

FILED
Court of Appeals
Division II
State of Washington
11/30/2018 10:26 AM

NO. 51630-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRADLEY REYNOLDS,

Appellant.

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

The Honorable Anne M. Cruser, Judge
The Honorable Stephen M. Warning, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to dismiss the charge of Failure to Register as a Sex Offender based on insufficient proof of a duty to register.

2. The trial court erred when it relied on appellant's prior Washington convictions for Failure to Register as a Sex Offender.

Issues Pertaining to Assignments of Error

1. An individual has a duty to register as a sex offender in Washington based on an out-of-state conviction if that conviction is comparable to a Washington sex offense or if conviction for that offense requires registration in the state of conviction. Neither is true in appellant's case. Did the trial court err when it denied a motion to dismiss the current charge?

2. When finding appellant guilty, and at sentencing, the court relied on prior Washington convictions for Failure to Register as a Sex Offender. Where registration in Washington was never required, are these prior Washington convictions invalid?

B. STATEMENT OF THE CASE

As an initial matter, in recognition of deficits in the current record, Reynolds has filed a timely Personal Restraint Petition more fully documenting and explaining his claims. See In re PRP

of Bradley Reynolds, No. 52376-1-II (consolidated with this appeal). Consistent with the Rules of Appellate Procedure, this brief necessarily relies only on the record from Superior Court. A more complete record is found in the PRP.

The Cowlitz County Prosecutor's Office charged Bradley Reynolds with Failure to Register as a Sex Offender for failing to report between August 15, 2017 and October 3, 2017, alleging that a 1990 conviction for Rape in the Third Degree from Clackamas County Oregon qualified as a "sex offense" and therefore required registration and reporting in Washington. CP 3.

A "sex offense" for registration purposes means:

Any out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction; or, if not required to register in the state of conviction, an offense that under the laws of this state would be classified as a sex offense under this subsection.

RCW 9A.44.128(10)(h).

Reynolds had prior Washington convictions for failures to register in 2005 (Kitsap County), 2006 (Kitsap County), 2013 (Jefferson County) and 2016 (Cowlitz County). CP 3, 64. In the 2016 case, Judge Stephen Warning found that Reynolds' 1990 Oregon conviction was not comparable to any Washington felony

sex offense. RP 9. Prior to 2010, comparability of an out-of-state sex offense was the only basis on which to impose a registration requirement in Washington. Therefore, Judge Warning found Reynold's pre-2010 convictions invalid. RP 9. But because a 2010 statutory amendment to RCW 9A.44.128 added a registration requirement if the individual was required to register in the state of conviction¹ (and Judge Warning found Reynolds was required to register in Oregon based on the 1990 conviction), Judge Warning found the 2013 and 2016 violations properly established. RP 9-10.

In the current case, Reynolds waived his right to trial by jury. CP 7. His attorney – Joshua Baldwin – then filed a document entitled “Motion In Limine.”² CP 8. The content of that motion, however – as well as oral argument on the motion – revealed that it was actually a motion to dismiss the charge for insufficient evidence. See CP 8-19; RP 4. Baldwin argued that, not only did the absence of any comparable Washington sex offense negate the duty to register in Washington (as Judge Warning had found), but because Oregon had not ordered registration at the time of

¹ See Laws of 2010 c 267 § 1, eff. June 10, 2010.

² Baldwin attached a copy of the defense motion from the 2016 matter, heard by Judge Warning, to his motion. See CP 12-19.

Reynolds' conviction in 1990, there was never any duty to register in Oregon, either. Therefore, neither of the triggering events for registration found in RCW 9A.44.128 had been met, Reynolds had never been required to register in Washington, and his past Washington convictions (as well as the current charge) were invalid. CP 9-10; RP 13-19.

Specifically, Reynolds noted that the judgment from his 1990 Oregon conviction did not contain a registration requirement. CP 9, 24-25. In fact, the box on the judgment for "sex offender package" was left unmarked. CP 24. The only reference to a reporting requirement was found in a document entitled "Addendum to Judgment Special Probation Conditions – Sex Offender Package," dated July 17, 2000 and apparently contained in the court file for the 1990 offense. CP 50. Baldwin argued this was insufficient to establish an Oregon registration requirement. CP 9-10; RP 14-15, 18-19.

