

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 41943-2-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL J. ERWIN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF MASON COUNTY

Before the Honorable Amber Finlay, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove that appellant Michael Erwin no longer resided at his registered address or that he lacked a fixed residence.

2. Mr. Erwin'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 where the prosecution failed to present sufficient evidence to prove all essential elements of the offense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Erwin registered his address as a house at 43 NE Belfair Street, Belfair, Washington, with the Mason County Sheriff's Office. The testimony presented at trial was that he received governmental mail at that address and responded to an official request for address verification form mailed to him at the address by the Mason County Sheriff's Office. Where there was no evidence that Mr. Erwin abandoned his registered residence and where there was evidence that he received mail there, was the evidence insufficient to prove that he did not have a "fixed address," that he was required to notify the sheriff that he had changed his address, that he failed to report on a weekly basis as a transient, or that he was required to fill out a list of locations at which he stayed during the previous week? Assignment of Error No. 1.

2. A person is not a transient under the statute unless that person has 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. Erwin was registered at the address, received his mail at the residence, and responded to an address verification form mailed to him at the address by a member of the sheriff’s office. Given the evidence that the address was his “fixed residence” under the statute, did the State present sufficient evidence that he did not have a “fixed residence,” that he failed to register as a transient, failed to report on weekly basis as a transient, or failed to fill out a list of his locations during the previous week when he reported to the sheriff’s office? Assignment of Error No. 2.

C. STATEMENT OF THE CASE

Appellant Michael Erwin was required to register as a sex offender in Mason County, Washington. 3Report of Proceedings [RP] at 81.¹ A Level

¹The record of proceedings consists of three volumes:
1RP—December 1, 2, 2010, first jury trial and suppression hearing;
2RP—Pre-trial hearings; and
3RP—March 3, March 11, 2011, second jury trial, March 14, 2011, sentencing.

II or Level III sex offender with a fixed address must report to the sheriff's office once a year, and the sheriff's office verifies the registered sex offender's (RSO) fixed address on a quarterly basis. 3RP at 244, 258. Transient RSOs must report to the sheriff's office on a weekly basis, 3RP at 258. For three years Mr. Erwin was registered as a transient and reported on a weekly basis to the sheriff's office in Mason County. 3RP at 269.

On November 20, 2009, Mr. Erwin notified the sheriff's office of a change of address from transient status to a fixed address located at 43 NE Belfair Street, in Belfair, Washington. 3RP at 261.

Mason County Deputy Sheriff Thurman Rankin contacts Level II and Level III RSOs in Mason County every ninety days. 3RP at 244. He went to the duplex at 43 NE Belfair two to three times between February and July, 2010, but did not make contact with Mr. Erwin. 3RP at 245, 246. He left a "face to face contact" form at the house. 3RP at 246. The contact form states that law enforcement attempted contact with an RSO at the residence, contains the deputy's name and telephone number, and requests that the RSO contact the deputy. 3RP at 246. Deputy Rankin stated that Mr. Erwin did not contact him. 3RP at 246, 247.

Detective William Adam of the Mason County Sheriff's Office received a call on July 16, 2010 from Kelly Burdette. 3RP at 259. Detective Adam stated that Ms. Burdette told him that Mr. Erwin was not living at 43 NE Belfair Street. 3RP at 260. He went to the address that day but was not able to make contact with Mr. Erwin. 3RP at 262. He returned to the house on July 17, 18, 19, and 20, 2010 but did not see Mr. Erwin. 3RP at 262, 263.

Mr. Erwin was arrested on a misdemeanor warrant on July 21, 2010, in Shelton, Washington. 3RP at 251. After his arrest, Mr. Erwin told Det. Adam that he lived on the back porch of the house and that when he was gone, he would roll up his belongings and put them elsewhere. 3RP at 264, 265. Det. Adam stated that Mr. Erwin then stated that for the seven days prior to his arrest on July 21 he was living in a tent at his mother's house. 3RP at 268. On cross-examination he stated that Mr. Erwin told him that he stayed at his mother's house two or three nights and at his girlfriend Kelly Burdette's house three or four nights. 3RP at 272.

