

No. 49622-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ADRIAN VALENCIA

Appellant.

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

The Honorable Anne Hirsch

Cause No. 16-1-00970-4

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BRIEF OF RESPONDENT

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## **A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the State produce sufficient evidence to show Valencia knowingly violated his sex offender registration requirements?
2. Did the trial court abuse its discretion when it counted Valencia's two prior failures to register as separate offenses for sentencing purposes?

## **B. STATEMENT OF THE CASE**

On November 16, 2016, the Appellant, Adrian Valencia, received his third conviction for violating his sex offender registration requirements. CP 86. He was initially designated as a sex offender following a 2010 conviction for attempted sexual abuse in the first degree. CP 87. As a result of the 2010 conviction, Valencia was required to comply with reporting and registration requirements under Washington law. *See* RCW 9A.44.130. These requirements mandated that Valencia report to the Thurston County Sheriff's Office (hereinafter "TCSO") on a weekly basis, and provide notification within ten days if he moved to another county or state. *See* CP 54.

Despite these requirements, Valencia failed to report on December 2, 2014, which was later counted as his first failure to register offense. Shortly thereafter, he became transient, and as a transient registered sex offender, Valencia was subject to different reporting guidelines. CP 82; RCW 9A.44.130(4)(a)(vi). The key differences between reporting requirements for a transient sex offender versus a sex offender living at a

fixed residence, is that the transient offender is required to keep a log of his whereabouts, and if he moves to another county or state, he must notify the sheriff's office within three days, whereas an offender staying at a fixed residence has ten days to provide notification. *Id.* In February, 2015, Valencia signed a new Sex Offender Registration Form (hereinafter "2015 Transient Registration"), reflecting his updated reporting requirements as a transient. CP 82. Then on March 18, 2015, he again failed to report as required, and in his most recent conviction, this was counted as his second failure to register offense. He was subsequently arrested, and pled guilty to two counts of failing to register as a sex offender. CP 87.

Upon his release from the Nisqually Jail, Valencia moved in with his sister who resided in Thurston County. RP 75-79. Because he was staying at a fixed residence, he was required to report within ten days if he moved to another county or state. CP 54. However, on May 5, Valencia moved out of his sister's house, again becoming transient. CP 55; RP 79. He reported this change to the TCSO, and signed a new Sex Offender Registration Requirements Form (hereinafter "2016 Transient Registration"), which plainly stated that he was required to provide notification within three days if he moved to a different county or state.

CP 55. Valencia initialed each clause of the form, and signed a section indicating that he had read the new requirements. CP 55.

On May 18, 2016, Valencia failed to report to his mandated weekly check-in.<sup>1</sup> According to Valencia's testimony, he then moved to Astoria, Oregon, on May 24 with the intent to relocate permanently. RP 77. It is undisputed that Valencia did not report within three days of this move. RP 85-92; Appellant's Brief at 4. Nine days later, Valencia returned to Thurston County, where he was arrested for unrelated reasons.<sup>2</sup> At the time of his arrest, Valencia had not attended his required weekly check-ins with the TCSO for more than three weeks.

Following his arrest, Valencia was charged with failure to register. RP 81. At his bench trial, Valencia argued that he was confused as to his reporting requirements, therefore he did not knowingly fail to register as required by RCW 9A.44.130. RP 82. Nevertheless, based on the signed 2016 Transient Registration, the court found that Valencia had acted with the requisite knowledge. RP 106-07. In addition, the court held that Valencia's prior failures to register counted as two separate offenses for

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<sup>1</sup> Valencia did call in lieu of reporting in person on the 18th, but was informed that in-person check-ins were required. RP 86-87. Valencia and Pamela McClure, of the TCSO, provided conflicting testimony as to whether he was told that his absence was excused for that week. RP 52, 87.

<sup>2</sup> Valencia testified that he had moved to Oregon permanently, but was back in Thurston County for a day at the time of his arrest. RP 77-78.

the purpose of calculating his offender score, and applying RCW 9A.44.132(1). RP 133. Valencia has now appealed both of those rulings.

### C. ARGUMENT

#### **1. Sufficient Evidence Was Presented to Establish That Valencia Knowingly Failed to Comply With Registration Requirements.**

In his first point of error, Valencia claims there was insufficient evidence to show he knowingly failed to comply with his reporting requirements. Appellant's Brief at 6-10. This claim is without merit.

The record shows that the State produced Valencia's 2016 Transient Registration, in which he indicated that he had fully read his reporting requirements, including his duty to report within three days if he moved. RP 55. Valencia read and signed the 2016 Transient Registration less than three weeks before he moved. CP 55. Rarely does evidence of knowledge come in a more readily available and persuasive form than a signed document from the defendant indicating that he had read the requirements he stands accused of violating.

Because a claim of insufficiency admits the truth of the State's evidence, and all inferences that reasonably can be drawn therefrom, *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) ("When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and

interpreted most strongly against the defendant.”), the signed 2016 Transient Registration could easily lead the trial court to conclude beyond a reasonable doubt that that Valencia was aware of the reporting requirements, and that he therefore knowingly violated his duty to register under RCW 9A.44.130.<sup>3</sup> Thus, the evidence produced at trial met the test for sufficiency of the evidence, which asks whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *Id.* As a result, Valencia’s claim of insufficient evidence must be denied.

