

No. 49622-4-II

Court of Appeals, Div. II,
of the State of Washington

State of Washington,

Respondent,

v.

Adrian Valencia,

Appellant.

Brief of Appellant

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1. Introduction

Adrian Valencia was convicted of failure to register as a sex offender. The State failed to prove the essential element that Valencia had actual knowledge of the registration requirements. Valencia attempted to understand the multiple, conflicting instructions he had been given, but ultimately he was mistaken. But a mistake is not enough to make a felony failure to register. Actual, subjective knowledge is required. This Court should reverse the conviction and dismiss the charges with prejudice.

The trial court also erred in sentencing. Valencia's criminal history contains two prior failure to register convictions that were actually a single offense. Valencia's offender score should have been a seven, not eight. His crime should have been a Class C felony (not Class B), with a maximum sentence of 60 months. The trial court's sentence was based on an incorrect offender score and exceeded the statutory maximum. This Court should reverse the conviction.

2. Assignments of Error

Assignments of Error

1. The trial court erred in finding Valencia guilty of failure to register as a sex offender when there was insufficient evidence that Valencia "knowingly" failed to comply with the registration requirements.

2. The trial court erred in calculating Valencia's offender score and standard sentence range.
3. The trial court erred in sentencing Valencia to more than 60 months when this would only have been his second failure to register conviction, not his third.

Issues Pertaining to Assignments of Error

1. The offender's subjective, actual knowledge of the registration requirements is an essential element of the crime of failure to register. Valencia was given conflicting instructions and did not actually understand the requirements. Was there insufficient evidence to support the element of actual knowledge beyond a reasonable doubt? (assignment of error #1)
2. Failure to register is an ongoing course of conduct that may not be divided into separate time periods to support separate charges, even when there is a short intervening period of compliance. Valencia's two prior convictions were for a single unit of prosecution and should have been considered a single offense. Did the trial court err in counting the prior convictions as two offenses when calculating the offender score? (assignment of error #2)
3. Failure to register is ordinarily a Class C felony. When the offender has been convicted for failure to register on two or more prior occasions, the next conviction is a Class B felony. Valencia's two prior convictions were on the same day, for a single unit of prosecution that should have been considered a single offense. Did the trial court err in counting the prior convictions as "two or more prior occasions" when determining the seriousness level and standard sentence range? (assignment of error #3)

3. Statement of the Case

- 3.1 Valencia was required to register as a sex offender but was given conflicting instructions that he did not understand.

Adrian Valencia grew up in Astoria, Oregon. RP 77.

In 2010, he was convicted in Oregon of a sex offense that gave rise to a duty to register as a sex offender. RP 75. Under Oregon law, a sex offender has ten days to report a change of address. RP 75; CP 51.

After moving to Thurston County, Washington, Valencia was convicted for failure to register. Ex. 5; *see* RP 23-25, 76. Upon his release from Nisqually Jail in April 2016, Valencia was told that he had 48 hours to register his new address with the Thurston County Sheriff's Office and that if he moved again, he would have ten days to notify the Thurston County Sheriff's Office of the subsequent move. Ex. 9; RP 75-76.

Valencia moved in with his sister and registered under that address. RP 79. His sister took him to his appointments with Department of Corrections at least two or three times per week. RP 71-72, 76. On about May 4, Valencia left his sister's house and registered with the sheriff's office as transient. Ex. 6; RP 79. At that time, Valencia received and signed a document that said if he moved to another county or state, he would have three days to notify Thurston County Sheriff's Office of the

move. Ex. 6; RP 80-81. Valencia testified at trial that he did not understand the notification requirements. RP 82, 91-92.

3.2 Valencia moved to Oregon and was prepared to provide 10-day notice to Thurston County but was arrested before he could mail the notice.

