quickly as he could, and he still managed to arrive by 5:15 p.m. that afternoon. RP 39. He then called early the next morning and reported to the courthouse within an hour, exactly as he was instructed by the detective. RP 40. It is difficult to imagine how much more available Mr. Vick could have made

himself to law enforcement, short of staying at the courthouse overnight, waiting for the detective to return for the morning shift. Although there was no victim here, the mitigation principle applies; Mr. Vick did everything he could to mitigate the circumstances and to further the purposes of the registration statute.

Mr. Vick testified that both before and after the incident on September 16, 2008, he continued to register with the sheriff's department and attend all of his required sex offender therapy appointments. 2RP 6. Mr. Vick's substantial compliance was undisputed by the State's sole witness, Detective Borden, who agreed that Mr. Vick had been truthful and honest in their conversations. RP 12-26.

b. The court abused its discretion by failing to consider an exceptional sentence. Despite the fact that Mr. Vick was in substantial compliance with the registration statute, the trial court failed to properly consider defense counsel's motion for imposition of an exceptional sentence below the standard range. CP 28-29; 2RP 6.

When this motion was argued, the trial court responded,

I don't have a lot of discretion. I'm not allowed to ignore the statute and ignore the will of the Legislature, regardless of what I personally think about the changes that the

Legislature made. And we're not even going to go into those ... as a matter of law, by statute, there really aren't any of the factors that would justify me in going below standard range as far as a sentence is concerned.

2RP 7. By its apparent belief that it didn't have the authority to consider an exceptional sentence, the trial court erred. In essence, the court abused its discretion in its misperception that it had none.

Failure to exercise discretion is an abuse of discretion.

State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). This Court may reverse a sentencing court's decision if it finds a clear abuse of discretion or misapplication of the law. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (citing State v. Elliott, 144 Wn.2d 6, 17, 785 P.2d 440 (1990)).

When a trial court's exercise of its discretion is "manifestly unreasonable or exercised on untenable grounds, or for untenable reasons," an abuse of discretion exists. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).

c. Mr. Vick's case must be remanded for resentencing. The trial court abused its discretion in failing to consider an exceptional sentence below the standard range. Therefore, the sentence must be remanded for resentencing.

F. CONCLUSION.

For the foregoing reasons, Mr. Vick respectfully requests this Court reverse his conviction and remand the case for further proceedings, or in the alternative reverse his sentence and remand for resentencing.

DATED this 17<sup>th</sup> day of December, 2009.

Respectfully submitted,



JAN TRASEN (WSBA 41177)  
Washington Appellate Project (91052)  
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 39424-3-II
v.	)	
	)	
MICHAEL VICK,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] LORI SMITH, DPA LEWIS COUNTY PROSECUTING ATTORNEY 345 W MAIN ST FL 2 CHEHALIS, WA 98532	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] MICHAEL VICK 899529 CEDAR CREEK CORRECTIONS CENTER PO BOX 37 LITTLE ROCK, WA 98556-0037	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF DECEMBER, 2009.

X \_\_\_\_\_ *[Signature]*

FILED  
COURT OF APPEALS  
DIVISION II  
09 DEC 18 AM 11:33  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710