

NO. 49696-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

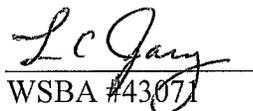
GERALD CAYENNE,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID EDWARDS, JUDGE

BRIEF OF RESPONDENT

ERIN C. JANY
Deputy Prosecuting Attorney
for Grays Harbor County


WSBA #43071

OFFICE AND POST OFFICE ADDRESS

County Courthouse
102 W. Broadway, Rm. 102
Montesano, Washington 98563
Telephone: (360) 249-3951

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I. COUNTER STATEMENT OF THE CASE

a. Procedural History

The Appellant was originally charged by Information filed on July 21, 2016. CP 1-2. On or about August 3, 2014, Gerald Cayenne, hereinafter identified as the Appellant, was released from Airway Heights Corrections Center. CP 5. The Appellant was directed to report to Community Corrections Officer (CCO) Damon Brown, who was then out of the Montesano Department of Corrections (DOC) Office. CP 5; RP Trial 22. As the Appellant was being released on a Sunday, it was arranged for a key to the Appellant's residence to be left at the Montesano DOC office where the Appellant could access it so that he would be able to get into his residence following his release. CP 5; RP Trial 22. The key was still in the same place when CCO Brown returned to the Montesano office during business hours. CP 5; RP Trial 23. The Appellant also failed to appear at DOC on August 4, 2014 as directed. CP 5; RP Trial 23.

On August 13, 2014, CCO Brown contacted Debbie Grandoff, who was then the sex offender registration support specialist for Grays Harbor County, to check if the Appellant had registered with the Grays Harbor County Sheriff's Department following his release.

CP 5; RP Trial 16-17 and 23. Ms. Grandoff advised that the Appellant had not registered up to that point. CP 5; RP Trial 23. The Appellant should have registered within three business days of his release on August 3, 2014. CP 5; RP Trial 8 and 23. CCO Brown checked again with Ms. Grandoff on November 5, 2014 to see if the Appellant had yet registered and she again advised that he had not. CP 5; RP Trial 23.

The Appellant was arrested at The Lucky Eagle Casino on November 14, 2014 and CCO Brown made contact with the arresting officer, Chehalis Tribal Public Safety Officer Burnett. CP 5. Officer Burnett advised CCO Brown that the Appellant repeatedly said that he lived in Lewis County. CP 5; RP Trial 24. CCO Brown then checked with the Lewis County Sheriff's Office to see if the Appellant had possibly registered with Lewis County. CP 5; RP Trial 24. There was no record of the Appellant having ever registered in Lewis County. CP 6; RP Trial 24. CCO Brown received information that the Appellant had registered with Chehalis Tribal Public Safety on November 17, 2014, however, it did not appear that the Appellant had registered in any Washington State jurisdiction following his release on August 3, 2014 through July 21, 2016. CP 6; RP Trial 24.

The Appellant had been arrested and sent back to prison multiple times throughout 2014, 2015, and 2016, but failed to register with the Grays Harbor County Sheriff's Office every time he was released. CP 6. The last known time the Appellant had registered in the State of Washington was on September 30, 2013 with Grays Harbor County Sheriff's Office. CP 6; RP Trial 13 and 14. At that time, he provided his address as 2411 South Bank Road in Oakville. CP 6; RP Trial 13 and 14; State's Trial Exhibit 1.

Prior to trial starting, the trial court addressed the State's Motions in Limine. RP Pretrial 3. The State addressed the issue related to the Appellant having registered with the Chehalis Tribe in 2014, which it argued in its Motions in Limine was irrelevant. RP Pretrial 4. The State argued that the Appellant has a duty to register with the Chehalis tribe as well as with Grays Harbor County, but that his duty to register under the federal laws do not pertain to or negate the Appellant's duty to register under Washington State laws. RP Pretrial 4, 5. The State argued that Chehalis tribe is a separate entity and sovereign country and that there isn't communication between the State and the tribe as it relates to the registration of sex offenders. RP Pretrial 5. The State further argued that the only reason it was known that the Appellant had register with the tribe

was because DOC was trying to find the Appellant after he failed to contact DOC and failed to register in Grays Harbor County, where he had a duty to do so. RP Pretrial 5. The State argued that presenting evidence of the Appellant registering in a sovereign county would not be relevant to the charge as it was his duty to register in Washington State, specifically Grays Harbor County, that was at issue and that the presentation of his registration with the tribe would only serve to confuse the jury. RP Pretrial 5.

