

No. 49622-4-II

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

State of Washington,

Respondent,

v.

Adrian Valencia,

Appellant.

Reply Brief of Appellant

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1. Introduction

The State argues there was substantial evidence of Valencia's actual knowledge by way of inference, but the inference the State invites is not reasonable. At best, a fact finder could infer that Valencia should have known the correct registration requirements. That is not enough to support a conviction for "knowingly" failing to register. This Court should reverse the conviction and dismiss the charges with prejudice.

The State argues that the trial court was within its discretion in finding that Valencia's two prior failure to register convictions were not the same criminal conduct, but the trial court had no such discretion. As a matter of law, there was only one, ongoing failure to register. This Court should reverse and remand for resentencing as a Class C felony with an offender score of seven.

2. Reply Argument

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

Valencia's opening brief argued that there was insufficient evidence to support a finding beyond a reasonable doubt that Valencia had actual knowledge of the registration requirements. Br. of App. at 8-10. 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); *State v. Shipp*, 93 Wn.2d 510, 515, 610 P.2d 1322 (1980) (“knowingly” means actual, subjective knowledge). Valencia argued that the State’s evidence—the two, conflicting sets of registration instructions—were insufficient to prove an objective, should-have-known standard, let alone the actual, subjective knowledge standard required under the criminal law. Br. of App. at 8-10.

The State argues that the 2016 Transient Registration signed by Valencia creates a reasonable inference that he had actual knowledge. Br. of Resp. at 4-5. The State is incorrect. Viewed in light of all of the evidence—even viewing it favorably to the state—an inference of actual, subjective knowledge is not reasonable.

Valencia received two, conflicting sets of instructions within two weeks of each other. One required 3-day notice, while the other allowed 10 days. At best, the court could have inferred that a reasonable person should have known which requirements applied. That is not the standard. “Should have known” is a negligence standard. The State’s evidence and inference that Valencia should have known is insufficient to convict him of a crime that requires actual, subjective knowledge. He did not know the requirements. The evidence is

insufficient to create an inference that he did know. 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.

In a Statement of Additional Grounds for Review, Valencia argued that he received ineffective assistance of counsel when his appointed defense attorney failed to present any evidence or expert testimony that, at the time of the alleged crime, Valencia was suffering the effects of a Traumatic Brain Injury that rendered him incapable of understanding or having actual knowledge of the registration requirements.¹ Valencia testified to these facts at sentencing. RP 126-29. There was no tactical reason not to present this evidence at trial. Had the evidence been presented as it should have, it would have cast further reasonable doubt on the question of whether Valencia had actual, subjective knowledge of the registration requirements. This evidence could have changed the outcome. This Court should remand for a new trial.

¹ Valencia's counsel was not aware of the Statement of Additional Grounds until one week before the June 30 due date for this Reply Brief. Counsel received a copy of the SAG on June 28. It is unknown whether counsel for the State received a copy of the SAG prior to filing the Brief of Respondent.

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

Valencia also argued that his prior convictions of failure to register should have counted as only one, reducing his offender score to seven and reducing his offense to a Class C (rather than Class B) felony. Br. of App. at 10-17. A long period of failing to register, separated by a short period of compliance, is one crime, not two. *State v. Durrett*, 150 Wn. App. 402, 411, 208 P.3d 1174 (2009). Under this standard, the two convictions involved the same criminal conduct. Br. of App. at 15. In holding that Valencia’s registration in February 2015 was an intervening act creating two crimes instead of one, the trial court applied an incorrect legal standard and therefore abused its discretion. Valencia’s prior failure to register was “an ongoing course of conduct that may not be divided into separate time periods to support separate charges.” *Durrett*, 150 Wn. App. at 409.

The State does not disagree with Valencia on the result of the error—but for the error, his offender score would have been a seven and his offense would have been a Class C felony. *E.g.*, Br. of Resp. at 5 n. 4. Instead, the State argues that the trial court acted within its discretion in treating Valencia’s prior failure to register as two, separate crimes. Br. of Resp. at 5-7.

However, *Durrett* does not leave the trial court with any discretion on this issue. Under *Durrett*, the “duty to register” is

a single, ongoing obligation, not a collection of discrete actions. *Durrett*, 150 Wn. App. at 409. It is “an ongoing course of conduct that may not be divided into separate time periods to support separate charges.” *Id.* (emphasis added). By dividing the ongoing course of conduct, the trial court abused its discretion.

The State’s argument that there was a three month separation between Valencia’s failures to register is misleading. The trial court based its decision not on a three-month separation, but on the basis of a single act—registration as a transient on February 10, 2015. RP 133 (“Obeying the law isn’t what the intervening act was. The intervening act was the registration.”). If two weeks of compliance could not separate the single crime in *Durrett*, then surely a single act of registering, on one day, cannot separate the single crime here.

In addition, the *Durrett* court held that there could be no separation as a matter of statutory interpretation. The *Durrett* court disagreed with the same arguments the State is making here:

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 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. *Durrett* is dispositive. The trial court abused its discretion.

The State argues, without citing any supporting authority, that Valencia could have been convicted twice because he violated two separate statutory provisions (fixed residence registration requirements and transient registration requirements). But failure to register is not an alternative means crime. *State v. Peterson*, 168 Wn.2d 763, 771, 230 P.3d 588 (2010). “The statute imposes one duty: to register with the sheriff.” *State v. Peterson*, 145 Wn. App. 672, 677, 186 P.3d 1179 (2008), *aff’d*, 168 Wn.2d 763. Residential status is not an element of the crime. *Peterson*, 168 Wn.2d at 774. The various sets of registration requirements “do not define the elements or create alternative means of committing the crime.” *Peterson*, 145 Wn. App. at 678. They cannot support separate charges.

Thus, the fact that Valencia violated different registration requirements before and after his February 2015 registration has no legal significance. It does not matter how Valencia failed to register. It only matters that he violated his ongoing duty. That violation is one crime, even if it involved multiple

requirements. The trial court abused its discretion by applying the wrong legal standard—by finding two, separate crimes when the statute, as interpreted by the appellate courts, supports only one crime as a matter of law. This Court should reverse and remand for resentencing as a Class C felony with an offender score of seven.

3. Conclusion

There was insufficient evidence that Valencia had actual knowledge of the registration requirements. This Court should reverse the conviction and dismiss the charges with prejudice.

Even if the Court affirms the conviction, the trial court abused its discretion by applying the wrong legal standard and finding two prior failure to register offenses when, as a matter of law, there was only one. As a result, the trial court imposed a sentence based on the wrong offender score and in excess of the statutory maximum for a Class C felony. This Court should reverse for resentencing.

Respectfully submitted this 29th day of June, 2017.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 29, 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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Adrian Valencia DOC #850024 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520	<u>X</u> U.S. Mail, Postage Prepaid ___ Legal Messenger ___ Overnight Mail ___ Facsimile ___ Electronic Mail

DATED this 29th day of June, 2017.

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