

NO. 45190-5-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CORY BRENT BREIDT,

Appellant.

BRIEF OF RESPONDENT

**SEAN BRITTAIN
WSBA # 36804
Deputy Prosecutor
for Respondent**

**Hall of Justice
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A. ANSWERS TO ASSIGNMENTS OF ERROR

1. The sex offender registration statute is not unconstitutionally vague.
2. RCW 9A.44.130 is not unconstitutionally vague even though it does not define the term “residence” or the phrase “residence address.”
3. RCW 9A.44.130 is not unconstitutionally vague even though it does not define “change” of residence address

B. STATEMENT OF THE CASE

1) Procedural History

On May 21, 2013, the Cowlitz County Prosecuting Attorney filed an amended information charging Cory Brent Breidt with Failure to Register as a Sex Offender on, about, or between November 1, 2012 and February 4, 2013. CP 1-2.¹ The case proceeded to a bench trial before The Honorable Marilyn Haan, which commenced on July 9, 2013. RP 6-45.

Judge Haan found Mr. Breidt guilty as charged and sentenced him to a standard range sentence of 24 months in custody and 36 months of community custody. RP 53-54; CP 24. Mr. Breidt filed a timely notice of appeal on July 29, 2013. CP 18-32.

¹ RCW 9A.44.130(1), 4(a), 4(b), 5(a), 5(b) and RCW 9A.44.132(1)(a)(ii).

2) Statement of Facts

Mr. Bredit has previously been convicted of a sex offense that requires him to register as a sex offender. RP 24-27, 34. On August 21, 2012, Mr. Breidt registered his address with the Cowlitz County Sheriff's Office as 304 SW 2nd Ave, Kelso, WA. RP 28. In order to register his address with the Sheriff's Office, Mr. Breidt had to fill out a change of address form with Christine Taff, known as the Registered Sex Offender Clerk, of the Sheriff's Office. RP 21, 23-24, 28. Between August 21, 2012 and February 4, 2013, Mr. Breidt did not provide a different address to the Sheriff's Office. RP 29.

On November 27, 2012, Detective Rich Fletcher of the Kelso Police Department attempted to verify Mr. Breidt's registered address by going to 304 SW 2nd Ave. RP 32. Detective Fletcher made contact with Porfitio Chavez, the resident of 304 SW 2nd Ave. RP 32. As of November 27, 2012, Mr. Chavez had resided at 304 SW 2nd Ave for approximately two years. RP 9-10. He resided at that address with his girlfriend and son. RP 10.

Sometime in August or September 2012, after Mr. Breidt had been released from prison, Mr. Chavez allowed Mr. Breidt to reside at his

residence. RP 11. Mr. Breidt did not have his own room; rather, he slept on a couch. RP 11. Mr. Breidt received his mail, ate his meals, and kept his belongings at Mr. Chavez's residence. RP 11-12.

During the month of October, 2012, Mr. Chavez informed Mr. Breidt that he would no longer be permitted to reside at 304 SW 2nd Ave. RP 12. Mr. Chavez allowed Mr. Breidt to remain at the residence for two additional weeks. RP 12. Mr. Breidt was "evicted" on November 1, 2012. RP 12, 16. Mr. Chavez allowed Mr. Breidt to keep a few items, such as paperwork at the residence. RP 13. The rest of Mr. Breidt's belongings left with Mr. Breidt. RP 13.

After November 1, 2012, Mr. Chavez did not know where Mr. Breidt was residing. RP 13. Occasionally, Mr. Breidt would stop by 304 SW 2nd Ave and "hang out for a little bit." RP 14. Mr. Chavez did not recall if Mr. Breidt ever stayed the night at his residence after November 1, 2012. RP 14, 17. Upon receiving mail for Mr. Breidt, Mr. Chavez would return it with a "return to sender" message. RP 16. When contacted by Detective Fletcher, Mr. Chavez told him that Mr. Breidt no longer lived at 304 SW 2nd Ave. RP 14.