Mr. Erwin received mail addressed to him at 43 NE Belfair Street from the Department of Social and Health Services (DSHS) between February and July, 2010. DSHS sent letters to Mr. Erwin at that address on February 10, February 16, June 4, June 28, and July 16, 2010. 3RP at 278

281. Exhibits 1, 2, 4, 5, 6, and 7. Karen Ayala of DSHS testified the letters sent to Mr. Erwin were not returned. 3RP at 282.

Mr. Erwin returned to Det. Adam an annual address verification form that Det. Adam had mailed to Mr. Erwin at 43 NE Belfair. 3RP at 268, 269.

The State charged Mr. Erwin with failure to register as a sex offender between February 17, 2010 and July 20, 2010. CP 122. The prosecutor argued during closing argument that Mr. Erwin failed to register in four ways. First, that he was transient and failed to report on a weekly basis and lacked a fixed address. 3RP at 326, 327. Second, that he failed to provide a list of location or locations where he stayed during the previous seven days. 3RP at 328. Third, that he failed to provide notice within 48 hours of ceasing to have a fixed address between February 17 and June 9, 2010. 3RP at 328. And fourth, between June 10 and July 20, 2010 he failed to provide written notice of having left his reported address within three business days. 3RP at 328.

A jury trial started on December 1, 2010, before the Honorable Judge Toni Sheldon. 1RP. The jury was unable to reach a verdict and a mistrial was declared. 1RP at 175.

The matter came on for a second trial on March 2, 2011, the

Honorable Amber Finlay presiding. Neither exceptions nor objections were taken to the jury instructions. 3RP at 315.

A jury convicted Mr. Erwin of failing to register as a sex offender. CP 29. The court imposed a standard range sentence. CP 7-23.

Timely notice of appeal was filed on March 14, 2011. CP 5. This appeal follows.

D. ARGUMENT

1. MR. ERWIN'S DUE PROCESS RIGHTS WERE VIOLATED WHEN HE WAS CONVICTED EVEN THOUGH THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT HIS REGISTERED ADDRESS WAS NOT HIS FIXED RESIDENCE OR THAT HE WAS TRANSIENT.

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. Erwin was charged with failure to register as a sex offender. CP 122. Under the sex offender registration statute in effect in June 2010, a sex offender was required to register in his or her county of residence and provide notification within specified time periods when he changed residence or ceased to have a fixed residence. Former RCW 9A.44.130(5), (6). To convict Mr. Erwin of failing to register as a sex offender as charged in this case, the State had to prove that between February 17, 2010, and July 20, 2010, Mr. Erwin knowingly failed to comply with the registration requirements of RCW 9A.44.130, by either failing to reside at his registered address or failing to comply with notification requirements when he changed his address. CP 80-90. Jury Instruction 9.

The issue is whether the State proved he had changed his residence or ceased to have a fixed residence during that time, such that notification was required under the former version of RCW 9A.44.130 or the amended statute.

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. RCW 9A.44.130 requires offenders to notify the sheriff's office when they change their residence address or cease to have a fixed residence. Chapter 9A.44 RCW does not, however, define the terms "residence" or "fixed residence." See RCW 9A.44.130; *State v. Stratton*, 130 Wn. App. 760, 124 P.3d 660 (2005); *State v. Pray*, 96 Wn. App. 25, 980 P.2d. 240, review denied, 139 Wn.2d.1010 (1999). Given the language of the statute, it has been up to the courts to decide what meaning to give the terms. *Stratton*, 130 Wn. App. at 765.

Washington case law recognizes that "residence" is commonly understood to mean "the place where a person lives as either a temporary or permanent dwelling, a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit." *State v. Pickett*, 95 Wn. App. 475, 478, 975 P.2d 584 (1999); see also *Stratton*, 130 Wn. App. at 765; *Pray*, 96 Wn. App. at 29.

In *Pray* the defendant abandoned his last registered address. *Pray*, 96 Wn. App. at 27. He subsequently stayed at three different locations, each for a very brief period, but while he was at each place he intended to return to it

and did not plan to leave on any definite date. Instead, he intended to stay in each place for an undetermined period until he found a permanent residence. *Id.* at 29. Division 1 held that each of the temporary but indefinite living arrangements constituted the defendant's residence, and he was required to register at each location. *Id.* at 29-30.