On May 18, Valencia called in to the Thurston County Sheriff's Office. RP 86-87, 91. He was informed that calling or mailing in his transient log was not enough; in-person check-in was required. RP 50-51, 86-87. Because it was too late in the day for Valencia to make it to the Thurston County Sheriff's Office on time, the woman at the sheriff's office told him to just make sure he showed up the following week. RP 87; *but cf.* RP 52 (Pamela McClure testified she did not excuse Valencia).

On May 24, Valencia moved back to Astoria, Oregon, with the intent to live there permanently. RP 77. He was receiving threatening phone calls in Thurston County and wanted to get away from a bad crowd. RP 77. He did not check-in at the Thurston County Sheriff's Office on May 25 or June 1 because he was living in Astoria. RP 85. Valencia believed that he had ten days to notify Thurston County Sheriff's Office of the move. RP 90-92.

Ten days would have fallen on June 3. *See* RP 58. On June 2, Valencia was prepared to mail his notification letter to Thurston County Sheriff's Office. RP 81. That day, Valencia

returned to Thurston County to visit with family. RP 77-78. He planned to return to Astoria the same day. RP 78. However, Valencia was arrested before he could mail the letter or make the return trip. RP 81.

3.3 Valencia was convicted in a bench trial of failure to register as a sex offender.

At the urging of his defense attorney, Valencia reluctantly agreed to a bench trial. RP 126. The trial court found Valencia guilty of failure to register because he did not check-in weekly. RP 106-07.

At sentencing, Valencia argued that the prior failure to register convictions were a single offense for sentencing purposes. RP 114, 124. The State acknowledged that this would result in a lower offender score and a Class C felony instead of a Class B felony. RP 115-16. The trial court held, as urged by the State, that the two prior convictions counted as two offenses because there was an intervening act that separated them. RP 133. The trial court used an offender score of eight and imposed a sentence of 33 months of total confinement, followed by 36 months of community custody. RP 133-34.

Valencia appeals.

4. Summary of Argument

This Court should reverse the conviction and sentence. Part 5.1, below, shows that there was insufficient evidence to prove beyond a reasonable doubt the essential element of actual, subjective knowledge of the registration requirements. This failure of evidence requires reversal of the conviction and dismissal of the charges with prejudice. Part 5.2 demonstrates that the trial court's sentence was improper because Valencia's prior convictions for failure to register constituted one offense, not two. As a result, Valencia's offender score should have been seven, not eight, and the crime should have been a Class C felony with a maximum sentence of 60 months. Even if this Court affirms the conviction, it should reverse for resentencing.

5. Argument

5.1 There was insufficient evidence to support the trial court's finding that Valencia had actual knowledge of the registration requirements.

A sex offender commits the crime of failure to register when the offender "knowingly fails to comply with any of the requirements of RCW 9A.44.130." RCW 9A.44.132(1). The offender's actual, subjective knowledge is an essential element of the crime. *See State v. Peterson*, 145 Wn. App. 672, 675, 186 P.3d 1179 (2008) ("knowingly" is an essential element). There was insufficient evidence to prove beyond a reasonable doubt that

Valencia had actual, subjective knowledge of the registration requirements.

5.1.1 Sufficiency of evidence standard

Whether evidence is sufficient is a question of constitutional law reviewed de novo. *State v. Batson*, 194 Wn. App. 326, 329, 377 P.3d 238 (2016). Evidence is sufficient when any rational trier of fact could find beyond a reasonable doubt the essential elements of the crime. *Id.* The court treats as true all of the State's evidence and all reasonable inferences that can be drawn from it. *Id.*

5.1.2 Actual, subjective knowledge of the registration requirements is an essential element of failure to register.

The required mental state of “knowingly fails to comply” is not specifically defined in the sex offender registration statutes. The general definition of “knowingly” under the criminal statutes requires actual, subjective knowledge. *State v. Shipp*, 93 Wn.2d 510, 515, 610 P.2d 1322 (1980).