C. ARGUMENT

- 1) **RCW 9A.44.130 IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED TO MR. BREIDT BECAUSE A PERSON OF ORDINARY INTELLIGENCE CAN UNDERSTAND WHAT IT MEANS TO HAVE A RESIDENCE AND WHAT IT MEANS TO CHANGE ONE'S RESIDENCE ADDRESS.**

The constitutionality of a statute is reviewed de novo. *City of Spokane v. Neff*, 152 Wn.2d 85, 88, 93 P.3d 158 (2004). A reviewing court “will presume that a statute is constitutional and it will make every presumption in favor of constitutionality where the statute's purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose.” *State v. Glas*, 147 Wn.2d 410, 422, 54 P.3d 147 (2002); *State v. Lee*, 135 Wn.2d 369, 390, 957 P.2d 741 (1998). More specifically, when reviewing statutes against vagueness challenges, “the presumption in favor of a law's constitutionality should be overcome only in exceptional cases.” *City of Seattle v. Eze*, 111 Wn.2d 22, 28, 759 P.2d 366 (1988).

Thus, a defendant who asserts a statute is unconstitutionally vague “bears the heavy burden of proving beyond a reasonable doubt that the statute is unconstitutional.” *State v. Peterson*, ___ Wn.App ___, 301 P.3d 1060, 1068 (2013) (citing *State v. Halstien*, 122 Wn.2d 109, 118, 857 P.2d

270 (1993). This burden is appropriately placed on a defendant since “the void for vagueness doctrine is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.” *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990) (quoting *Colten v. Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 1957, 32 L.Ed.2d 584 (1972)). “Where a vagueness challenge does not implicate the First Amendment” the statute at issue is evaluated “as applied to the particular facts of the case and the party's conduct. *Id.* (citing *City of Seattle v. Montana*, 129 Wn.2d 583, 597, 919 P.2d 1218 (1996)).

Consequently, to successfully prove a statute is unconstitutionally vague a defendant must be prove beyond a reasonable doubt that, as it applies to him, the statute either (1) “does not define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is proscribed, or (2) ... does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” *State v. Jenkins*, 100 Wn.App 85, 89, 995 P.2d 1268 (2000) (citing *State v. Coria*, 120 Wn.2d

156, 163, 839 P.2d 890 (1992). Essentially, a statute is not unconstitutionally vague if persons “of ordinary intelligence can understand a penal statute, notwithstanding some possible areas of disagreement.” *Peterson*, 301 P.3d at 1069 (quoting *State v. Maciolek*, 101 Wn.2d 259, 265, 676 P.2d 996 (1984)). “In other words, vagueness in the constitutional sense is not mere uncertainty.” *Douglass*, 115 Wn.2d at 179 (citation and quotation omitted); *Eze*, 111 Wn.2d at 27 (“[A] statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.”). This standard necessarily follows from the fact that “some vagueness is inherent in the use of language” *Id.* (citing *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 740, 818 P.2d 1062 (1991)).

To determine whether a statute is sufficiently definite, i.e., not unconstitutionally vague, the statute must be reviewed in “the context of the entire enactment” affording the “language used in the enactment . . . a sensible, meaningful, and practical interpretation.” *Douglass*, 115 Wn.2d at 180. Accordingly, this determination “does not demand ‘impossible standards of specificity or absolute agreement,’ and it permits some amount of imprecision in the language of the statute.” *Jenkins*, 100

Wn.App at 90 (quoting *Coria*, 120 Wn.2d at 163). Moreover, “[t]he fact that some terms in an enactment are undefined does not automatically mean that the enactment is unconstitutionally vague.” *Douglass*, 115 Wn.2d at 180. Instead, “in the absence of a statutory definition this court will give the term its plain and ordinary meaning ascertained from a standard dictionary.” *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002); *State v. Athan*, 160 Wn.2d 354, 369, 158 P.3d 27 (2007) (“When there is no statutory definition to guide us, words should be given their ordinary meaning. Often, we rely on dictionaries to supply the ordinary meaning.”).

Specific to the sex offender registration statute, when the statute has not provided a definition our courts have had no problem utilizing standard dictionary definitions or using the ordinary meaning of words. *State v. Stratton*, 130 Wn.App 760, 764-65, 124 P.3d 660 (using Webster’s Third New International Dictionary to define “fixed” and “residence” to determine what the statute meant by the term “fixed residence”); *State v. Pickett*, 95 Wn.App 475, 478-79, 975 P.2d 584 (1999) (using the ordinary meaning of the term “residence” in determining whether there was sufficient evidence of the crime of failure to register);

Jenkins, 100 Wn.App at 90 (relying on *Pickett* for the ordinary meaning of the term “residence”).²