The Appellant's defense counsel argued that evidence that he registered with the tribe was directly relevant because it would pertain to the knowledge element of the crime. RP Pretrial 6. Defense counsel argued that because his registration requirement for both Washington State and the tribe arose out of the same incident that required registration, i.e. his sex offense, it would be prejudicial to the defense not to allow evidence of his registration with the tribe to be presented. RP Pretrial 6-7. The trial court pointed out that RCW 9A.44.130 and the other provisions relating to sex offender registration do not require a sex offender to register with any law enforcement agency other than the sheriff's office in the county where the person resides, which defense counsel agreed with. RP Pretrial 7. The trial court then equated the defense argument to the argument presented in

State v. Vanderpool, 99 Wn.App. 709 (2000), which presented a substantial compliance argument. RP Pretrial 8-9. The trial court advised that allowing the Appellant to argue that he essentially substantially complied with the requirements of RCW 9A.44.132 because he registered with the tribe would undermine the policy of RCW 9A.44.130 without strict compliance with registration requirements. RP Pretrial 9. The trial court further advised that RCW 9A.44.132 is very clear in that the Appellant has a duty to register with the sheriff in the county in which he resides, which is what the State was alleging the Appellant had not done in the Information. RP Pretrial 9-10.

The trial court thereafter granted the State's motion and advised that it was not going to permit any evidence or reference or argument to be presented regarding the Appellant's registration with the Chehalis tribe or tribal police in the State's case in chief. RP Pretrial 10. The trial court further advised that if the State presented evidence that the Appellant register with the Grays Harbor County Sheriff in September of 2013, which would satisfy his knowledge of his duty to register under Washington State laws, then the court would not allow the defense to bring it up in his defense either. RP Pretrial 10. During the trial, through Leanna Ristow, the current sex offender registration support specialist for

Grays Harbor County, the State presented testimony about RCW 9A.44.130 requiring anyone being convicted of a sex offense having to register within three business days upon conviction or release from custody or moving to a new county or area. RP Trial 8-9. The State further presented the steps a person who has a duty to register would go through, including what paperwork is done and what information they receive. RP Trial 9-12.

Also in the trial, the State presented and admitted evidence specific to the Appellant's registration in 2013. RP Trial 12. Specifically, the State admitted the Appellant's Sex and Kidnap Offender Registration Annual Verification/Charge of Address form, which showed that the Appellant registered with the Grays Harbor County Sheriff's Office on September 30, 2013. RP Trial 12; State's Trial Exhibit 1. The State also admitted the Appellant's Offender Registration Notification Form from September 30, 2013, which contains all of the laws related to registration and the requirements of registration for sex and kidnap offenders. RP Trial 14, 15, and 16; State's Trial Exhibit 3. Ms. Ristow testified that the Appellant had acknowledged his duties to register as listed on the Notification Form by initialing each rule and RCW on the form. RP Trial 16. Ms. Ristow further testified that the Appellant was then registered in

Grays Harbor County as of that date in 2013, but then left for a period of time and returned to Grays Harbor County in 2014. RP Trial 16. Ms. Ristow testified that the Appellant did not re-register as required after returning to the county in 2014 and that he had been out of compliance with his duty to register since 2014 until the present time. RP Trial 17.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1) Exclusion of Relevant Evidence Claim

Appellant counsel makes the argument that the evidence that the Appellant registered with the Chehalis Tribe is relevant to his defense because his registration with the tribe would tend to disprove that the Appellant knew he had failed to comply with his registration requirements in Grays Harbor County and/or the State of Washington. Appellant counsel also makes some reference to the fact that the Chehalis Tribe is in Grays Harbor County, perhaps trying to argue that because the tribe is within the county, his registration with the tribe somehow satisfies his duty to register in Grays Harbor County. However, this issue isn't explored further by appellant counsel so the State will not address this any further than to point out that tribal nations, including the Chehalis Tribe, are "domestic dependent

nations” that exist within the boundaries of the United States and retain sovereign powers. See The United States Department of Justice Archives, Attorney General June 1, 1995 Memorandum on Indian Sovereignty, *Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes*, <https://www.justice.gov/archives/ag/attorney-general-june-1-1995-memorandum-indian-sovereignty>.