In contrast, in *Stratton, supra*, this Court addressed the definition of "residence" under the statute but reviewed the question in the context of whether a person living in his car lacked a "fixed residence" and had to register under the transient provisions. After registering at the address of a home he was buying, the defendant defaulted on the purchase. *Stratton*, 130 Wn. App. at 760. He moved all of his belongings out of the home and surrendered the keys. *Id.* 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. *Id.* at 762-63. He also parked his car in which he slept in the driveway of the home at night fairly "regularly." *Id.* Officers saw a "for sale" sign in the yard at the house and noted there was no furniture or belongings inside. *Id.* at 763. No one answered when they knocked on the door. *Id.* 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” and concluded that Stratton had violated the registration requirements of RCW 9A.44.130. *Id.*

On review, this Court reversed the conviction. First, this Court noted that, in interpreting the undefined term “fixed residence” contained in the statute, found that the intent of the statute was to provide authorities with information on how to contact a registrant for the purpose of keeping track of him for community safety purposes. *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 of the term “residence,” this Court held that 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. *Id.* at 764-65. 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 that Stratton had properly registered his address as the address of the home and thus had not failed to comply with the registration requirements. *Id.* at 765.

This Court found that a person only met the definition of transient, if they were like the defendant in *Pickett, supra*. 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. Stratton got mail at the address where he was registered, had phone service there and intended to return there with no departure date in mind. *Id.*

Similarly, Mr. Erwin was still registered at the place which was his “fixed residence”- the Belfair Street address- even though, like Stratton, he was not living inside the house. He got his mail there, including official mail from the sheriff’s office and DSHS. Further, it is undisputed that Mr. Erwin never gave anyone a different address at which to contact him. The State presented no testimony that he intended to change his address from Belfair Street, or that he did not consider that to be his residence and or that he had an intention of residing anywhere else. And like in *Stratton*, Mr. Erwin’s registration address was the address at which he could be contacted by mail, should the authorities choose to do so.

Therefore, 43 NE Belfair Street was Mr. Erwin’s “fixed residence” as that term is defined in this Court’s decision in *Stratton*. Accordingly, the State failed to prove that Mr. Erwin did not knowingly fail to register as required by former RCW 9A.44.130 or as amended, and the prosecution did

not prove all the essential elements of the crime. Mr. Erwin's conviction for failure to register as a sex offender must be reversed and the charge dismissed.

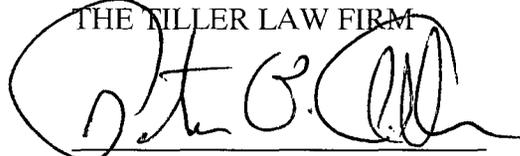
F. CONCLUSION

The State failed to prove that Mr. Erwin's "fixed residence" was not 43 NE Belfair Street or that he was transient. His conviction for failure to register as a sex offender must therefore be reversed and the charge dismissed.

DATED: September 27, 2011.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "P. B. Tiller", is written over a horizontal line. The signature is stylized and somewhat cursive.

PETER B. TILLER-WSBA 20835

Of Attorneys for Michael Erwin

EXHIBIT A

STATUTES

RCW 9A.44.130

Registration of sex offenders and kidnapping offenders — Procedures —
Definition — Penalties.

***** CHANGE IN 2011 *** (SEE 5203-S.SL) *****

(1)(a) Any adult or juvenile residing whether or not the person has a fixed residence, or who is a student, is employed, or carries on a vocation in this state who has been found to have committed or has been convicted of any sex offense or kidnapping offense, or who has been found not guilty by reason of insanity under chapter 10.77 RCW of committing any sex offense or kidnapping offense, shall register with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation, or as otherwise specified in this section. When a person required to register under this section is in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility as a result of a sex offense or kidnapping offense, the person shall also register at the time of release from custody with an official designated by the agency that has jurisdiction over the person.

