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Court of Appeals
Division II
State of Washington
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NO. 52605-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JASON ALLAN LUSK-HUTCHINS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. Reversal is required because the State presented insufficient evidence that Mr. Lusk-Hutchins committed the offense of failure to register.

- a. Courts must strictly construe the registration statute, and the plain language of the statute imposes no registration requirement for the acquiring of a fixed residence without moving.

Mr. Lusk-Hutchins reported in person, weekly, while he lacked a fixed residence, in compliance with RCW 9A.44.130(6)(b). CP 22; Exs. 8 (p.2-3), 10; RP 63, 83-85. Once Mr. Lusk-Hutchins stayed at the location he reported to the sheriff for six out of his seven reported days, that location became his fixed residence. Ex. 10 (p.2); RCW 9A.44.128(5) (defining “fixed residence” as “a building that a person lawfully and habitually uses as living quarters a majority of the week.”). Once Mr. Lusk-Hutchins no longer lacked a fixed residence, the statute did not require him to continue to report weekly. In addition, Mr. Lusk-Hutchins’s newly acquired fixed residence did not involve a move. Because he did not change his residence by moving, the requirement of RCW 9A.44.130(5)(a) to register within three business days of moving fails to apply. Therefore, Mr. Lusk-Hutchins did not fail to comply with either reporting obligation imposed by the statute, and the State presented insufficient evidence that Mr. Lusk-Hutchins was guilty of failure to

register. (For a summary of the different reporting obligations imposed by the statute and how Mr. Lusk-Hutchins complied, see the charts in the opening brief at pages 12 and 16.)

The State responds not by explaining how Mr. Lusk-Hutchins's actions are covered by a specific reporting obligation with which he failed to comply but by focusing on the legislative intent behind the failure to register statute. Br. of Respondent at 5-6. The State argues that because the legislature enacted the registration statute to protect communities, it must have intended a registration requirement in instances similar to Mr. Lusk-Hutchins's. Br. of Respondent at 6-7. However, where the language of the statute is plain and unambiguous, courts resort to neither legislative intent nor history. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). Here, the imposition of specific reporting requirements triggered by specific circumstances is clear, and this Court need look no further than the statute itself.

Courts must strictly construe the failure to register statute. *State v. Dollarhyde*, ___ Wn. App. 2d ___, 444 P.3d 619, 621 (July 2, 2019). Strict construction requires a narrow interpretation of the statute, and courts may not interpret the statute to impose requirements not included in the statute or to cover conduct unaddressed by the statute. *State v.*

Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (court must literally and strictly construe penal statute).

In *Dollarhyde*, the defendant reported weekly as a registrant lacking a fixed address. 444 P.3d at 621-22. The State alleged the defendant failed to provide a complete and accurate accounting as to where he stayed every night and so failed to comply with the weekly reporting requirement. *Id.* The court found the State failed to prove that the sheriff specifically requested an accurate accounting from the defendant when he reported each week. *Id.* at 621. At most, the sheriff relied on a general request that may have been relied when the defendant first registered years before. *Id.* The court noted, “Statutes establishing procedures leading to a loss of liberty are construed strictly.” *Id.* (quoting *In re Detention of Cross*, 99 Wn.2d 373, 379, 662 P.2d 828 (1983)). The court reversed the conviction for insufficient evidence because a strict construction of the statute requires a clear and specific request for an accounting of every night’s stay at each weekly reporting. *Id.* Where the State failed to prove such a specific request was made for the weeks in question, it presented insufficient evidence to support the conviction. *Id.* at 622.

Applying the principle of strict construction here, Mr. Lusk-Hutchins did not fail to comply with a reporting requirement. The statute

imposes a requirement to report weekly while a registrant lacks a fixed residence. RCW 9A.44.130(6)(b). The statute clearly defines what it means to possess or lack a fixed residence. RCW 9A.44.128(5) (defining “fixed residence” as “a building that a person lawfully and habitually uses as living quarters a majority of the week”); RCW 9A.44.128(9) (defining “lacks a fixed residence” as situations where “the person does not have a living situation that meets the definition of a fixed residence”). Here, Mr. Lusk-Hutchins registered weekly while he lacked a fixed residence in compliance with RCW 9A.44.130(6)(b). CP 22; Exs. 8, 10; RP 63, 83-85.

Likewise, the statute imposes a requirement to report a change of residence resulting from a move. RCW 9A.44.130(5)(a). “The phrase ‘change his or her residence address’ can only apply when a person establishes a different residence or replaces one residence with another.” *State v. Breidt*, 187 Wn. App. 534, 543, 349 P.3d 924 (2015). Mr. Lusk-Hutchins did not establish a different residence by moving from one place to another. Therefore, he had no obligation to report a change of residence by moving under RCW 9A.44.130(5)(a).

The State focuses on “transient” status in an attempt to interpret the statute to impose additional requirements. Br. of Respondent at 8-9. But the statute does not use the term “transient” and instead speaks only of a change of residence by moving and of possessing or lacking a fixed

residence. Here, when Mr. Lusk-Hutchins's residence became a fixed residence under the statutory definition, it did not involve establishing a different residence by moving. The location was the same. Therefore, he did not "change" his residence address and had no duty to report a change under subsection (5)(a), or to report as lacking a fixed residence under subsection (6)(b).

- b. This Court should reverse Mr. Lusk-Hutchins's failure to register conviction for dismissal with prejudice.