Tribal nations govern themselves and many, as is the case with the Chehalis Tribe, have their own police department, tribal civil and criminal codes, tribal court, and tribal attorney. See Official Site of the Confederated Tribes of the Chehalis Tribe, *Public Safety and Office of the Tribal Attorney*, <https://www.chehalis-tribe.org/index.php>. The Chehalis Tribe furthermore has its own criminal code related to sex and kidnapping offender registration requirements. See Chehalis Tribal Code 4.10.130-190, <http://www.codepublishing.com/WA/ChehalisTribe/>. As with the Washington State registration laws, there is no reference to cross-registration between the tribe and the State of Washington, only that sex and kidnapping offenders have a duty to register with each jurisdiction separately.

An accused person has a right to a meaningful opportunity to present a defense. Wash. Const. art. I, § 22; *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). But this right is not absolute. *Jones*, 168 Wn.2d at 720. “Evidence that a defendant seeks to introduce ‘must be of at least minimal relevance.’ ” *Id.* (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). “Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence.” *Id.* (citing *State v. Gregory*, 158 Wn.2d 759, 786, 147 P.2d 1201 (2006)). Relevant evidence is that which tends to make the existence of any material fact more or less probable. ER 401. If the evidence is relevant, the court balances the State's interest in excluding the evidence against the defendant's need for the evidence. *Jones*, 168 Wn.2d at 720.

Here, the evidence that was excluded was simply not relevant. The Appellant was charged with failure to register under RCW 9A.44.130. RCW 9A.44.130 requires that a person who has been convicted of any sex or kidnapping offense shall register with the county sheriff for the county of the person's residence. RCW 9A.44.130(1)(a). RCW 9A.44.130 also requires that if such a person moves, that person must register with the county sheriff of the new

county within three business days of moving and provide, by certified mail, with return receipt requested or in person, written notice of the change of address to the county sheriff with whom the person last registered. RCW 9A.44.130(5)(b).

There is nothing in the statute that states or even indicates that if a person registers with another jurisdiction, in this case a sovereign domestic dependent nation, that this somehow satisfies the person's duty to register with the county in which he is or claims to be residing. As the trial court pointed out in this case, the statute is very clear. Not only was the Appellant required to register with Grays Harbor County while residing in the county or claiming to reside in the county, but if he moved to a new area, then he would have a duty to register with the new county and notify Grays Harbor County, as the county he last registered with, of his move. The Appellant did neither of these things. The registration with the tribe has no relevance to the issue as to whether he fulfilled his duties under RCW 9A.44.130.

To argue otherwise equates to making the argument that a person who moves to Washington from Oregon and is a resident here longer than 30 days, that person then has a valid Washington driver's

license. That isn't any more true than what appellant counsel is arguing here. That person may still have a valid Oregon driver's license, which is valid in Oregon, but he or she does not have a valid Washington driver's license. He or she is still required to obtain a valid Washington driver's license within thirty days from the date they become a resident and to surrender their Oregon driver's license. See RCW 46.20.021.

Furthermore, in order to be relevant, the evidence must tend to make the existence of any material fact more or less probable. Here, it is not a material fact that the Appellant had a duty to register with the Chehalis Tribe or that he did register with the tribe. His dual duty to register with both jurisdictions has nothing to do with his duty to register with Grays Harbor County and to follow the requirements of his duty to register in the State of Washington. His registration requirement with the Chehalis Tribe and his registration with the tribe only goes to prevent him from possibly being charged by the tribe for a violation under Chehalis Tribal Code 4.10.150. See Chehalis Tribal Code 4.10.150 – Sex and Kidnapping Offenders – Failure to Register, <http://www.codepublishing.com/WA/ChehalisTribe/>. As argued above, case law supports that the Appellant has no right to present

irrelevant evidence and the trial court was correct to exclude the Appellant's tribal registration.

Appellant counsel goes on to argue that evidence of the Appellant's registration with the Chehalis Tribe was relevant to the element of knowledge because it could have disproved the state's allegation that the Appellant knowingly failed to comply with his registration requirements in Grays Harbor County. What the appellant counsel is actually arguing is that the Appellant mistakenly believed that he had complied with all of his registration duties – with both the Chehalis Tribe and Grays Harbor County – by registering with the Chehalis Tribal Police and that he was therefore in substantial compliance with his duty to register. There is, however, established case law that addresses the issue of whether a defendant knowingly violated the sex offender registration because of an inability to understand the statute. This was specifically addressed in *State v. Vanderpool*. *State v. Vanderpool*, 99 Wn.App. 709, 995 P.2d 104 (2000).