(b) Any adult or juvenile who is required to register under (a) of this subsection:

(i) Who is attending, or planning to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW shall, within three business days prior to arriving at the school to attend classes, notify the sheriff for the county of the person's residence of the person's intent to attend the school, and the sheriff shall promptly notify the principal of the school;

(ii) Who is admitted to a public or private institution of higher education shall, within three business days prior to arriving at the institution, notify

the sheriff for the county of the person's residence of the person's intent to attend the institution;

(iii) Who gains employment at a public or private institution of higher education shall, within three business days prior to commencing work at the institution, notify the sheriff for the county of the person's residence of the person's employment by the institution; or

(iv) Whose enrollment or employment at a public or private institution of higher education is terminated shall, within three business days of such termination, notify the sheriff for the county of the person's residence of the person's termination of enrollment or employment at the institution.

(c) The sheriff shall notify the school's principal or institution's department of public safety and shall provide that department with the same information provided to a county sheriff under subsection (3) of this section.

(d)(i) A principal receiving notice under this subsection must disclose the information received from the sheriff under (b) of this subsection as follows:

(A) If the student who is required to register as a sex offender is classified as a risk level II or III, the principal shall provide the information received to every teacher of any student required to register under (a) of this subsection and to any other personnel who, in the judgment of the principal, supervises the student or for security purposes should be aware of the student's record;

(B) If the student who is required to register as a sex offender is classified as a risk level I, the principal shall provide the information received only to personnel who, in the judgment of the principal, for security purposes should be aware of the student's record.

(ii) Any information received by a principal or school personnel under this subsection is confidential and may not be further disseminated except as provided in RCW 28A.225.330, other statutes or case law, and the family and educational and privacy rights act of 1994, 20 U.S.C. Sec. 1232g et seq.

(2) This section may not be construed to confer any powers pursuant to RCW 4.24.550 upon the public safety department of any public or private school or institution of higher education.

(3)(a) The person shall provide the following information when registering: (i) Name; (ii) complete residential address; (iii) date and place of birth; (iv) place of employment; (v) crime for which convicted; (vi) date and place of conviction; (vii) aliases used; (viii) social security number; (ix) photograph; and (x) fingerprints.

(b) Any person who lacks a fixed residence shall provide the following information when registering: (i) Name; (ii) date and place of birth; (iii) place of employment; (iv) crime for which convicted; (v) date and place of conviction; (vi) aliases used; (vii) social security number; (viii) photograph; (ix) fingerprints; and (x) where he or she plans to stay.

(4)(a) Offenders shall register with the county sheriff within the following deadlines:

(i) OFFENDERS IN CUSTODY. (A) 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, of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, and (B) kidnapping offenders who on or after July 27, 1997, are in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender. The agency shall within three days forward the registration information to the county sheriff for the county of the offender's anticipated residence. The offender must also register within three business days from the time of release with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation. The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register.

When the agency with jurisdiction intends to release an offender with a duty to register under this section, and the agency has knowledge that the

offender is eligible for developmental disability services from the department of social and health services, the agency shall notify the division of developmental disabilities of the release. Notice shall occur not more than thirty days before the offender is to be released. The agency and the division shall assist the offender in meeting the initial registration requirement under this section. Failure to provide such assistance shall not constitute a defense for any violation of this section.

(ii) OFFENDERS NOT IN CUSTODY BUT UNDER STATE OR LOCAL JURISDICTION. Sex offenders who, on July 28, 1991, are not in custody but are under the jurisdiction of the indeterminate sentence review board or under the department of corrections' active supervision, as defined by the department of corrections, the state department of social and health services, or a local division of youth services, for sex offenses committed before, on, or after February 28, 1990, must register within ten days of July 28, 1991. Kidnapping offenders who, on July 27, 1997, are not in custody but are under the jurisdiction of the indeterminate sentence review board or under the department of corrections' active supervision, as defined by the department of corrections, the state department of social and health services, or a local division of youth services, for kidnapping offenses committed before, on, or after July 27, 1997, must register within ten days of July 27, 1997. A change in supervision status of a sex offender who was required to register under this subsection (4)(a)(ii) as of July 28, 1991, or a kidnapping offender required to register as of July 27, 1997, shall not relieve the offender of the duty to register or to reregister following a change in residence.