The Honorable Anne Cruser rejected the argument that Reynolds never had a duty to register in Oregon and therefore had no duty in Washington. RP 23. Preserving his right to appeal Judge Cruser's adverse ruling, Reynolds stipulated (for purposes of trial only) that he had a duty to register in Washington. CP 51-52.

Judge Cruser found that Reynolds lacked a fixed residence, repeatedly failed to report, and was guilty as charged. RP 32-37; CP 51-55.

The Honorable Stephen Warning subsequently imposed an exceptional sentence below the standard range of 30 months' confinement and 60 months' community custody. CP 66-67, 78. Reynolds timely filed a Notice of Appeal. CP 79-95.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED REYNOLDS' CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE AND FOUND HIM GUILTY OF FAILING TO REGISTER.

In criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The proper remedy

where the evidence is deemed insufficient to support a conviction is reversal of the conviction and dismissal of the charge with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

“A person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130.” RCW 9A.44.132(1); see also RCW 9A.44.130(1)(a) (requiring registration for those with a qualifying “sex offense”). Once registered, any individual lacking a fixed residence is required to report weekly to the county sheriff’s office. RCW 9A.44.130(6).

As discussed above, at issue in this appeal is whether the State demonstrated that Reynolds’ 1990 Oregon conviction for Rape in the Third degree was a qualifying “sex offense” under RCW 9A.44.128(10)(h), either because it is comparable to a Washington sex offense or because conviction for that offense required that Reynolds register as a sex offender in Oregon.

Regarding comparability, in cases where the elements of the foreign offense are broader than Washington's statutes, the offense is not legally comparable. State v. Olsen, 180 Wn.2d 468, 472-473, 325 P.3d 187, cert. denied, ___ U.S. ___, 135 S. Ct. 287, 190 L. Ed. 2d 210 (2014); State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)); In re Personal Restraint of Lavery, 154 Wn.2d 249, 255-256, 111 P.3d 837 (2005).

As the State seemed to concede below, RP 9, the 1990 Oregon offense is not comparable to a Washington sex offense. State v. Arndt, 179 Wn. App. 373, 388, 320 P.3d 104 (2014) (Oregon conviction for Rape in the Third Degree not comparable to a Washington conviction for Third Degree Rape of a Child). In Oregon, "A person is guilty of rape in the third degree if the person has sexual intercourse with another person under 16 years of age." ORS § 163.355; CP 22.

This offense is not comparable to child rape or molestation in Washington because our statutes require additional proof that the victim is not married to the perpetrator and that the perpetrator

is at least 48 months older than the victim.³ See RCW 9A.44.079(1) (Rape of a Child in the Third Degree); RCW 9A.44.089(1) (Child Molestation in the Third Degree).

Therefore, the question becomes whether Reynolds was nonetheless required to register in Washington because the 1990 Oregon conviction was “an offense for which the person would be required to register as a sex offender while residing” in Oregon. RCW 9A.44.120(10)(h). The answer is no.

At the time of Reynolds’ 1990 conviction, there is no indication he was required to register in that state. In 1997, the Oregon Legislature enacted ORS § 181.603, which provided, “When the court imposes sentence upon a person convicted of a sex crime the court shall notify the person of the requirement to register as a sex offender under ORS 181.595 and 181.596.”

³ Even if not legally comparable, comparability may be established by examining the facts underlying the foreign conviction to determine if the defendant’s conduct would have resulted in a conviction for a Washington offense. In making a factual comparison, however, the court may consider only facts that were admitted, stipulated, or proved beyond a reasonable doubt. Olsen, 180 Wn.2d at 473-474; Thiefault, 160 Wn.2d at 415; Lavery, 154 Wn.2d at 255-258. The State did not argue comparability based on the facts established in the Oregon prosecution.