In *Stratton*, *Pickett*, and *Jenkins*, it was not the lack of a statutory definition for, or a general vagueness in the term, “residence” that proved fatal to the conviction in each, but rather a specific problem in the way the sex offender registration statute applied to each defendant; problems that have been remedied and that are not at issue here. In *Pickett*, for example, the Court of Appeals took umbrage with the fact that the sex offender registration statute at that time failed to offer offenders with no fixed residence a way to comply with the statute, i.e., one could not register as homeless. *State v. Peterson*, 168 Wn.2d 763, 773, 230 P.3d 588. (2010) (citing 95 Wn.App at 479). Consequently, there was insufficient evidence that the defendant had a residence from which to register. Nonetheless, *Pickett* still utilized a definition of residence as “the term is commonly understood” and cited with approval out-of-state cases for the proposition

² Mr. Breidt claims that “[a]s noted in *Drake* and *Stratton*, the terms ‘residence’ and ‘residence address’ are inherently ambiguous” Br. Of Resp. at 15. The case law seems otherwise. *Drake*, an insufficiency of the evidence case, readily adopts a definition of residence in determining whether the State met its burden to prove that the defendant in that case changed his residence. 149 Wn.App 88, 94-95 (2009). Meanwhile, *Stratton* states that “[r]esidence’ is ambiguous *as applied here*.” 130 Wn.App at 765 (emphasis added). Nonetheless, *Stratton* determined that the defendant’s living situation in which he was parked at his registered address, receiving mail and telephone calls there, was sufficient for it to be considered his fixed residence. *Id.* at 766. Accordingly, the State failed to prove that the defendant lacked a fixed residence. *Id.* at 767.

that residence is a term “so easily understood by a person of common intelligence.” 95 Wn.App at 479 Fn. 8 (citing *People v. McCleod*, 55 Cal.App. 64 Cal.Rptr.2d 545, 552–53 (1997); *State v. Zichko*, 923 P.2d 966, 971 (1996) (each case dealing with a sex offender registration statute that did not define residence)).

Meanwhile in *Jenkins*, the defendant registered an “address,” as was required by the former sex offender registration statute, at which he received mail and messages but he slept at various friends’ houses. 100 Wn.App. at 87-88. *Jenkins*, in adopting the definition of residence from *Pickett*, found that residence was vague because “one reasonably could conclude that a person without a fixed, regular place to sleep does not have a residence under the terms of the statute.” *Id.* at 91. The infirmities in the sex offender statute identified in *Pickett* and *Jenkins* have been remedied in that the statute now allows for those with no fixed residence to register as such. *See* RCW 9A.44.130.

Here, there is no vagueness problem. Mr. Breidt registered 304 SW 2nd Ave as his residence, moved his belongings into the house and began to live there. During the middle of October, Mr. Breidt was informed by the primary resident of the house, Mr. Chavez, that he would

no longer be allowed to reside at 304 SW 2nd Ave. Mr. Breidt was given two weeks before vacating the residence. As of November 1, 2012, just as Mr. Chavez told Detective Fletcher, and just as Mr. Chavez testified, Mr. Breidt was no longer residing at 304 SW 2nd Ave.

“Residence as the term is commonly understood is 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. at 478. A person of ordinary intelligence can understand what it means to have a residence and what it means to change one’s residence address. If Mr. Breidt changed his residence address, the sex offender registration statute instructs him that he must register that new address. Additionally, if Mr. Breidt ceased to have a fixed residence, the statute likewise instructs him on how to comply with his registration requirements. Accordingly, as applied to the facts at issue, neither “residence” nor “residence address” are unconstitutionally vague. Moreover, to the extent the statute’s definiteness is in question, Mr. Breidt has failed to prove it unconstitutional beyond a reasonable doubt.

D. CONCLUSION

For the reasons argued above, Mr. Breidt's conviction should be affirmed.

Respectfully submitted this 10th day of March, 2014.

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By



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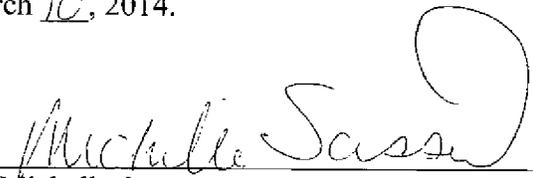
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 10th, 2014.


Michelle Sasser

COWLITZ COUNTY PROSECUTOR

March 10, 2014 - 2:29 PM

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