

No. 48717-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRYAN MACKER,

Appellant.

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

The Honorable James Orlando

APPELLANT'S OPENING BRIEF

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WASHINGTON APPELLATE PROJECT
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A. ASSIGNMENTS OF ERROR

1. The State failed to prove, with sufficient evidence to allow entry of judgment consistent with the Due Process clause of the 14TH Amendment, that Mr. Bryan Macker committed the offense of failure to register as a sex offender as proscribed by RCW 9A.44.130 and 132(1)(b).

2. The bench trial court erred in entering Finding of Fact II, that all relevant events occurred in Pierce County, Washington at the respondent's registered address in Graham.

3. The trial court erred in entering Conclusion of Law II that Bryan Macker had a duty to register as a sex offender in Pierce County, Washington.

4. The trial court erred in entering Conclusion of Law V that Mr. Macker was guilty of the crime of Failing to Register as a Sex Offender and that acts occurred in Pierce County, Washington.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

In Mr. Bryan Macker's short, one-day bench trial, there was evidence that Mr. Macker had not been living for some months at his last registered address in Pierce County, but no evidence was adduced at trial as to where he was later found. If he was moving to a new state or had moved to a new state, he would be required

to register “with the new state” within three days after “establishing residence” there, but as to Pierce County, he would be required only to “provide notice” of the move within three days. The Pierce County sex offender unit employee was never asked if she knew if Mr. Macker had or had not registered with a new county, or a new state, and was never asked if Mr. Macker had or had not provided notice of a move to a new state, only that Macker had not registered a new address with Pierce County.

Did the State present sufficient evidence of guilt for a violation of RCW 9A.44.130?

C. STATEMENT OF THE CASE

1. **Procedural history.** Mr. Bryan Macker was charged with failure to register – third offense, pursuant to RCW 9A.44.132(1)(b) and “RCW 9A.44.130.” CP 2 (information).

Mr. Macker waived his right to a jury and was tried before the Pierce County Superior Court on January 28, 2016. CP 3.

Mr. Macker appeals the trial court’s entry of judgment of guilt to this class B felony,¹ which was based on the court’s finding that Bryan could not be located at the Graham address of his mother

¹ Pursuant to section .132(1)(b), the crime of violating section .130 is a Class B felony if the person has twice previously been convicted of failure to register as a sex offender. RCW 9A.44.132(1)(b).

where he had registered last, in March of 2015. CP 4-11 (Findings of Fact); CP 26 (notice of appeal).

2. Facts. Detective Ray Shaviri performs offender checks as part of his duties with the Pierce County Sheriff's Office. On July 8, 2015, he went to the Graham, Washington address listed in Mr. Macker's sex offender registration paperwork, and no one answered the door. 1/28/16RP at 89. He also telephoned Mr. Macker on the cell phone number listed, and heard Macker's voice message, but the detective did not receive a call back. 1/28/16RP at 89-90.

The next day, July 9, Detective Shaviri went to the house at the 25101 52ND Ave. East address again, and spoke with an apparent tenant named Akeem, who stated that Mr. Macker was not around, and that Gwendolyn Williams, Mr. Macker's mother, was sleeping. 1/28/16RP at 90-91. Later that morning, Detective Shaviri returned to the house and spoke with Williams, who indicated her son had not been around for two months. 1/28/16RP at 91. Later, the detective did not locate Mr. Macker after conducting a "JBRS" check of persons in law enforcement custody. 1/28/16RP at 92-94.

Mr. Macker's mother, Gwendolyn Williams, testified that her son Bryan had keys and this was his home at the time when the Detective came by in early July, in addition to having mail and clothes there. Although Williams had not actually seen Bryan, this did not signify anything because she was often sleeping as a result of her medication. 1/28/16RP at 59-60, 63-64.

Pierce County Sheriff's Office employee Andrea Conger, a custodian of records with the Sheriff's Office's sex offender registration unit, testified that Mr. Macker had a duty to register based on a 2004 Washington conviction for a sex offense. 1/28/16RP at 20-24, 32-33. Ms. Conger also identified certified judgment and sentence documents indicating Mr. Macker had subsequent Washington convictions for failure to register. 1/28/16RP at 26-32.