Former ORS § 181.603(1).⁴ “Sex crime” includes “Rape in any degree.” Former ORS § 181.594(2).⁵ Further, under Oregon law, the defendant must complete a form, provided to the defendant, documenting the registration requirement “[a]t the initial intake for incarceration or release on any type of supervised release” Former ORS § 181.603(2). As argued in the trial court, nothing in the record indicates Reynolds was advised at sentencing for his 1990 offense of a requirement that he register as a sex offender. Nor is there any indication that he was required to register at that time. See CP 9. And while an “addendum to judgment” dated July 17, 2000 indicates “Defendant shall register as a sex offender pursuant to Oregon Revised Statutes,” CP 50, the addendum does not contain a cause number, the defendant’s name, or a signature. See CP 9.

Moreover, there is no indication Reynolds was provided or completed a form documenting a registration requirement, as required under former ORS § 181.603(2). Ultimately, because Oregon’s prerequisites to any registration requirement were not

⁴ Former ORS § 181.603 is now codified at ORS § 163A.050. Former ORS §§ 181.595 and 181.596 are now codified at ORS §§ 163A.010 and 163A.015, respectively.

proved, there has been no showing the 1990 Oregon conviction was “an offense for which the person would be required to register as a sex offender while residing in Oregon. RCW 9A.44.120(10)(h). Hence, there has been no showing Reynolds has a qualifying “sex offense” under Washington law that requires registration here.

Judge Cruser’s analysis ended once she concluded Reynolds was required to register in Oregon. Therefore, she never considered his additional argument that the absence of an Oregon registration requirement tainted all of his Washington convictions for failing to register. See CP 10 (absence of Oregon registration requirement invalidates Washington convictions). Except for the 2016 offense, which was resolved by stipulated trial, all of Reynolds’ Washington convictions for Failure to Register resulted from guilty pleas. CP 8, 13. And because those pleas were premised on a mistaken belief he was required to register as a sex offender in Washington because his Oregon conviction was comparable to a Washington sex offense, Reynolds argued there was no factual basis for the pleas, they were not the product of a knowing, intelligent, and voluntary waiver of constitutional rights,

⁵ Former ORS § 181.594 is now codified at ORS § 163A.005.

and they could not be considered for the current charge. See CP 13-19 (citing, among other authorities, Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969); State v. Summers, 120 Wn.2d 801, 846 P.2d 490 (1993); In re Keene, 95 Wn.2d 203, 622 P.2d 360 (1980)).

As previously discussed, in Reynolds' 2016 case, Judge Warning agreed with this argument for Reynolds' pre-2010 Washington convictions (for violations in 2005 and 2006) because his 1990 Oregon rape conviction was not comparable to any Washington sex offense. RP 9. And, for the same reason, Judge Warning again found these convictions invalid at sentencing in the current case. CP 64. But because the 2010 statutory amendment to RCW 9A.44.128 added a registration requirement if the individual was required to register in the state of conviction (and Judge Warning assumed Reynolds fell under this requirement), Judge Warning found convictions for the 2013 and 2016 violations valid and warranted. RP 9-10.

Now, however, it is apparent the State has not established that Reynolds was under an obligation to register in Oregon. Therefore, all of the post-2010 Washington convictions should also

be deemed invalid. Like the pre-2010 convictions, the foundation for conviction (a valid registration requirement in Washington) is simply missing.

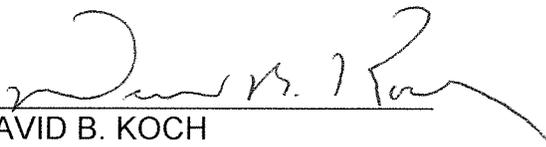
D. CONCLUSION

The motion to dismiss Reynolds' current charge should have been granted. His conviction should be reversed and the charge dismissed.

DATED this 30th day of November, 2018.

Respectfully submitted,

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November 30, 2018 - 10:26 AM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v. Bradley Reynolds, Appellant
Superior Court Case Number: 17-1-01348-7

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