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NO. 52605-1-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JASON ALLAN LUSK-HUTCHINS,

Appellant.

RESPONSE TO BRIEF OF APPELLANT

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I. ISSUES

1. Did the State present sufficient evidence to prove beyond a reasonable doubt that the Appellant failed to register as a sex offender?
2. Can the Appellant appeal his standard range sentence?
3. Does the recently passed legal financial obligation legislation require this court to strike the trial court's imposition of the criminal filing fee and DNA collection fee?

II. SHORT ANSWERS

1. Yes. The State presented sufficient evidence to prove beyond a reasonable doubt that the Appellant failed to register as a sex offender.
2. No. The trial court did not abuse its discretion by imposing a standard range sentence.
3. The State takes no position on the issue involving legal financial obligations.

III. FACTS

In 2002, the Appellant, Jason Lusk-Hutchins, was convicted in Clark County Superior Court of Rape of a Child in the Third Degree. RP at 50. In 2009, the Appellant was convicted in Clark County Superior Court of Indecent Liberties without Forcible Compulsion DV. RP at 54-55. Both of these convictions require the Appellant to register as a sex offender. CP 22. The Appellant has also been convicted of Failure to Register as a Sex Offender on four separate occasions. RP at 50-55.

On June 26, 2017, the Appellant registered with Kris Taff with the Cowlitz County Sheriff's Department as required. RP at 57; CP 22. On October 24, 2017, the Appellant again registered with the Cowlitz County Sheriff's Department. This time, he registered his address as transient. RP at 61; CP 22. The Appellant checked in weekly with the Cowlitz County Sheriff's Department as required on October 31, 2017. RP at 64. At the time of these check-ins, the Appellant provided a log of the places he had stayed during those weeks as required by his transient registration. RP at 63; CP 22. The Appellant failed to report weekly as required for the weeks of November 7, 2017, November 14, 2017, November 21, 2017, November 28, 2017, and December 5, 2017. RP at 64; CP 23.

The Appellant was later arrested and charged with Failure to Register as a Sex Offender. CP 3-4. The Appellant waived his right to a jury trial. His bench trial commenced on June 28, 2018. At trial, the State presented its evidence through Ms. Taff. RP 42-78. The Appellant never specifically testified that that he actually resided at the address that he listed on his check-in logs from October 24, 2017 and October 31 2017; rather, he simply acknowledged that he had stayed at that residence as documented by his check-in logs. RP at 79-89.

At the close of evidence, the State argued that the Appellant failed to comply with his registration requirements by failing to report weekly as

required by his transient status. RP at 115-116. The Appellant argued that he did not have to check-in pursuant to his registration status because he had obtained a fixed address. RP at 116-118. The State rebutted this argument by pointing out that if the Appellant had in fact obtained a fixed address, he was required to notify the Cowlitz County Sheriff's Department. RP 118-119; 121-122. The trial court found the Appellant guilty of failing to register as a sex offender for failing to check-in weekly as required by his transient status and/or failing to update his address with the sheriff's department. RP 127-131; CP 22-23.

At the sentencing hearing, the Appellant requested an exceptional sentence below the standard range based upon his various mental health issues. RP 135-138; 140-141. The Appellant did not provide any documentation, reports, or testimony from medical experts to support his claims. The State objected to an exceptional sentence below the standard range, noting that the Appellant had constantly reoffended whenever he was released from custody. RP at 138.

The trial court acknowledged the Appellant's argument, stating "the first that...strikes me with this with Mr. Lusk-Hutchins is that he actually has had a long history of mental health issues from early in life." RP at 141. The court further noted that "the issue of an exceptional sentence downward, it has some traction with me in that the mental health issues are

present. RP at 143. However, the court also recognized that there were two convictions for sex offenses, multiple prior convictions for failure to register as sex offender, long periods of incarceration time, and short periods of compliance time before reoffending. RP 141-143. The court did not indicate that it would never impose an exceptional sentence below the standard range in these types of cases. The court did not base its' sentenced upon a factor such as the Appellant's race, sex, or religion. The court did acknowledge its ability to impose an exceptional sentence; however, the court determined that a standard range sentence was appropriate given the Appellant's history and the need to protect the safety and community from the Appellant. RP at 144. The Appellant filed a timely appeal.