Conger further testified that Mr. Macker registered an address with Pierce County on March 18, 2015, of 25101 52ND Avenue East, in Graham, Washington, the address the detective went to. 1/28/16RP at 43-45.

At the conclusion of her direct examination, Ms. Conger was asked if, between May 1, 2015, and August 5, 2015, "did Mr. Macker attempt to register another address other than the 25101 –

52ND Avenue East Address [sic]? She stated he did not.

1/28/16RP at 46.

D. ARGUMENT

THE STATE DID NOT PROVE THAT MR. MACKER HAD NOT MOVED TO ANOTHER STATE, AND EITHER FAILED TO TIMELY REGISTER WITH THE NEW STATE WITHIN THREE DAYS OF ESTABLISHING RESIDENCE, OR FAILED TO PROVIDE NOTICE OF THE MOVE TO PIERCE COUNTY.

(1). The State must prove a failure to comply with RCW

9A.44.130, which may often require the State to prove a

negative. The charging information, as permitted by State v.

Peterson's determination that the elements of the crime are solely

the failure to comply with any requirement of RCW 9A.44.130 while

under a duty to do so, did not specify the particular subsection or

subsections of that wide-ranging statute that Mr. Macker was being

accused of failing to comply with. CP 2; State v. Peterson, 168

Wn.2d 763, 770-74, 230 P.3d 588 (2010); see State v. Kjorsvik,

117 Wn.2d 93, 97, 812 P.2d 86 (1991).

The crime of failure to register as a sex offender is

committed when a person fails to satisfy any of the requirements of

RCW 9A.44.130.

A person commits the crime of failure to register as a sex offender if the person has a duty to register under

RCW 9A.44.130 for a felony sex offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130.

RCW 9A.44.132(1). The evidence must be sufficient to convict.

U.S. Const., amend. 14; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Proving an accused's failure to comply with section .130 may, in some circumstances, require the prosecution to prove a negative. State v. Batson, No. 72158-5-I, 2016 WL 3190501, at *2 (Wash. Ct. App. June 6, 2016).

In some circumstances, this requires that the State prove a negative. For example, in State v. Prestegard, the State alleged that Keith Prestegard violated RCW 9A.44.130 by failing to register his change of address. Thus, "the State had to prove a negative: that Prestegard did not reregister after he moved."

State v. Batson, No. 72158-5-I, at *2 (footnotes to State v. Prestegard, 108 Wn. App. 14, 18-19, 28 P.3d 817 (2001) omitted).²

² In Prestegard, the State was required to prove that the defendant failed to re-register his new address with the county sheriff after moving from one address to another within Wahkiakum County, Washington and, as usual in such cases, also prove that the sheriff's office had a reliable system for taking registrations such that it would have Prestegard's re-registration if he had submitted one. Prestegard, 108 Wn. App. at 17-19 (reversing because trial court erroneously precluded defendant from presenting evidence that the sheriff's office regularly lost such documents that were properly delivered to the sex offender unit).

(2). The State did not prove that Mr. Macker had not moved to another state and failed to register his new address with that new state, or failed to “provide notice” to Pierce County of the move to the new state. If a person moves from a Washington county to another state different than Washington, the person has a duty to register his address with the new state, and the duty to “provide notice” of the move to the Washington county he was last registered in. RCW 9A.44.130(4)(a)(viii).

In this case, the trier of fact was presented with evidence that Detective Shaviri, in July, was unable to locate Mr. Macker at the Graham address of his mother, where he had registered in March. The prosecutor asked the sex offender unit records custodian from the Pierce County Sheriff’s Office if Mr. Macker had registered a new address with her office, and she said he had not. 1/28/16RP at 46.

But the defendant had no duty to register in Pierce County or indeed in Washington if he moved to another state or was moving to another state and had yet to establish residency there. He would be required to register only with the new state, and to provide notice to Pierce County of having moved to the new state.

