

No. 40422-2-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL EDWARD CATON

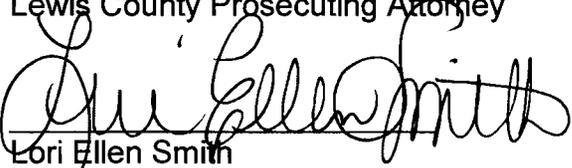
Appellant.

Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

MICHAEL GOLDEN
Lewis County Prosecuting Attorney

By:


Lori Ellen Smith
Deputy Prosecuting Attorney
WSBA No. 27961

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II

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STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal (without waiving the right to challenge Appellant's version of the facts at oral argument or in any other arguments in this case).

ARGUMENT

A. SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT CATON'S CONVICTION FOR FAILURE TO REGISTER AS A SEX OFFENDER.

Caton claims there was insufficient evidence presented to support his conviction for failure to register as a sex offender every ninety days. This argument is without merit.

When reviewing a claim of insufficient evidence, the appellate court examines whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Drum, 168 Wash.2d 23, 34-35, 225 P.3d 237 (2010). An appellant challenging the sufficiency of evidence necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. Drum, 168 Wash.2d at 35. Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. State v.

Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Thomas, 150 Wash.2d 821, 874-75, 83 P.3d 970 (2004).

In the present case, Caton was charged with violating former RCW 9A.44.120(7), which required Caton to register "every ninety days to the sheriff of the country where he or she is registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. Id. Here, Caton registered with the Lewis County Sheriff's Office (Detective Brad Borden) on May 19th, 2009. RP 59, 60. Detective Borden told Caton he had to come back in to register again on June 16, 2009, and Caton signed the form requiring him to report again on June 16, 2009. RP 60, 61. With regard to the fact that this date was not "90 days" later, Detective Borden explained as follows:

DETECTIVE BORDEN: We don't set the individual dates. It would be very chaotic. We have all the level II and III report on one day, so we catch them up if they have shown up in the mid circle [sic].

PROSECUTOR: So there are four pre-designated days a year?

DETECTIVE BORDEN: Yes, there are.

PROSECUTOR: One in March, June, September and December?

DETECTIVE BORDEN: Yes.

PROSECUTOR: On June 16, 2009, did Mr. Caton appear at the Sheriff's Office as required?

DETECTIVE BORDEN: No, he did not.

RP 61.

This testimony shows that Caton did not report when he was told to, and that Caton had notice to report on the stated date RP 60. The sheriff's office is allowed to set up a system of orderly reporting dates *within the 90-day reporting period* for sex offenders to report so that the sheriff's office does not have sex offenders walking in every day, "willy nilly," trying to find Detective Borden in order to register. County sheriff actions of standardizing reporting dates will not be invalidated unless they are arbitrary and capricious. State v. MacKenzie, 114 Wn.App. 687, 696-96, 60 P.3d 607 (2002). Here Caton has not shown that the dates set up by the sheriff's officer were arbitrary and capricious.

In sum, the record shows there was sufficient evidence presented to support Caton's conviction for failure to register as a sex offender under RCW 9A.44.130(7). Furthermore, Caton cites no on-point caselaw or rule in support of his argument that the evidence presented here was insufficient to support the conviction.

B. THERE IS NO "DUE PROCESS" VIOLATION.

Caton also argues that the sheriff's office setting of the June 16th, 2009 reporting date violated his right to notice and due process.

As in his previous argument, Caton continually grouses about the sheriff's office setting reporting dates earlier than ninety days and that such notice "is not the type of notice envisioned by the due process clause which would inform a person of average intelligence just what conduct constitutes a crime." Brief of Appellant 10. And, as in the previous argument, Caton cites no authority stating that setting reporting dates earlier than every ninety days violates a sex offender's "due process" rights. Caton's argument also ignores the fact that he was expressly given "notice" of what was expected of him and what was expected of him was that he report to the sheriff's office on June 16, 2009--Caton himself signed the form with this date listed on the form. RP 59,60. After missing his reporting date of June 16, 2009, Caton himself told Detective Borden that he had a copy of the form Detective Borden had given him telling him to report on June 16, 2009. RP 62. Thus, Caton's "no notice" argument is neither well-reasoned nor supported by on-point authority. As such, this Court should not

consider it. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." State v. Collins 152 Wash.App. 429, 440, 216 P.3d 463 (2009), n. 27, citing Palmer v. Jensen, 81 Wash.App. 148, 913 P.2d 413 (1996); RAP 10.3(a)(6). This Court should affirm.

C. THERE IS NO "EQUAL PROTECTION" VIOLATION.

Once again, without citing any on-point law, Caton also claims that the sheriff's office setting of reporting dates earlier than 90 days violates his right to "equal protection." This Court should not consider this argument because it is neither well-reasoned or supported by on-point authority from Washington or any other jurisdiction. See State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (refusing to consider issues raised without citation to authority). Additionally, this Court is "not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Logan, 102 Wn.App. 907, 911 n. 1, 10 P.3d 504 (2000) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). Furthermore, this sex offender registration statute has survived an "arbitrary-enforcement/ equal protection" challenge in the past. See e.g State v. Ward 123 Wash.2d 488, 516-517, 869 P.2d 1062, 1077 (1994)(system of

deadlines for certain sex offenders to register does not violate equal protection). This Court should affirm.

D. THERE IS NO "SEPARATION OF POWERS" VIOLATION.

Caton also argues that the sheriff's system of setting dates for sex offenders to report like it did in this case constituted an "arbitrarily set date" and "violated the separation of powers doctrine and constituted an improper delegation of authority." Brief of Appellant 15. Once again, Caton cites no on-point authority for this argument.

