

No. 41943-2-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

MICHAEL J. ERWIN, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay

No. 10-1-00234-1

BRIEF OF RESPONDENT

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A. State's Counterstatement of Issue Pertaining to Assignment of Error

On the date of the offense for which Erwin was convicted of failing to register as a sex offender, Erwin was required by RCW 9A.44.130 to register as a sex offender. He had previously registered at an address in Mason County, but the prosecution alleged that on the date of the offense he did not actually live at the address that he reported when he registered. The evidence showed that he did not have a fixed residence. Because Erwin did not live at the registered address, had not reported a change of address, and had no fixed residence, the State charged Erwin with failing to obey the registration requirements for an offender who lacks a fixed address in violation of RCW 9A.44.130. A jury convicted Erwin. Was there sufficient evidence at trial for the jury to find that Erwin lacked a fixed address?

B. Statement of Case

Michael Erwin is a felony sex offender who is required by RCW 9A.44.130 to register his address with the county. RP 211, 276. From April 18, 2006, up to November 20, 2009, Erwin was registered with Mason County as transient. RP 269. On November 20, 2009, Erwin changed his transient registration with the Mason County Sheriff's Office and reported a fixed address of 43 Northeast Belfair Street, Belfair, Washington. RP 261. After November 20, Erwin never again registered as transient but instead maintained his registration at 43 Northeast Belfair Street. RP 269-270.

In the summer of 2010, sheriff's deputies learned that Erwin was not in fact living at his registered address and that he had no fixed residence. RP 229-210. Erwin was charged with failing to register as a sex offender, and the charge went to a jury trial that resulted in a mistrial because the jury could not reach a unanimous agreement. RP 172-173; CP 122. After declaring a mistrial, the court set a new trial date. RP 175. The next trial commenced on March 2, 2011. RP 210.

Caitlyn Lederer was a neighbor of the 43 Northeast Belfair Street residence and testified that Erwin rarely showed up at the residence, that he only showed up sporadically, and that he stayed once for a whole week but other than that he never stayed there more than a few days. RP 234-235. During June and July of 2010, Lederer did not see Erwin at all. RP 237. Lederer testified that she saw Erwin at the residence frequently in February, March, April and May, of 2010, but after that she began to see Erwin less and less often until in July she didn't see him at all. RP 241.

Deputy Rankin of the Mason County Sheriff's Office does field contacts with registered sex offenders. RP 244. Deputy Rankin checked the residence at 43 Northeast Belfair Way in Belfair and tried to contact Erwin. RP 244. Deputy Rankin went to the residence two or three times from February to July of 2010. RP 245-246. Because Deputy Rankin was

unable to find Erwin at the residence, he left a "face-to-face contact form" at the residence to notify Erwin to contact the deputy. RP 246. Deputy Rankin received no contact from Erwin. RP 246.

Detective Adam is the sex offender registration coordinator for Mason County. RP 256-257. Detective Adam testified that Kelly Burdette lived at 43 Northeast Belfair Street. RP 259. Burdette told Detective Adam that Erwin was not living at his registered address of 43 Northeast Belfair Way, so Detective Adam went to the address on July 16 to try to contact Erwin and find out whether he was living there. RP 260. When Detective Adam went to the residence, he was not able to find Erwin at that address, and there were no signs that Erwin was living there. RP 261. Detective Adam checked the residence again on July 17, 18, 19, and 20, but was unable on any occasion to find Erwin at the residence. RP 262-263. Detective Adam was at the house at various times ranging from early morning to late at night. RP 306-307, 308-309.

On July 21, 2010, Erwin was found at a convenience store in Shelton, Washington, and was arrested on a misdemeanor warrant and taken into custody. RP 263. Detective Adam contacted Erwin and asked him about his residence. RP 264. Erwin told Detective Adam that he lived on the porch at the residence and that whenever he would leave the

residence, even for ten minutes, he would roll up his stuff and put it away out of sight. RP 264-265. Erwin said that the only times that Detective Adam was at the residence was when Erwin was temporarily away and his stuff was put away out of sight. RP 264-265.

Erwin told Detective Adam that for the seven days prior to his arrest he wasn't at the registered address because he had been living in a tent on his mother's property. RP 265. Erwin did not report his whereabouts to the Sheriff's Department. RP 265.

At the close of trial, the jury was instructed by Instruction Number 9, as follows:

To convict the defendant of the crime of failure to register as a sex offender, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That the defendant has previously been convicted of a sex offense that would be classified as a felony under the laws of the State of Washington, and defendant was required to register as a sex offender;
- (2) That on or about February 17, 2010 through July 20, 2010, the defendant knowingly failed to comply with the following requirement of a sex offender registration:
 - (a) Lacking a fixed residence, the defendant failed to report weekly, in person, to the sheriff of the county where he is registered; or

- (b) Lacking a fixed residence, the defendant failed to provide the county sheriff with a list of the location where he had stayed during the last seven days; or
- (c) The defendant failed to provide written notice to the county sheriff's office within 48 hours of ceasing to have a fixed residence during the period between February 17, 2010 and June 9, 2010; or
- (d) The defendant failed to provide written notice to the county sheriff's office within three business days of ceasing to have a fixed residence during the period between June 10, 2010 and July 20, 2010;

(3) That the acts occurred in the State of Washington.