Although Ms. Conger, in her initial testimony, discussed “Offender

Watch,” which she explained is a “national database . . . to keep track of where offenders are living,” she did not testify that Offender Watch contains information, or timely information, as to whether, or when, any sex offender has officially registered an address in other state(s) with the appropriate government authority. She also did not testify that she checked Offender Watch for such information, even if that website did contain it. The party plaintiff in this case simply did not address the matter, likely because it never occurred to it that it needed to.

But the requirements of proof for conviction remain. The plain language of RCW 9A.44.130(4)(viii) as in effect until July 24, 2015 and thereafter (with no change) specifically indicates that moving to a new state does not require advance notice to the departure county of registration (compare the provisions regarding travel out of the United States, at section .130(5)), and would not result in the registration with Pierce county of a new address in that new state.

To the contrary, the person need only “provide notice” to the county of departure, which is different from registering an address, and Conger, the records custodian, was never asked about notice or the notice acceptance procedure of her department, if any:

(viii) 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.

(Emphasis added.) RCW 9A.44.130(4)(a)(vii). The State failed to prove that this is not what occurred. Cf. State v. Peterson, supra, 168 Wn.2d at 766-67 (where trial evidence showed defendant moved from registered Everett address in November and registered as homeless with the County in December, State did not have to prove whether 48 hour transience deadline, 72-hour in-county move deadline, or 10-day deadline for in-State move applied, because all were missed).

The State took advantage of its ability to sufficiently give notice of the charge merely by broadly alleging a violation of “RCW 9A.44.130,” thus precluding any Kjorsvik challenge to the information. See CP 2. However, for guilt, the State was required under Due Process to prove, but failed to prove, that Mr. Macker

had not moved to a new state. Mr. Macker, of course, need not prove anything, except affirmative defenses, of which there is one in .130 which is not pertinent here. U.S. Const. amend. 14; see State v. Deer, 175 Wn. 2d 725, 287 P.3d 539 (2012); see RCW 9A.44.130(6)(c) (involving homeless persons who lack a fixed residence).

Plain language dictates meaning, and when the Legislature uses different language, it means different things. State v. Roggenkamp, 153 Wn.2d 614, 625–26, 106 P.3d 196 (2005). The prosecution asked Ms. Conger if the defendant had or had not done something – registered or attempted to register a new address with Pierce County – that he actually had no duty under the statute to do if he moved to another state. 1/28/16RP at 46. Conger was not asked whether Mr. Macker did or did not do the things he would be required to do if he had moved to another state, namely, register “with the new state”, and “provide notice” to Pierce County. RCW 9A.44.130(4)(a)(viii). These latter statutory terms, of course, are two different things. Mr. Macker had no duty to register his new address with Pierce County, only to “provide notice” to Pierce County of the move. It was never shown that he did not do either.

(3). The State failed to present sufficient evidence to convict, requiring reversal with prejudice. The test for sufficiency of the evidence is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.” State v. Gentry, 125 Wn.2d 570, 596–97, 888 P.2d 1105 (1995). The appellate courts defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. State v. Emery, 161 Wn. App. 172, 199, 253 P.3d 413 (2011).

Here, because the evidence was insufficient to convict as charged, Mr. Macker’s remedy is dismissal of the information, with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

E. CONCLUSION AND APPELLATE COSTS PRAYER

Based on the foregoing, the appellant, Mr. Macker, requests that this Court of Appeals reverse his conviction, as argued herein.

Further, in the event that Mr. Macker does not substantially prevail on appeal, he asks this Court, under its discretionary authority, to deny any award of appellate costs. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016), review denied, No. 92796-

1 (Wash. June 29, 2016). Counsel has no reason to conclude that Mr. Macker's financial circumstances have changed since he was deemed indigent for purposes of being assigned appointed appellate counsel. 2/19/16RP at 125.

DATED this 16th day of August, 2016.

Respectfully submitted,

s/ OLIVER R. DAVIS.

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

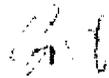
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 48717-9-II
)	
BRYAN MACKER,)	
)	
Appellant.)	

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