(iii) OFFENDERS UNDER FEDERAL JURISDICTION. Sex offenders who, on or after July 23, 1995, and kidnapping offenders who, on or after July 27, 1997, as a result of that offense are in the custody of the United States bureau of prisons or other federal or military correctional agency for sex offenses committed before, on, or after February 28, 1990, or kidnapping offenses committed on, before, or after July 27, 1997, must register within three business days from the time of release with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation. Sex offenders who, on July 23, 1995, are not in custody but are under the jurisdiction of the United States bureau of prisons, United States courts, United States parole commission, or military parole board for sex offenses committed before, on, or after February 28,

1990, must register within ten days of July 23, 1995. Kidnapping offenders who, on July 27, 1997, are not in custody but are under the jurisdiction of the United States bureau of prisons, United States courts, United States parole commission, or military parole board for kidnapping offenses committed before, on, or after July 27, 1997, must register within ten days of July 27, 1997. A change in supervision status of a sex offender who was required to register under this subsection (4)(a)(iii) as of July 23, 1995, or a kidnapping offender required to register as of July 27, 1997 shall not relieve the offender of the duty to register or to reregister following a change in residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation.

(iv) OFFENDERS WHO ARE CONVICTED BUT NOT CONFINED. Sex offenders who are convicted of a sex offense on or after July 28, 1991, for a sex offense that was committed on or after February 28, 1990, and kidnapping offenders who are convicted on or after July 27, 1997, for a kidnapping offense that was committed on or after July 27, 1997, but who are not sentenced to serve a term of confinement immediately upon sentencing, shall report to the county sheriff to register within three business days of being sentenced.

(v) OFFENDERS WHO ARE NEW RESIDENTS OR RETURNING WASHINGTON RESIDENTS. Sex offenders and kidnapping offenders who move to Washington state from another state or a foreign country that are not under the jurisdiction of the state department of corrections, the indeterminate sentence review board, or the state department of social and health services at the time of moving to Washington, must register within three business days of establishing residence or reestablishing residence if the person is a former Washington resident. The duty to register under this subsection applies to sex offenders convicted under the laws of another state or a foreign country, federal or military statutes for offenses committed before, on, or after February 28, 1990, or Washington state for offenses committed before, on, or after February 28, 1990, and to kidnapping offenders convicted under the laws of another state or a foreign country, federal or military statutes, or Washington state for offenses committed before, on, or after July 27, 1997. Sex offenders and kidnapping offenders from other states or a foreign country who, when they move to Washington, are under the jurisdiction of the department of corrections, the indeterminate sentence review board, or the department of

social and health services must register within three business days of moving to Washington. The agency that has jurisdiction over the offender shall notify the offender of the registration requirements before the offender moves to Washington.

(vi) OFFENDERS FOUND NOT GUILTY BY REASON OF INSANITY. Any adult or juvenile who has been found not guilty by reason of insanity under chapter 10.77 RCW of (A) committing a sex offense on, before, or after February 28, 1990, and who, on or after July 23, 1995, is in custody, as a result of that finding, of the state department of social and health services, or (B) committing a kidnapping offense on, before, or after July 27, 1997, and who on or after July 27, 1997, is in custody, as a result of that finding, of the state department of social and health services, must register within three business days from the time of release with the county sheriff for the county of the person's residence. The state department of social and health services shall provide notice to the adult or juvenile in its custody of the duty to register. Any adult or juvenile who has been found not guilty by reason of insanity of committing a sex offense on, before, or after February 28, 1990, but who was released before July 23, 1995, or any adult or juvenile who has been found not guilty by reason of insanity of committing a kidnapping offense but who was released before July 27, 1997, shall be required to register within three business days of receiving notice of this registration requirement.

(vii) OFFENDERS WHO LACK A FIXED RESIDENCE. Any person who lacks a fixed residence and leaves the county in which he or she is registered and enters and remains within a new county for twenty-four hours is required to register with the county sheriff not more than three business days after entering the county and provide the information required in subsection (3)(b) of this section.

(viii) OFFENDERS WHO LACK A FIXED RESIDENCE AND WHO ARE UNDER SUPERVISION. Offenders who lack a fixed residence and who are under the supervision of the department shall register in the county of their supervision.

(ix) OFFENDERS WHO MOVE TO, WORK, CARRY ON A VOCATION, OR ATTEND SCHOOL IN ANOTHER STATE. Offenders required to register in Washington, who move to another state, or who

work, carry on a vocation, or attend school in another state shall register a new address, fingerprints, and photograph with the new state within three business days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. The person must also send written notice within three business days of moving to the new state or to a foreign country to the county sheriff with whom the person last registered in Washington State. The county sheriff shall promptly forward this information to the Washington state patrol.