A person acts “knowingly” when “he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense.” RCW 9A.08.010(1)(b)(i). This definition reiterates the word's plain meaning: “the fact or condition of being aware of something.” *State v. Scott*, 110 Wn.2d 682, 691-92, 757 P.2d 492 (1988).

This plain meaning requires actual, subjective knowledge, not an objective, reasonable person, should-have-known standard. Although the statute defining knowledge includes a second alternative, “he or she has information which would lead a reasonable person in the same situation to believe that facts exist,” this alternative is included only “to make it clear to the jury what level of circumstantial evidence is sufficient for it to conclude that the defendant had actual knowledge.” *Shipp*, 93 Wn.2d at 517. The alternative definition creates only an inference: the jury must still find actual, subjective knowledge. *Id.*

A particular defendant may be less attentive or intelligent than the ordinary person, and therefore lack actual, subjective knowledge. *Shipp*, 93 Wn.2d at 516. To allow a reasonable person standard to substitute for actual knowledge would allow a person to be convicted of a “knowledge” crime when the person had actually only been negligent, a less culpable mental state. *Id.* at 515.

5.1.3 The evidence was insufficient to prove actual knowledge beyond a reasonable doubt.

Here, Valencia was, like the hypothetical defendant in the *Shipp* court’s analysis, less capable of forming actual, subjective knowledge of the sex offender registration requirements. The State presented evidence that Valencia had received two,

conflicting sets of registration requirements: one requiring registration within three days of a move, and the other allowing ten days. RP 26-29; Exs. 6 and 9.

Even an ordinary, reasonable person, being presented with these two, conflicting sets of instructions within two weeks of each other, would not have been able to form a belief of which set of instructions was correct. Valencia's situation was further complicated by the fact that he had originally learned the sex offender registration requirements in Oregon, where the notice period is ten days, the same as Valencia was told in Ex. 9. RP 74-75. Two out of three of the sets of instructions Valencia received gave him ten days, rather than three, to notify Thurston County of his move. After he moved to Oregon, even an ordinary, reasonable person could not be expected to know which set of instructions actually applied.

Valencia testified that he did not understand the registration requirements after reviewing Ex. 6. RP 82. His conduct was consistent with that lack of knowledge. On May 18, Valencia believed that he could mail in his weekly transient reporting. RP 86. He was corrected over the phone, but his failure to report that day was without knowledge. On May 24, Valencia moved to Astoria, Oregon, and believed that he had ten days to notify Thurston County of the move. RP 82. He had his notification letter ready to mail on June 2, within the ten-day

period, but was arrested before he could put it in the mail.

RP 81.

The State's evidence—the two, conflicting sets of instructions—are not even sufficient to prove an objective, should-have-known standard, let alone the actual, subjective knowledge standard required under the criminal law. Having received two, conflicting sets of instructions in a matter of less than two weeks, neither Valencia nor a hypothetical, reasonable person could have been expected to be able to form a belief as to which set of instructions actually applied.

Valencia tried to reconcile the two sets of instructions, but ultimately was mistaken. *See* RP 82, 92. The statute does not allow a felony conviction for a mistake; it requires actual knowledge. Valencia did not have actual knowledge of the registration requirements. The State's evidence fails to prove beyond a reasonable doubt that he did. This Court should reverse the conviction and dismiss the charges with prejudice for the State's failure to prove this essential element of the crime.

5.2 The trial court erred in treating Valencia's prior convictions of failure to register as two separate offenses.

Even if this Court affirms the conviction, the trial court erred and abused its discretion in entering an improper sentence. A sentencing court acts without authority when it

imposes a sentence based upon a miscalculated offender score. *State v. Johnson*, 180 Wn. App. 92, 99-100, 320 P.3d 197 (2014). Here, the trial court erred in imposing a sentence based upon an offender score of eight, when it should have been seven because Valencia's prior convictions of failure to register were a single offense. The same error resulted in Valencia's crime being treated as a Class B felony when it should have been Class C. This court should reverse for resentencing.

