

NO. 50767-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re Post-Sentence Review of:

MICHAEL THOMPSON,

Respondent.

DEPARTMENT OF
CORRECTIONS'
REPLY

I. REPLY

Petitioner, the Department of Corrections (Department), replies to the State's response. The State agrees with the Department that attempted failure to register would not be included in the definition of a sex offense pursuant to RCW 9.94A.030(47)(a)(iv). The State disagrees however with the Department that attempted failure to register is not a sex offense pursuant to RCW 9.94A.030(47)(a)(v).

The State reasons the Department's logic is flawed by suggesting it acknowledged attempted failure to register is a sex offense because it is a felony violation of RCW 9A.44.132. Response, at 9. That is not the case. The Department previously discussed circumstances in which the *completed* crime of failure to register would qualify as a sex offense. Petition, at 4. It was in this context the Department argued RCW 9.94A.701(3)(d) could not expressly apply to Mr. Thompson due to his two prior convictions for failure to register as a sex offender. Petition, at

5. The implication being that even if Mr. Thompson's current conviction was for the completed crime of failure to register, subsection (3)(d) would not authorize community custody due to his prior convictions.

The State further argues that attempted failure to register qualifies as a sex offense by comparing the statute defining a sex offense to SRA sentencing provisions related to standard sentencing ranges and Pattern Jury Instructions. It may be the case that the SRA deals with attempt crimes based on their completed versions for purposes of determining an offender's total sentencing range; however, that is a separate and distinct issue from whether a crime falls within the definition of a sex offense. Whether a crime falls within a particular definition will certainly inform the parties of the sentencing range for that crime. However, the converse is not true. From a practicality standpoint, the standard sentencing ranges cannot instruct on the definitions contained in RCW 9.94A.030. For example, the parties must first know what constitutes a "sex offense" before turning to the standard sentencing ranges for particular sex offenses. The only relevant statute here is the definitional statute. The SRA's later use of "sex offense" does not somehow incorporate anticipatory offenses into a definition that does not already include them.

Similarly, whether a Pattern Jury Instruction informs a jury on the elements of attempt as well as the elements of the completed crime is not

dispositive of the issues in Mr. Thompson's matter. In *In re Richey*, 162 Wn.2d 865, 175 P.3d 585 (2008), Thomas Richey entered guilty pleas to first degree murder and attempted first degree intentional murder *or* attempted first degree felony murder. *Richey*, 162 Wn.2d, at 868. Richey appealed arguing attempted first degree felony murder is not a crime. *Id.* The Washington Supreme Court agreed concluding that the crime of attempted first degree felony murder does not exist and is "illogical in that it burdens the State with the necessity of proving that the defendant intended to commit a crime that does not have an element of intent." *Richey*, 162 Wn.2d at 869.

The State originally charged Mr. Thompson with failure to register as a sex offender. Response, at Appendix A. On the same date Mr. Thompson entered a guilty plea to attempted failure to register as a sex offender, the State filed an amended information charging Mr. Thompson with attempted failure to register as a sex offender. Response, at Appendix B, Appendix C. Thus there was no jury trial in Mr. Thompson's matter and consequently no jury instructions.

Had Mr. Thompson's matter resulted in a jury trial, it is doubtful the State would have proceeded to trial on an attempted failure to register as a sex offender information. By doing so, the State would have tasked itself with proving Mr. Thompson took a substantial step towards failing

to register. As discussed previously, “attempted failure to register” is illogical because the State does not have to prove the person intended not to register. Petition, at 9. The state must only prove the person knew of the duty to register, and did not register. *Id.* It would be difficult if not impossible for the State to prove at trial Thompson attempted to fail to register as a sex offender.

Finally, the State argues the Department’s reliance on *In re Postsentence Review of Leach* is misplaced, maintaining that unlike the statute in *Leach*, the statute here defines a sex offense as a felony violation of RCW 9A.44.132 and an attempt to commit that crime is a violation of the underlying statute. The State opines *Leach* is inapplicable because the statute at issue there did not specifically include *attempted* assault. This argument ignores that both the community custody statute applicable here, RCW 9.94A.701, and the statute authorizing the Department to supervise community custody, RCW 9.94A.501, include the *completed* crime of failure to register. Petition, at 8. Further, the State agreed that within the definition of a sex offense, the statute itself does not include failure to register as a sex offender in the section dealing with anticipatory offenses. Had the Legislature intended for attempted failure to register to be included in the definition of a sex offense, it would have included RCW 9A.44.132 in RCW

9.94A.030(47)(a)(i) through (iii) and made it a part of “such crimes.” The absence of the anticipatory crime of “attempted failure to register” indicates the Legislature did not intend to include this particular attempted crime. Thus, failure to register by itself is explicitly excluded from the definition of a sex offense in RCW 9.94A.030(47)(a)(i)-(iv).

Because attempted failure to register is not a sex offense as defined in RCW 9.94A.030(47), the Superior Court lacks authority to order community custody pursuant to RCW 9.94A.701(1)(a).

II. CONCLUSION

For the reasons stated above, the Court should grant this petition and remand this matter to the Superior Court for correction of the judgment and sentence.

RESPECTFULLY SUBMITTED this 18th day of September, 2017.

ROBERT W. FERGUSON
Attorney General

s/ Mandy Rose
MANDY ROSE, WSBA #38506
Assistant Attorney General
Attorneys for Petitioner
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445

CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the foregoing document with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service, postage prepaid, the document to the following non electronic filing participants:

RACHAEL R. PROBSTFELD
DEPUTY PROSECUTING ATTORNEY
CLARK COUNTY PROSECUTOR'S OFFICE
P.O. BOX 5000
VANCOUVER, WA 98666-5000

DUSTIN D. RICHARDSON
712 W. EVERGREEN BLVD
VANCOUVER, WA 98660-3033

MICHAEL THOMPSON DOC #845536
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

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

DATED this 18th day of September 2017 at Olympia, Washington.

s/ Katrina Toal
KATRINA TOAL
Legal Assistant 3
Corrections Division
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
KatrinaT@atg.wa.gov

CORRECTIONS DIVISION ATTORNEY GENERAL'S OFFICE

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PO Box 40116
Olympia, WA, 98504-0116
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