IV. ARGUMENT

1. The State presented sufficient evidence to prove beyond a reasonable doubt that the Appellant failed to register as a sex offender.

a. Standard of review

The standard of review for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). For purposes of a

challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. *State v. Jones*, 63 Wn. App. 703, 707-08, 821 P.2d 543, *review denied*, 118 Wn.2d 1028, 828 P.2d 563 (1992). All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993). A reviewing court need not itself be convinced beyond a reasonable doubt, *Jones*, 63 Wn. App. at 708, and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

The charge of failure to register as a sex offender requires the State to prove beyond a reasonable doubt that the defendant has a duty to register under RCW 9A.44.130 for a felony sex offense, and knowingly failed to comply with any of the requirements of the statute. RCW 9A.44.130, RCW 9A.44.132. For sentencing purposes, the State is also required to prove beyond a reasonable doubt that a defendant has been convicted of failing to register as a sex offender on two or more occasions. RCW 9A.44.132(1)(b).

b. RCW 9A.44.130 required the Appellant to notify the Cowlitz County Sherriff Department of his change of address.

“When interpreting a statute, ‘the court's objective is to determine the legislature's intent.’” *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d

354(2010) (quoting *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). The starting point for this analysis is always to determine the statute's plain language and ordinary meaning. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). "When the plain language is unambiguous—that is, when the statutory language admits of only one meaning—the legislative intent is apparent, and we will not construe the statute otherwise. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999).

If the statute is deemed ambiguous, the legislature's intent can be determined by applying recognized principles of statutory construction. "A kind of stopgap principle is that, in construing a statute, 'a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.'" *State v. J.P.*, 149 Wn.2d at 450 (quoting *State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003) (Madsen, J., dissenting)). The interpretation of a statute is a question of law and is therefore reviewed de novo. *State v. Schultz*, 146 Wn.2d 540, 544, 48 P.3d 301 (2002). The purpose of the sex offender registration statute is to assist law enforcement agencies' efforts to protect their communities

against sex offenders who re-offend. *State v. Pray*, 96 Wn. App. 25, 28, 980 P.2d 240 (1999) (citing LAWS OF 1990, ch. 3, § 401).

RCW 9A.44.130 imposes a duty to register as a sex offender with the county sheriff upon a person who has been convicted of a sex offense. RCW 9A.44.130(1)(a). The deadline for registration depends on the specific living situation of the convicted sex offender. RCW 9A.44.130(4)(a). If a convicted sex offender changes their residence address within the same county, they must notify the county sheriff. RCW 9A.44.130(5)(a). If a convicted sex offender lacks a fixed address, they must notify the sheriff department of their transient status, report in person weekly to the county sheriff, and keep an accurate log of where they stayed during that week. RCW 9A.44.130(6)(a) & (b).

Here, the Appellant argues that a person who previously registered as transient would not have a duty to notify the county sheriff when they subsequently obtain a fixed residence. To reach this conclusion, the Appellant would have this court implore something other than a common sense understanding of “change of residence address” and “moving.” RCW 9A.44.130 does not give definition of these two terms. In instances such as this, the court will utilize their ordinary meaning. *State v. Jenkins*, 100 Wn. App 85, 89, 995 P.2d 1268 (2000).

“[T]he phrase ‘changes his or her residence address’ means when a person makes a different location ‘the place where a person lives as either a temporary or permanent dwelling...’” *State v. Breidt*, 187 Wn. App. 534, 543, 349 P.3d 924 (2015). Additionally, “change” is defined as “to make different” or “to replace with another.” *Id.* at 542 (citing WEBSTER’S THIRD NEW INT’L DICTIONARY 1931 at 373 (1969)). “Move” is defined as “to change one’s residence or location.” “Move.” Merriam-Webster Online Dictionary. 2019. <http://www.merriam-webster.com> (8 July 2019).

Here, RCW 9A.44.130 required the Appellant to check-in on a weekly basis due to his transient status, or notify the Cowlitz County Sheriff’s Department that he obtained a fixed address. The Appellant had registered his address as “transient,” thereby requiring him to check-in on a weekly basis. For the purposes of the statute, “transient” is an address. It does not signify a specific location or fixed residence; rather, it informs the supervising authority that a person will stay at one place or another briefly. Following the common understanding of “change,” “residence address,” and “move,” the fact that the Appellant obtained an actual fixed residence is a change of address that would require him to move.

The point that this fixed residence was also the same residence he reported staying at during his weekly check-in is irrelevant. When he began

staying at the residence, as he reported, he was still transient. Thus, he was a guest or boarder who would stay briefly. If he then established the residence as his fixed residence, his living situation has changed and he has made this residence a “permanent dwelling.” Therefore, he has now officially moved into this residence, thereby changing his address from transient to a fixed address.

The Appellant interpretation of the registration requirements of RCW 9A.44.130 would lead to an absurd result. Following the Appellant’s rationale, if a person who had registered as transient then obtained a fixed residence, they would never have to register the fixed address, nor would they have to check-in on a weekly basis. The sheriff department would have zero ability to effectively monitor convicted sex offenders in this situation. This would frustrate the purpose of the failure to register statute – monitoring where convicted sex offenders are located to ensure the safety of the public.

c. The State presented sufficient evidence to support the Appellant’s conviction for failure to register as a sex offender.