Elements (2)(a), (2)(b), (2)(c), and (2)(d) are alternatives and only one need be proven. If you find from the evidence that either element (2)(a), or (2)(b), or (2)(c), or (2)(d), and both elements (1) and (3) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

RP 320-321; CP 42.

The jury returned a guilty verdict. RP 351.

C. Argument

The residency status of a person who is required to register as a sex offender is not an element of the crime of failing to register as a sex

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offender. *State v. Peterson*, 168 Wn.2d 763, 230 P.3d 588 (2010). The residency status of the registrant does, however, define the method and deadline for registering. *Id.*

Even though the residency status of the registrant is not an element, the jury instructions in the instant case (particularly instructions 7 and 9) limited their applicability to a situation where Erwin lacked a “fixed residence.” CP 40, 42-43.

Erwin asserts on appeal that the evidence at trial was insufficient to sustain his conviction because, he asserts, there was insufficient evidence to sustain a finding that he lacked a fixed residence.

When reviewing a challenge to the sufficiency of the evidence, the reviewing court views the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *State v. Drum*, 168 Wn.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 Wn.2d at 35. Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The 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 Wn.2d 821, 874 -75, 83 P.3d 970 (2004).

In the instant case, as outlined in the facts section above, during the months of June and July, 2011, Erwin was seldom at the residence. Deputies tried numerous times at various times of the day and night, unsuccessfully, to reach Erwin at the property, and left a contact card for Erwin, but Erwin never contacted the sheriff's department in response. Erwin said that he lived on the porch, but neither he nor his belongings were observed there when law enforcement attempted to contact him. Erwin said that he'd been living for one week in a tent at his mother's property.

Erwin offers the case of *State v. Stratton*, 130 Wn. App. 760, 12-1 P.3d 660 (2005) to support his assertion that even though he was not located at his registered address, he still lived there for registration purposes. However, the facts of *Stratton* are dissimilar to the facts of Erwin's case because the defendant in *Stratton* continued to inhabit the registered property address by living in his car in the driveway of the property, maintained a phone there, and received mail at the address.

Specifically, the court in *Stratton* found that "[t]he sheriff could

have contacted Stratton at the 121 Beacon Hill Drive address by mail, by phone, or in person in the evenings." *Stratton* at 765. In the instant case, however, deputies made numerous attempts to contact Erwin at his registered address but were unable to find him there and were unable to make contact with him even though a face-to-face contact card was left there. Unlike Erwin, the defendant in *Stratton* "was not moving from" place to place "each night," and "[h]e intended to return to the [registered address] daily...." *Stratton* at 766. Erwin, however, was moving about from day to day, whereabouts unknown to the Sheriff's Office, and he seldom returned to the registered address.

The facts of the instant case are analogous to those of *State v. Castillo*, 144 Wn. App. 584, 183 P.3d 355 (2008). The defendant in *Castillo* was convicted of failing to register as a sex offender after officers searched his registered address but could not find him. *Id.* Officers were told by another resident that the defendant did not live at the residence, and after looking around the house, officers did not find any sign that Castillo lived at the registered address. On review, the court found that the evidence at trial was sufficient to sustain the jury's verdict of guilty. *Id.* These facts are similar to the facts of the instant case where neighbors testified that Erwin was not seen at the residence, officers attempted

several contacts but were unable to find Erwin at the registered address, and although Erwin said that he was staying on the back porch of the residence, officers searched but were unable to find any indication that Erwin was actually staying at the residence. When confronted with these facts, Erwin admitted that he had been staying for the past seven days in a tent on his mother's property rather than sleeping on the porch at the registered address.

D. Conclusion

The record contains substantial direct and circumstantial evidence from which a reasonable jury could find beyond a reasonable doubt that Erwin was not living consistently at his registered address because he was, in fact, transient. Erwin registered as a sex offender for years as transient but then changed his registration to a fixed address. It appears that he frequented the fixed address for a period of time but then resumed transient status without changing his registration. When he shifted his residency status from a fixed address to transient, RCW 9A.44.130 required that he change his registration status to transient and that he abide the reporting requirements of a transient registrant. Substantial evidence

in the record supports the jury's finding that Erwin failed to follow the required registration requirements.

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Statement of Arrangements

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Answer/Reply to Motion: ____

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Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

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Personal Restraint Petition (PRP)

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