5.2.1 A mixed standard of review applies to this issue.

This Court reviews an offender score calculation de novo but reviews a determination of what constitutes "same criminal conduct" for abuse of discretion or misapplication of the law. *Johnson*, 180 Wn. App. at 100. A trial court abuses its discretion if its decision was reached by applying the wrong legal standard and is thus made "for untenable reasons." *Id.*

5.2.2 Valencia's prior convictions for failure to register were a single crime under *State v. Durrett*.

In *State v. Durrett*, 150 Wn. App. 402, 208 P.3d 1174 (2009), this Court held that a failure to register, separated by a short period of compliance, was one crime, not two. *Durrett*, 150 Wn. App. at 411. The court analyzed the statutes to determine the legislatively intended unit of prosecution for failure to register as a sex offender. A sex offender has an ongoing duty to

register with the sheriff of the county in which the offender lives. RCW 9A.44.130. The statute provides notice requirements any time an offender relocates. *Id.* An offender with no fixed residence must report weekly. RCW 9A.44.130(6)(b). An offender is guilty of failure to register if the offender “knowingly fails to comply with any of the requirements of RCW 9A.44.130.” RCW 9A.44.132(1)¹.

The *Durrett* court concluded that the requirement to report weekly, in person, to the sheriff was “an ongoing obligation or duty rather than a collection of discrete actions.” *Durrett*, 150 Wn. App. at 409. The court held that Durrett’s failure to register, separated by a short period of compliance, was “an ongoing course of conduct that may not be divided into separate time periods to support separate charges.” *Id.* The court rejected the State’s argument that Durrett’s reporting was an intervening act creating two separate and independent periods of nonreporting:

The State’s reasoning is flawed. The period of Durrett’s failure to report weekly began on November 6, 2006, and ended on January 22, 2007, when he was arrested. Had he not reported at all during this period, he would have been subject to conviction for one count of failure to register. But under the State’s theory, because he partially

¹ The operative language of the current statute is the same as that of the former statute analyzed in *Durrett*, 150 Wn. App. at 406-07.

complied by interrupting the noncompliance with two weeks of compliance, he became subject to conviction on two counts. Had he reported weekly on more occasions during this period, he could have become subject to even more charges. That interpretation is contrary to the statutory goal of encouraging regular reporting.

Durrett, 150 Wn. App. at 411. The court remanded for resentencing on a single count of failure to register. *Id.* at 413.

Valencia's prior convictions were, similarly, a single offense under *Durrett*. The convictions were the result of a plea deal that Valencia understood as being for a single offense. RP 114, 130. At sentencing in this case, the State argued that the prior convictions were for two separate periods of time, one from December 2-4, 2014, and another from March 18-31, 2015. CP 74. The State argued that Valencia's registration as transient on February 10, 2015, was an intervening act creating two separate crimes. CP 75-76, 83. Valencia argued that obeying the law cannot be an intervening act to create two separate crimes. RP 124. The trial court agreed with the State. RP 133. But the trial court erred.

Under *Durrett*, the proper legal standard is that an offender's failure to register, separated by a short period of compliance, is "an ongoing course of conduct that may not be divided into separate time periods to support separate charges." *Durrett*, 150 Wn. App. at 409. Valencia's prior convictions were

for a single period of failure to register, from Dec. 2, 2014, to March 31, 2015, separated by a short period of compliance. When Valencia was charged with “knowingly fail[ing] to comply with any of the requirements,” the entire time period was, under *Durrett*, a single unit of prosecution. RCW 9A.44.132(1); *Durrett*, 150 Wn. App. at 409-11. The prior convictions were one offense, not two.