(b) The county sheriff shall not be required to determine whether the person is living within the county.

(c) An arrest on charges of failure to register, service of an information, or a complaint for a violation of RCW 9A.44.132, or arraignment on charges for a violation of RCW 9A.44.132, constitutes actual notice of the duty to register. Any person charged with the crime of failure to register under RCW 9A.44.132 who asserts as a defense the lack of notice of the duty to register shall register within three business days following actual notice of the duty through arrest, service, or arraignment. Failure to register as required under this subsection (4)(c) constitutes grounds for filing another charge of failing to register. Registering following arrest, service, or arraignment on charges shall not relieve the offender from criminal liability for failure to register prior to the filing of the original charge.

(d) The deadlines for the duty to register under this section do not relieve any sex offender of the duty to register under this section as it existed prior to July 28, 1991.

(5)(a) If any person required to register pursuant to this section changes his or her residence address within the same county, the person must provide, by certified mail, with return receipt requested or in person, signed written notice of the change of address to the county sheriff within three business days of moving.

(b) If any person required to register pursuant to this section moves to a new county, the person must register with that county sheriff within three business days of moving. Within three business days, the person must also provide, by certified mail, with return receipt requested or in person, signed written notice of the change of address in the new county to the county sheriff with whom the person last registered. The county sheriff

with whom the person last registered shall promptly forward the information concerning the change of address to the county sheriff for the county of the person's new residence. Upon receipt of notice of change of address to a new state, the county sheriff shall promptly forward the information regarding the change of address to the agency designated by the new state as the state's offender registration agency.

(6)(a) Any person required to register under this section who lacks a fixed residence shall provide signed written notice to the sheriff of the county where he or she last registered within three business days after ceasing to have a fixed residence. The notice shall include the information required by subsection (3)(b) of this section, except the photograph and fingerprints. The county sheriff may, for reasonable cause, require the offender to provide a photograph and fingerprints. The sheriff shall forward this information to the sheriff of the county in which the person intends to reside, if the person intends to reside in another county.

(b) A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The person must keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

(c) If any person required to register pursuant to this section does not have a fixed residence, it is an affirmative defense to the charge of failure to register, that he or she provided written notice to the sheriff of the county where he or she last registered within three business days of ceasing to have a fixed residence and has subsequently complied with the requirements of subsections (4)(a)(vii) or (viii) and (6) of this section. To prevail, the person must prove the defense by a preponderance of the evidence.

(7) A sex offender subject to registration requirements under this section who applies to change his or her name under RCW 4.24.130 or any other law shall submit a copy of the application to the county sheriff of the county of the person's residence and to the state patrol not fewer than five

days before the entry of an order granting the name change. No sex offender under the requirement to register under this section at the time of application shall be granted an order changing his or her name if the court finds that doing so will interfere with legitimate law enforcement interests, except that no order shall be denied when the name change is requested for religious or legitimate cultural reasons or in recognition of marriage or dissolution of marriage. A sex offender under the requirement to register under this section who receives an order changing his or her name shall submit a copy of the order to the county sheriff of the county of the person's residence and to the state patrol within three business days of the entry of the order.

(8) The county sheriff shall obtain a photograph of the individual and shall obtain a copy of the individual's fingerprints. A photograph may be taken at any time to update an individual's file.

(9) Except as may otherwise be provided by law, nothing in this section shall impose any liability upon a peace officer, including a county sheriff, or law enforcement agency, for failing to release information authorized under this section.

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL J. ERWIN,

Appellant.

COURT OF APPEALS NO.
41943-2-II

MASON COUNTY NO.
10-1-00234-1

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant were mailed to David Ponzoha, Clerk of the Court of Appeals, and copies were mailed to Michael J. Erwin, Appellant, and Tim Whitehead, Mason County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on September 27, 2011, at the Centralia, Washington post office addressed as follows:

Mr. Tim Whitehead
Deputy Prosecuting Attorney
PO Box 639
Shelton, WA 98584

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

CERTIFICATE OF
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1

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Dated: September 27, 2011.

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