Instead, Caton cites State v. Ramos, 149 Wn. App. 266, 202 P.3d 383 (2009), but--as Caton does point out-- Ramos involved setting the *classification levels* of sex offenders, not the sheriff's office's "report-date-setting" for sex offenders. Ramos, supra. The State fails to see how the report date set by Detective Borden in this state is analogous to the subject matter discussed in Ramos. Furthermore, the Legislature clearly states in the statute that the reporting date "shall be on a day specified by the country sheriff's office, and shall occur during normal business hours." RCW 9A.44.130(7). That was done in this case. RP 60-62. This Court should accordingly affirm.

E. THERE IS NO CONFRONTATION CLAUSE VIOLATION.

Caton also claims a confrontation clause violation when Detective Borden testified that both he and the end of sentence review board classified Caton as a "level II" sex offender. RP 57-60. This argument should not be convincing to this Court.

Caton cites Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), in the main, for this argument. However, there is absolutely no indication that the report from the "end of sentence review board" which classified Caton as a "level II" sex offender is "testimonial" as contemplated by either Crawford or Melendez-Diaz. If the report from the end of sentence review board is not "testimonial" then there is no confrontation clause violation and the records relied upon are mere "business records" --just as the trial court ruled in this case.

Furthermore, Detective Borden, after Ramos, supra., had to base his classification of Caton on something besides his own determination, and in this case it was on the end of sentence review board (DOC's) classification of the offender when Caton was released. RP 57. Borden got this information first hand from the

DOC. Detective Borden said that he consulted the "sex offender registration file for Mr. Caton" which contains "the end of sentence review committee alert documentation that's provided to me by the Department of Corrections." RP 63,64. Detective Borden explained that the "end of sentence review committee report" is "generated by the end of sentence review committee and is provided through the Department of Corrections." RP 65.

Detective Borden went on:

that committee provides a synopsis of the details concerning the individual. Also they use a risk assessment tool. At the time that the risk assessment was done for Mr. Caton, it was the Washington State Sex Offender Risk Assessment tool. . . . The tool has numeric value. Anything over a certain set number would increase the individual's risk level and/or if the committee decides that individual is going to be a risk level I, II or III that deals with community notification. On Mr. Caton, they had elevated him to a level II, based upon his past criminal behavior.

RP 65,66. When Caton's counsel again objected that "Exhibit 1" was "based on some other documentation to indicate risk level II and that that should be a prerequisite foundational requirement, prior to the admission of that document," the trial court stated:

Detective Borden is the sex offender registration department of the Lewis County Sheriff's office. He's testified that he's charged with the responsibility of enforcing the sex offender registration statute. He has in his possession information that classifies somebody in Mr. Caton's position at a particular level. Why would he not be entitled to use that information in filling out the forms and why would it render

the document inadmissible, based upon hearsay if in fact he used that information?

RP 68. The trial court ultimately ruled that Exhibit 1 was a "business record" kept by the Sheriff's Department (and the classification level was listed on that record) and was thus properly admitted. RP 68. The trial court's ruling was correct and this court should affirm.

Even if this could be seen as a "confrontation clause" violation and further assuming it was error to allow this evidence without having someone from DOC testify, any error should be harmless. A confrontation clause violation is subject to harmless error analysis. State v. Flores 164 Wash.2d 1, 18-19, 186 P.3d 1038 (2008), citing State v. Watt, 160 Wash.2d 626, 635, 160 P.3d 640 (2007). In evaluating whether the error is harmless, this court applies the " 'overwhelming untainted evidence' " test. State v. Davis, 154 Wash.2d 291, 305, 111 P.3d 844 (2005). Under that test, when the properly admitted evidence is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id.*

In the present case, the method relied upon by Detective Borden was essentially the same method of classifying the offender as was approved in State v. Brosius, 154 Wn.App. 714, 225 P.3d 1049 (2010). Furthermore, even if the State had put on someone

from DOC or the end of sentence review board and had that entity explain in all of the "ER 404B-gory-detail," (because the risk classification necessarily contains such "bad acts" detail) the State ventures a guess that it would be right here again being accused of bringing improper, highly prejudicial "ER 404b" evidence before the jury or the judge.

In other words, the State can't "win" in the way it tries to present evidence to prove failure to register as a sex offender cases. If it relies on business documents, it is a "confrontation clause" violation, but if it relies upon live testimony about the reasons (evidence of prior "bad acts") for that classification, the State would be accused of some prejudicial, reversible error of "constitutional magnitude" that a new trial is required, or even a dismissal is warranted. In this case, Caton stipulated to his prior triggering offenses--and he also admitted he was given the next report date but he did not show up. Given Caton's stipulation to his prior predicate convictions, there really doesn't seem to be much doubt about his risk classification. Any error should be found harmless and this court should affirm.

CONCLUSION

For the foregoing reasons, this Court should affirm. In the alternative, if this Court finds reversible error, this case should be remanded for a new trial.

RESPECTFULLY SUBMITTED this 18th day of November, 2010.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR

by:

Lori Smith

LORI SMITH, WSBA 27961
Deputy Prosecutor

Declaration of Service

The undersigned certifies that a copy of the document to which this certificate is attached was served upon the Appellant by U.S. mail, addressed to Appellant's Attorney as follows:

Anne Cruser
P.O. Box 1670
Kalama, WA 98625

Dated this 22nd day of November, 2010, at Chehalis, Washington.

Lori Smith