The State’s arguments to the trial court had cited *State v. Green*, 156 Wn. App. 96, 230 P.3d 654 (2010), but *Green* actually followed *Durrett*, supporting Valencia’s argument. *Green* was required to register with the sheriff every 90 days. *Green*, 156 Wn. App. at 98. He registered on April 9, 2007, but failed to report again until April 29, 2008, one year later. *Id.* The court noted that, as in *Durrett*, the statute did not clearly establish a new unit of prosecution for every 90-day period. *Id.* at 100. Following *Durrett*, the court found that *Green* had committed an ongoing and continuous offense over the entire year, which could not support separate charges. *Id.* at 101. The court held that the trial court had properly dismissed a second charge for failure to register during the same, one-year period. *Id.* at 102. *Green* supports Valencia’s argument that his prior convictions were a single offense.

5.2.3 A single prior offense for failure to register would result in an offender score of seven, not eight.

For purposes of offender score analysis, the sentencing court analyzes prior convictions to determine if they encompass the “same criminal conduct” under RCW 9.94A.589(1)(a). RCW 9.94A.525(5)(a)(i). Two or more prior convictions are counted as one offense if they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” *Id.*; RCW 9.94A.589(1)(a).

Durrett requires a conclusion here that the prior convictions were the “same criminal conduct.” Both prior convictions were failure to register, requiring the same criminal intent of “knowingly fail[ing] to comply with any of the requirements.” *See* RCW 9A.44.132(1). Because there was only a single unit of prosecution for the entire period of Dec. 2, 2014, to March 31, 2015, both convictions covered the same time and place. Failure to register does not have an identifiable victim other than the general public, so both convictions involved the same victim. Both convictions were the same criminal conduct and should have been counted as one offense, not two.

Counting the prior convictions as a single offense under RCW 9.94A.525 results in an offender score of seven, not eight. The trial court abused its discretion in finding the convictions were not the same criminal conduct and erred in sentencing

Valencia with an offender score of eight. This Court should reverse for resentencing with an offender score of seven.

5.2.4 A single prior conviction for failure to register would result in a Class C felony, not a Class B felony.

The trial court's error in treating the prior convictions as two, rather than one as required by *Durrett* resulted in Valencia's current conviction being treated as a Class B felony, rather than as Class C as it should have been.

(a) The failure to register as a sex offender pursuant to this subsection is a class C felony if:

(i) It is the person's first conviction for a felony failure to register; or

(ii) The person has previously been convicted of a felony failure to register as a sex offender in this state or pursuant to the laws of another state, or pursuant to federal law.

(b) If a person has been convicted of a felony failure to register as a sex offender in this state or pursuant to the laws of another state, or pursuant to federal law, on two or more prior occasions, the failure to register under this subsection is a class B felony.

RCW 9A.44.132(1). Valencia's prior convictions, treated as a single offense under *Durrett*, make the current conviction only his second, and therefore a Class C felony.

As a Class C felony, the crime has a maximum sentence of 60 months combined in confinement or community custody.

RCW 9A.20.021(1)(c); RCW 9.94A.701(9). The trial court was required to reduce the term of community custody so as not to exceed the statutory maximum. RCW 9.94A.701(9). The trial court erred in imposing a sentence of 33 months total confinement plus 36 months community custody, exceeding the statutory maximum of 60 months for a Class C felony.

This Court should remand for resentencing as a Class C felony.

6. Conclusion

The State failed to prove that Valencia had actual knowledge of the registration requirements, an essential element of the crime. This Court should reverse the conviction and dismiss the charges with prejudice.

Even if the Court affirms the conviction, the trial court erred and abused its discretion in entering a sentence based on the wrong offender score and exceeding the statutory maximum for a Class C felony. This Court should reverse for resentencing.

Respectfully submitted this 3rd day of April, 2017.

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I certify, under penalty of perjury under the laws of the State of Washington, that on April 3, 2017, I caused the foregoing document to be filed with the Court and served by the method indicated below, and addressed to each of the following:

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To Brief of Appellant

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