The court in *Vanderpool* rejected the argument that the defendant had substantially complied when he moved to Spokane County from Benton County and registered there, then failed to notify

Spokane County when he returned to Benton County about a year later. *Vanderpool*, 99 Wn.App. at 710-11, 712. The defendant argued that since he was arrested in Benton County shortly after leaving Spokane County, the authorities knew his whereabouts. *Id.* at 712. The court found, however, that while Benton County may have known the defendant's whereabouts, Spokane County was not notified, which the defendant had a duty to do. *Id.* Since the defendant had not notified Spokane County, it was simple nonperformance, not misperformance. *Id.*

The court in *Vanderpool* further clarified that to allow substantial compliance as a defense would conflict with the well-established rule that “a good faith believe that a certain activity does not violation the law is...not a defense in a criminal prosecution.” *Vanderpool*, 99 Wn.App. at 712 (citing *State v. Reed*, 84 Wash.App 379, 384, 928 P.2d 469 (1997) (citing *State v. Patterson*, 37 Wash.App. 275, 282, 679 P.2d 416, *review denied*, 103 Wn.2d 1005 (1984))). The court further held that even if the defendant did not understand the statute, “ignorance of the law is no excuse. *Id.* at 714 (citing *Reed*, 84 Wash.App. at 384). The court also specifically found that because the defendant had registered in the past and had signed

the form that contained the statutory requirements of RCW 9A.44.130, there was sufficient information presented for the trier of fact to find that the defendant had knowledge of his duties and that he knowingly failed to register. *Vanderpool*, 99 Wn.App. at 713-714.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the fact finder's determinations, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 110 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

A defendant acts “knowingly” if “(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he or she has information which would lead a

reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.” RCW 9A.08.010(1)(b). For purposes of RCW 9A.44.130, “knowledge” may be inferred where a defendant has properly previously registered. *See State v. Castillo*, 144 Wn.App. 584, 589–90, 183 P.3d 355 (2008) (reasonable to infer that a sex offender knew the registration requirements when he had registered before); *State v. Vanderpool*, 99 Wn.App. 709, 713–14, 995 P.2d 104 (a rational trier of fact could decide that defendant knowingly violated the registration requirements when the record contains evidence that he has followed the registration statute before), *review denied*, 141 Wn.2d 1017 (2000).

Here, the State presented evidence that the Appellant had registered with Grays Harbor County in 2013 and that he had also acknowledged his duties by initialing each rule and RCW on the Notification Form at that same time. RP Trial 16; State’s Trial Exhibit 3. As in *Vanderpool* then, there was sufficient evidence for the trier of fact to have found that the Appellant had knowledge of his duties and that he knowingly failed to register. The idea that the Appellant may have mistakenly believed that by registering with the

Chehalis Tribe this also “covered” his registration duties in Grays Harbor County is the same argument made in *Vanderpool*. The Appellant’s ignorance of the law is similarly no excuse.

The State certainly presented sufficient evidence to show that the Appellant knowingly violated his registration requirements based on the above-cited case law and would respectfully request that the jury’s finding of guilty be upheld.

2) Court’s Failure to Ensure Sentence Did Not Exceed Statutory Maximum Claim

The Appellant also appeals his 36 month term of community custody, arguing that the combination of and his term of 50 months of confinement and his community custody term exceeds the 60 month statutory maximum punishment for his crime in violation of RCW 9.94A .701(9),⁵ and that he is entitled to be resentenced to reduce his term of community custody. *State v. Boyd*, 174 Wn.2d 470, 472–73, 275 P.3d 321 (2012).

The State concedes that the Appellant was given a 50 month sentence and 36 month term of community custody, which would exceed the 60 month statutory maximum punishment. CP 24-38. The judgment and sentence should have clarified that the Appellant was to

be on community custody for the remainder of the statutory maximum, i.e. 10 months of community custody if the Appellant served the full 50 months in custody or whatever time was remaining after serving his sentence up to 60 months in total, factoring in time served while in Grays Harbor County and awarded good time. As such, the State agrees that the Appellant is entitled to have an amended judgment and sentence entered to reflect his true community custody term.

CONCLUSION

For the aforementioned reasons, the State humbly requests that this Court affirm the conviction and order that an amended judgment and sentence be completed in this case to reflect the true community custody term.

DATED this 18th day of October, 2017.

Respectfully Submitted,

BY: 
ERIN C. JANY
Deputy Prosecuting Attorney
WSBA # 43071

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