Mr. Lusk-Huskins no longer lacked a fixed address and therefore was not required to report weekly under RCW 9A.44.130(6)(b). In addition, Ms. Lusk-Huskins did not change his residence by moving and therefore was not required to register within three days of moving under RCW 9A.44.130(5)(a). Mr. Lusk-Huskins acquired a fixed residence without changing his residence by moving. The statute imposes no registration requirement in this unique circumstance.

The State presented insufficient evidence that Mr. Lusk-Huskins failed to comply with an applicable reporting requirement of the registration statute. Therefore, the State failed to prove beyond a reasonable doubt that Mr. Lusk-Hutchins knowingly failed to comply with an applicable registration requirement of the statute. RCW 9A.44.130,

9A.44.132(1)(b). This Court should reverse his conviction and remand for dismissal.

2. Resentencing is required because the court failed to consider meaningfully Mr. Lusk-Hutchins's motion for an exceptional sentence under the appropriate statutory standard.

At his sentencing hearing, Mr. Lusk-Hutchins moved for an exceptional sentence below the standard range based on the mitigating circumstance of his significant, persistent mental health issues. RP 79-87, 135-41. The court imposed a standard range sentence without considering whether Mr. Lusk-Hutchins established the mitigating circumstances by a preponderance of the evidence and without finding whether the mitigating circumstances constitute a substantial and compelling reasons justified an exceptional sentence. The court's failure to make findings and failure to apply the standard of RCW 9.94A.535 demonstrates the court did not apply the appropriate standard and failed to recognize its ability to depart from the standard range. Therefore, Mr. Lusk-Hutchins is entitled to appeal the sentence. *State v. Corona*, 164 Wn. App. 76, 78-79, 261 P.3d 680 (2011); *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

The State argues the sentencing court did consider Mr. Lusk-Hutchins's mental health issues as a basis for an exceptional sentence

downward and, therefore, Mr. Lusk-Hutchins cannot appeal the imposed sentence within the standard range. Br. of Respondent at 11-12. Mr. Lusk-Hutchins agrees the court acknowledged the underlying information that he set forth as mitigation. RP 143; Br. of Appellant at 26. However, the court considered this evidence only for purposes of determining the appropriate sentence *within* the standard range. RP 143. The court did not consider whether this evidence justified a *departure from* the standard range.

The court failed to apply the standard of RCW 9.94A.535, failed to determine whether Mr. Lusk-Hutchins had established mitigating circumstances by a preponderance of the evidence, and failed to decide whether the mitigating circumstances offered substantial and compelling reasons justifying an exceptional sentence. Instead, the court employed its own test by balancing Mr. Lusk-Hutchins's mental health issues against "the concern for the safety and protection of the community." RP 144. The court failed actually to consider Mr. Lusk-Hutchins's motion for an exceptional sentence under the appropriate legal standard. In addition, it appears the court failed to recognize its ability to depart from the standard range.

Mr. Lusk-Hutchins is entitled to have his motion for an exceptional sentence meaningfully considered under the appropriate legal standard.

State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (“Every defendant is entitled to ask the trial court to consider [an exceptional] sentence and to have the alternative actually considered.”). The court failed to follow the statutory framework when it did not consider whether the proffered mitigating circumstances provided substantial and compelling reasons justifying an exceptional sentence. Therefore, this Court should vacate the sentence and remand for a new sentencing hearing. *Id.* at 343.

3. This Court should strike the imposition of certain legal financial obligations from Mr. Lusk-Hutchins’s judgment and sentence.

- a. The State ignores binding Supreme Court precedent and instead “takes no position” on the prohibited costs.

The State acknowledges the court found Mr. Lusk-Hutchins indigent at sentencing. Br. of Respondent at 13. The State acknowledges the court imposed “only non-discretionary legal financial obligations.” Br. of Respondent at 13. However, the State inexplicably fails to acknowledge *State v. Ramirez* or to admit that the now-prohibited costs must be stricken. 191 Wn.2d 732, 426 P.3d 714 (2018). Instead, the State “takes no position.” This Court should interpret the State’s deferral and the absence of any authority contradicting Mr. Lusk-Hutchins’s argument as a concession.

- b. State v. Ramirez requires this Court strike the \$200 criminal filing fee, \$100 DNA collection fee, and interest accrual from Mr. Lusk-Hutchins's judgment and sentence.

In *Ramirez*, our Supreme Court unequivocally held the 2018 amendments to the various LFO statutes apply prospectively to all defendants whose cases are pending on direct appeal. 191 Wn.2d at 747-50. This includes amendments prohibiting the criminal filing fee for indigent defendants, repetitive DNA fees, and nonrestitution interest. *Id.* This Court should strike the criminal filing and DNA collection fees, as well as the imposition of interest, from Mr. Lusk-Hutchins's judgment and sentence.

B. CONCLUSION

The State did not prove by sufficient evidence that Mr. Lusk-Hutchins failed to comply with a registration requirement. This Court should reverse and dismiss the conviction. In addition, the court applied the wrong legal standard and misunderstood its discretion at sentencing. This Court should vacate the sentence and remand for a new sentencing hearing. Finally, the criminal filing and DNA fees and accrual of interest must be stricken from the judgment and sentence.

DATED this 29th day of August, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a long horizontal flourish extending to the right.

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 52605-1-II
v.)	
)	
JASON LUSK-HUTCHINS,)	
)	
APPELLANT.)	

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