The Appellant is a convicted sex offender who is required to register. The Appellant registered as transient and was required to report to the Cowlitz County Sheriff’s Department on a weekly basis. He failed to check-in for five consecutive weeks, from November 7, 2017 through

December 5, 2017. Thus, the Appellant failed to comply with his sex offender registration requirements.

The Appellant testified that the address he provided to the sheriff's department during his weekly check-in on October 31, 2017 later became his fixed address. Once he established a fixed address, he was required to report to the sheriff's department that he changed his address from "transient" to the new fixed address. The Appellant never informed the Cowlitz County Sheriff's Department that he changed his address.

Based upon the above stated evidence that was provided to the trier of fact, the State presented sufficient evidence that the Appellant committed the crime of failure to register as a sex offender. His conviction should be affirmed.

2. The trial court properly imposed a standard range sentence.

a. Standard of review.

Generally, a standard range sentence cannot be appealed. RCW 9.94A.585(1); *State v. Osman*, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). However, a defendant can appeal the procedure by which a standard range sentence is imposed. *State v. Garcia-Martinez*, 88 Wn. App. 322, 329, 944 P.2d 1104 (1997). When a defendant requests an exceptional sentence downward, review is limited to whether the sentencing court (a) categorially refuses to impose an exceptional sentence downward under any

circumstances (i.e. states that a sentence below the standard range would never be imposed), (b) relies upon an impermissible basis (i.e. defendant's race, sex, religion or some other characteristic) when refusing to impose an exceptional sentence, or (c) fails to recognize that it has the discretion to impose an exceptional sentence downward. *Id.* at 330; *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007).

For example, in *State v. Cole*, 117 Wn. App. 870, 73 P.3d 411 (2003), the defendant unsuccessfully requested an exceptional sentence downward and then challenged the court's refusal to impose it on appeal. The *Cole* court held the defendant could not appeal a standard range sentence where the sentencing court considered the claimed mitigating factors, heard argument from both sides, and then exercised its discretion by denying the defendant's request. *Id.* at 881. This is the same conclusion reached by the *Garcia-Martinez* court. There, the court held that when a sentencing court has considered the facts and concluded that no basis exists for an exceptional sentence, it has exercised its discretion and the defendant may not appeal that ruling. *Garcia-Martinez*, 88 Wn. App. at 330.

b. The Appellant cannot appeal the standard range sentence imposed because the trial court did not abuse its discretion when it denied the Appellant's request of an exceptional sentence.

The Appellant's argument that the trial court failed to apply the appropriate legal standard when it denied the Appellant's request for an

exceptional sentence downward is without merit. The trial court did in fact consider the basis for the Appellant's request for an exceptional sentence downward, noting that he has dealt with mental health issues for a prolonged period of time. The trial court also noted the repeated criminal behavior, the multiple convictions for failure to register as sex offender, the multiple convictions for sex offenses, and the lack of prolonged periods of time of compliance with his registration requirements.

The trial court did not deny the request based upon a categorical refusal to impose an exceptional sentence. The denial was not based upon the Appellant's race, sex, religion, or some other factor. The trial court recognized that it had the authority to impose an exceptional sentence downward; however, it used its discretion when it balance the repeated criminal behavior and need to protect the community with the Appellant's mental health issues.

Simply put, the trial court took the time to evaluate the Appellant's purported mitigating factors – his mental health issues – heard argument from both sides, and then exercised its discretion by denying the request. Thus, the Appellant cannot appeal the standard range sentence imposed by the trial court.

3. The State takes no position in regards to the Appellant's legal financial obligations argument.

The Appellant was determined to be indigent at the time of sentencing. The trial court imposed only non-discretionary legal financial obligations. The Appellant is requesting this court to retroactively apply an amendment to the legal financial obligation legislation and strike the criminal filing fee and DNA collection fee. The State simply defers to this court's judgment.

V. CONCLUSION

RCW 9A.44.130 required the Appellant to register his address with the Cowlitz County Sheriff's Department. The State presented sufficient evidence to sustain his conviction for failing to register as a sex offender. The Appellant cannot appeal his standard range sentence because the trial court did not abuse its discretion when it denied his request for an

exceptional sentence downward. The State takes no position in regards to the Appellant's legal financial obligations.

The Court should affirm his conviction.

Respectfully submitted this 11 day of July, 2019.

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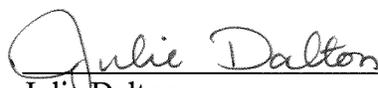
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on July 11, 2019.



Julie Dalton

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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