

FILED
Court of Appeals
Division II
State of Washington
1/23/2020 4:20 PM
No. 53284-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

MICHAEL JAY STEWART

REPLY BRIEF OF APPELLANT

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A. Argument in Reply

In his Brief of Appellant, Mr. Stewart argued both the charging document failed to adequately set out the essential elements of and the jury instructions allowed the jury to convict him without a unanimous verdict as to the alternative means. These two arguments are distinct but overlap in significant ways. Both arguments require this Court to analyze the case under *State v. Peterson*, 168 Wn.2d 763, 230 P.3d 588 (2010).

1. The Information fails to set forth the essential elements of the offense of failure to register.

The State asks this Court to “summarily reject” Mr. Stewart’s arguments about the essential elements in the charging document. The State contends the argument is unsupported by applicable authority and meaningful analysis.

Although the essential elements argument in the Brief of Appellant is not lengthy, it does identify with sufficient specificity the argument raised. Three cases are cited. More importantly, the argument incorporates by reference the arguments made regarding jury unanimity. The Brief states, “The Information does not specify which provision of RCW 9A.44.130 he was alleged to have violated. As will be argued in more detail below, this Court should interpret RCW 9A.44.130 as an alternative crimes statute and dismiss the case. *State v. Mason*, 170

Wn.App. 375, 285 P.3d 154 (2012).” The issue of what the essential elements of failure to register are and how they should be applied substantially overlap. The Court should reach the merits of this issue.

After Mr. Stewart filed his Brief of Appellant, but prior to the State’s Brief of Respondent, the Washington Supreme Court decided *State v. Cruz, sub nom. State v. Pry*, ___ Wn.2d ___, 452 P.3 536 (2019). The issue in *Pry* was whether the phrase “rendering criminal assistance” is adequate to charge a person with the crime of rendering criminal assistance. The defense argued that there are six distinct ways that a person can render criminal assistance and simply telling a defendant he is charged with “rendering criminal assistance” does not adequately advise the person of the offense charged. The State argued the phrase is “merely definitional” and nothing more is required.

The Supreme Court agreed with the defense, noting that none of the six enumerated methods for rendering were listed and saying, “[T]he charging document include any facts that describe what, exactly, Cruz’s crime entailed.” *Pry* at 542.

The problems addressed in the *Pry* decision are compounded in Mr. Stewart’s case. Although the *Peterson* case concluded that the crime of failure to register entails only one act, moving without registering, as argued in his Brief of Appellant, there are scores of ways to fail to register,

many of which have nothing to do with changing addresses. See *Peterson* at 770. The charging document alleged, in relevant part, that Mr. Stewart “did knowingly fail to comply with the registration requirement of RCW 9A.44.130 when required to do so.” CP, 3. Just as in *Pry*, which generically alleged he “rendered criminal assistance” without specifying which of the six methods he violated, Mr. Stewart was generically charged he “failed to comply with the registration requirements without specifying which registration requirement” he violated.

The Information in *Peterson* alleged the defendant “failed to register within 72 hours of ceasing to reside at his Everett apartment.” In that case, the defendant at least had the benefit of knowing he was charged with “moving without registering.” But Mr. Stewart was not even given the benefit of that much notice. He was simply told he failed to comply with the registration requirements.

Once a person has initially registered as a sex offender, failure to register basically requires two facts: a triggering event and an act of omission. There are multiple triggering events possible, of which moving is but one. Other possible triggering events include getting out of custody, being asked to submit updated fingerprints or photographs, registering for school, or being terminated from employment. The act of omission is failing to notify the sheriff’s office of the change within three business

days of the triggering event. A person in Mr. Stewart's situation should receive actual notice of what triggering event is being alleged. It is insufficient to simply tell him he failed to comply with the registration requirements. The Information is defective and dismissal without prejudice is the remedy.

2. Mr. Stewart's right to a unanimous verdict was violated.

In his Brief of Appellant, Mr. Stewart argued the jury should have been given a *Petrich* instruction advising them of the need for jury unanimity. *State v. Petrich*, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984). The resolution of this issue turns on how this Court treats the *Peterson* case. This Court should overturn *Peterson* and require unanimous verdicts when the state proceeds on multiple legal theories for failure to register.

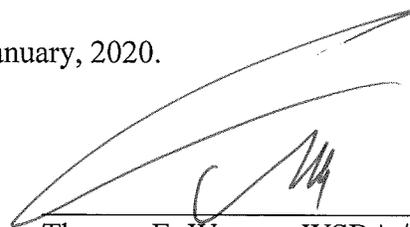
Peterson was incorrect when it was decided and is harmful in its application and needs to be overturned. The State implicitly concedes that *Peterson* is incorrect, as did this Court in *State v. Mason*, 170 Wn.App. 375, 285 P.3d 154 (2012). According to *Peterson*, the crime of failure to register involves one criminal act: moving without registering. *Peterson* at 770. But this conclusion is clearly incorrect, a fact that the State concedes, "This Court has previously noted that not all means of violating RCW 9A.44.130 arise from the criminal act of failing to alert authorities of one's whereabouts." Brief of Respondent, 11, citing *Mason* at 382.

The remaining question is whether the *Peterson* decision is harmful. The facts of this case illustrate the harm that can come from a lack of jury unanimity. In this case, the jury heard highly prejudicial evidence, but largely irrelevant to the charged crime, that the defendant did not report to his CCO when required and cut off his GPS monitoring bracelet. They also heard conflicting information about the law, both in the form of testimony and exhibits, about the duty of offenders to re-register after being released from custody. Given this irrelevant and confusing evidence, it was incumbent on the trial judge to require jury unanimity on the alternative means. The jury should have been required to be unanimous as to the alternative means of committing failure to register.

B. Conclusion

This case should be dismissed without prejudice for failure of the Information to set out all of the essential elements of the offense. In the alternative, the case should be reversed for failure to give a jury unanimity instruction.

DATED this 23rd day of January, 2020.

A handwritten signature in black ink, appearing to read 'T. Weaver', is written over a horizontal line. The signature is stylized and somewhat cursive.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant/Appellant

THE LAW OFFICE OF THOMAS E. WEAVER

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

STATE OF WASHINGTON,) Court of Appeals No.: 53284-1-II
)
Plaintiff/Respondent,) DECLARATION OF SERVICE OF REPLY
) BRIEF OF APPELLANT
vs.)
)
MICHAEL JAY STEWART,)
)
Defendant/Appellant.)

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On January 23, 2020, I e-filed the Reply Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated a copy of said document to be sent to Michelle Hyer of the Pierce County Prosecuting Attorney's Office via email to: PCpatcecf@co.pierce.wa.us through the Court of Appeals transmittal system.

On January 23, 2020, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Reply Brief of Appellant to the defendant:

Michael Jay Stewart, DOC #944400
Larch Corrections Center
15314 NE Dole Valley Road
Yacolt, WA 98675-9531

///
///

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

3 DATED: January 23, 2020, at Bremerton, Washington.

4 

5 _____
6 Alisha Freeman

THE LAW OFFICE OF THOMAS E. WEAVER

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