**2. The Trial Court Did Not Abuse Its Discretion When It Counted Valencia’s Prior Failures To Register As Two Separate Offenses.**

In his second point of error, Valencia argues that the trial court erred by counting his prior failures to register as separate offenses.<sup>4</sup> Appellant’s Brief at 10. However, the trial court’s decision to count the

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<sup>3</sup> Valencia’s brief argues that there is evidence supporting that he was subjectively mistaken to whether he was required to report in three days or ten. Appellant’s Brief at 6-10. Such evidence may have been relevant at trial, but it carries little weight in an insufficient evidence claim, due to the fact that the evidence is now viewed in the light most favorable to the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Thus, because the trial court weighed Valencia’s testimony against the 2016 Transient Registration, and found the signed document more persuasive, that finding must be given deference on appeal.

<sup>4</sup> Had the trial court aggregated the prior failures to register as a single criminal act, then Valencia would have been subject to a lower sentence range, and his latest offense potentially would have been considered a class C felony rather than class B. *See* Appellant’s Brief at 10-17.

offenses separately is reviewed under an abuse of discretion standard, *State v. Aldana Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013) (“[W]e have repeatedly observed that a court's determination of same criminal conduct will not be disturbed unless the sentencing court abuses its discretion or misapplies the law.”), and the facts show that the trial court was acting within its discretion when it made its ruling.

To begin, Valencia’s two prior failures occurred on Dec. 2, 2014 and March 18, 2015; more than three months apart. CP 87. Under RCW 9.94A.589(1)(a),<sup>5</sup> Valencia bears the burden of proving that the offenses did not occur at the same time and place. *Aldano Graciano*, 176 Wn.2d at 538-41 (“[I]t is the defendant who must establish that crimes constitute the same criminal conduct.”). While there is no black letter law for precisely how much time must pass before a court can consider acts to be separate criminal conduct, at the very least, a three month gap is long enough that the trial court cannot be said to have clearly abused its discretion. Because Valencia has not met his burden of showing that the acts occurred at the same time and place, his claim must fail.<sup>6</sup>

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<sup>5</sup> RCW 9.94A.589 (1)(a) (“Same criminal conduct, as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.”).

<sup>6</sup> Valencia cites to *Durrett*, in which a two week period of compliance was insufficient to establish separate criminal acts. *State v. Durrett*, 150

Perhaps more importantly though, in the intervening time period between Valencia's prior failures to register, he became transient, CP 82-83; a change of circumstances which the legislature found significant enough to merit its own separate statutory requirements. *See* RCW 9A.44.130(4)(a)(vi). As a result, he was required to sign the 2015 Transient Registration. CP 82-83. Thus, on Dec. 2, 2014, Valencia violated the requirements pertaining to sex offenders residing at a fixed residence, whereas, once he became transient, Valencia violated the separate requirements for transient offenders.<sup>7</sup> Critically, it was the signing of the 2015 Transient Registration which the trial court held to be an intervening act, and which formed the basis of the court's decision to count the failures to register as separate offenses. RP 133.

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Wn.App. 402, 404, 208 P.3d 1174 (2009). There the court held that two weeks of compliance did not subject him to conviction on two separate counts. *Id.* at 411. However, in the present case, the three month gap is considerably longer than the two week gap in *Durrett*. Consequently, *Durrett* is not controlling.

<sup>7</sup> Distinguishing the present case from *Durrett*, in *Durrett*, the only intervening act was a two week period of compliance, leading the court to note that had the defendant not reported at all, he would have only been subject to one conviction. *Durrett*, 150 Wn. App. at 411. Here, the intervening act was much more significant, and because Valencia violated two separate statutory provisions, he could arguably have been convicted twice, regardless of whether he had ever reported in the intervening time period. Thus, again, *Durrett* cannot be considered controlling. *Green* is also cited by Valencia, but that case is similarly not controlling because it deals with no intervening acts whatsoever. *State v. Green*, 156 Wn.App. 96, 230 P.3d 654 (2010).

In conclusion, Valencia has failed to establish that the trial court's ruling was an abuse of discretion. Valencia's two prior failures to register violated separate statutory reporting requirements; they were separated by three months; they occurred under substantially different circumstances; and, as an intervening act, Valencia reported to the TCSO to sign the 2015 Transient Registration, subjecting himself to new reporting requirements. Taken together, these facts provide a reasonable basis for the trial court's ruling. *State v. Stenson*, 132 Wn.2d 668, 757, 940 P.2d 1239 (1997) (holding that an exercise of discretion will not be overturned unless no reasonable person would take the position adopted by the trial court). Accordingly, Valencia's second claim must also be denied.

#### D. CONCLUSION

For these reasons, the State asks the court to affirm Valencia's conviction.

Respectfully submitted this 31 day of May, 2017.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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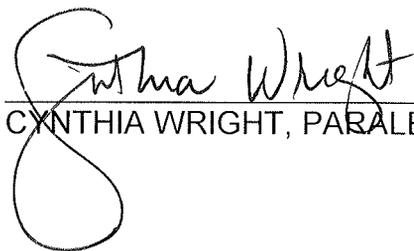
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 31 day of May, 2017, at Olympia, Washington.

  
\_\_\_\_\_  
CYNTHIA WRIGHT, PARALEGAL

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

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