

COA No. 29046-8-III

FILED

SEP 29 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY \_\_\_\_\_

COURT OF APPEALS, DIVISION III,  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

JARROD J. YOCKEY, Appellant.

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BRIEF OF APPELLANT

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## I. ASSIGNMENT OF ERROR

A. Because the facts did not satisfy the elements of the crime of failure to register as a sex offender, the court erred by finding a factual basis for appellant Yockey's guilty plea, which should be set aside.

### Issue Pertaining to Assignment of Error

1. Should the guilty plea be set aside because there was no factual basis for it?

## II. STATEMENT OF THE CASE

Jarrold J. Yockey was charged by information on April 13, 2009, with the crime of failure to register as a sex offender, in violation of RCW 9.94A.130. (CP 1).

Because of a previous third degree rape conviction, he was required to register as a sex offender. (RP 9). On February 19, 2008, he registered an address at 1316 W. Dean in Spokane. (CP 4). On February 27, 2009, Mr. Yockey was released from incarceration on a probation violation. (CP 4). He was again arrested on March 18, 2009.

Connie Powell, the owner of the building at 1316 W. Dean, had rented the upstairs apartment to Mr. Yockey. (CP 3). She

thought he most likely had last resided in the apartment around August 2008. (CP 3).

Mr. Yockey took a plea bargain. His statement of defendant on plea of guilty to a sex offense was signed on April 30, 2010. (CP 66). In it, he agreed that instead of his making a statement, the court could review the police reports and/or statement of probable cause supplied by the prosecution to establish a factual basis for the plea. (CP 65).

The court held the guilty plea and sentencing hearing on April 30, 2010. The court accepted his plea. (4/30/10 RP 8). The State gave this factual basis for the guilty plea:

As to file ending 51-6, the failure to register, evidence would show that Mr. Yockey has a previous sex offense, a third-degree rape, I believe a DV third degree child rape. He was required to register. He's been in and out of incarceration. Intervening sex offenses have also extended his requirement to register, and he was required to register between the period of February 27<sup>th</sup> and March 18<sup>th</sup>, 2009. Mr. Yockey, when meeting with his community corrections officer, did indicate that he had not remained at the address he provided on Knox. Instead, he went to – or, I'm sorry – he did go to an address on Dean. He was in fact residing in a basement on Knox, contrary to his address that he had provided, those events also occurring in Spokane County, State of Washington. (4/30/10 RP 9-10).

The court found a factual basis for the plea, which it determined was made knowingly, intelligently, and voluntarily. (4/30/10 RP 10).

Mr. Yockey received an exceptional sentence downward. (CP 47-48; 4/30/10 RP 21). Defense counsel filed a notice of appeal. (CP 75).

### III. ARGUMENT

The guilty plea should be set aside because there is no factual basis for it.

CrR 4.2(d) provides:

**(d) Voluntariness.** The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

A trial court accepting a guilty plea may rely on any facts at its disposal in finding a factual basis for the plea so long as the material relied on is made a part of the record. *State v. Norval*, 35 Wn. App. 775, 669 P.2d 1264 (1983). The court need not be convinced beyond a reasonable doubt, but the evidence must be such that a jury might reach this conclusion. *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976).

The facts in the record do not support Mr. Yockey's guilty plea. He registered an address at 1316 W. Dean in Spokane. (CP 4). His landlord, Ms. Powell, rented the apartment to him. (CP 3).

The record, however, does not reflect that Mr. Yockey was evicted from the apartment. No eviction notice or removal order appears in the record. There is also no evidence his stay at the Knox address was anything other than a temporary sojourn or transient visit in that the record does not show he ever abandoned, or intended to abandon, his tenancy at the apartment on Dean. *State v. Pickett*, 95 Wn. App. 475, 478, 975 P.2d 584 (1999).

In *State v. Drake*, 149 Wn. App. 88, 201 P.3d 1093, *rev. denied*, 166 Wn.2d 1026 (2009), this Court held that the evidence was insufficient to support the defendant's conviction for failure to register as a sex offender when there was no evidence the defendant, who had been evicted from his apartment for nonpayment of rent, received notice of eviction or a removal order (if one existed), even though the State had proved the defendant's rent was not paid, the landlord evicted him, and his possessions stored and picked up by someone else after he was arrested. The State had not proven beyond a reasonable doubt the defendant knowingly failed to register at a new address or as a homeless person.

The facts in *Drake* were insufficient as a matter of law to support the conviction. Here, the facts relied on for Mr. Yockey's

guilty plea were very similar to the facts in *Drake* and likewise did not show he knowingly failed to register. There was no evidence Mr. Yockey had failed to pay the rent and was evicted or his possessions stored and picked up by someone else. On this evidence, a jury could not find him guilty of the offense beyond a reasonable doubt. *Drake, supra*. Accordingly, the factual basis provided by the prosecution was insufficient to support Mr. Yockey's guilty plea. *Newton*, 87 Wn.2d at 370.

It is a violation of due process to accept a guilty plea without an affirmative showing that the plea was knowing, intelligent, and voluntary. *State v. Johnson*, 104 Wn.2d 338, 340, 705 P.2d 773 (1985). To meet this standard, a factual basis for the charge of failure to register as a sex offender must exist. See *State v. Zhao*, 157 Wn.2d 188, 200, 137 P.3d 835 (2006). It did not. Mr. Yockey's guilty plea was not knowing, intelligent, and voluntary. *Id.* It was thus invalid and must be set aside. *Zhao*, 157 Wn.2d at 203.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Yockey respectfully urges this Court to set aside his guilty plea and dismiss the charge.

DATED this 20<sup>th</sup> day of September, 2010.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on September 20, 2010, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Mark E. Lindsey, Spokane County Prosecutor's Office, 1100 W. Mallon, Spokane, WA 99260-2043, and Jarrod J. Yockey, #984876, Coyote Ridge C.C., PO Box 769, Connell, WA 99326.

Kenneth H. Kato

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