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Court of Appeals
Division III
State of Washington

No. 34650-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

MARK C. JACOBS,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the conviction for failure to register as a sex offender.

2. The trial court erred in finding Mr. Jacobs guilty because the shed he was living in did not meet the statutory definition of a fixed residence. Conclusions of law No. 1-3, CP 11.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Was Mark Jacobs' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the charged crime?

C. STATEMENT OF THE CASE

Mr. Jacobs was charged with and convicted by the Court for failure to register as a sex offender between December 1, 2014 and April 13, 2015. CP 1, 11. Mr. Jacobs had registered March 26, 2014, as living at 2102 South 3rd Ave, Unit #2, Union Gap, Washington. RP 70¹. Following the testimony, the Court found Mr. Jacobs had been living at that address in a trailer home with a friend named Kristen in early December of 2014, until the time Kristen moved out. Finding of Fact No.

¹ Citations to the record other than the sentencing hearing, which was numbered separately, will be designated "RP" followed by the page number

4, CP 10. He was physically living in a shed at that address from the time Kristen moved out of the trailer home in December of 2014, and was continuing to live in the shed on April 12, 2015. Finding of Fact No. 5, CP 10. He intended to stay in the shed at the address because he wanted to be where law enforcement could expect to find him. Finding of Fact No. 6, CP 10. He did not have permission to be live in the shed. Finding of Fact No. 9, CP 11.

The Court concluded, based on *State v. Stratton*, 130 Wash. App. 760, 124 P.3d 660 (2005), Mr. Jacobs would not be guilty. RP 150. But since the legislature had defined “fixed residence” after *Stratton* was decided, he was guilty. The Court stated in its written conclusion, “The shed on the property of 2102 S 3rd Ave, Unit #2, Union Gap, Washington, does not meet the definition of fixed residence under RCW 9A.144.128(5), although it was habitually used as a residence, it was not lawfully used as a residence.” Conclusion of law No. 1, CP 11.

This appeal followed. CP 24-33.

D. ARGUMENT

1. Mr. Jacobs' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the charged crime.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case,

means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997),

evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

If a convicted sex offender changes his residence address within the same county, he must give the county sheriff written notice of the change within 72 hours. RCW 9A.44.130(5)(a). In addition, a convicted sex offender who lacks a "fixed residence" is required to provide written notice to the sheriff of the county where he last registered within 48 hours. RCW 9A.44.130(6)(a). In addition, he must report weekly, in person, to the sheriff of the county where he is registered. RCW 9A.44.130(6)(b).

In *State v. Stratton*, the defendant was required to register as a sex offender and reported the address of a house he was living in and purchasing. *State v. Stratton*, 130 Wash. App. 760, 762–63, 124 P.3d 660 (2005). After he defaulted on the purchase, he voluntarily moved out of the house but was allowed to remain on the property for a while, living out of his vehicle, which he regularly parked in the driveway behind the house at night. *Id.* He did not notify the sheriff about his situation because he had not moved off the property and still considered it his residence. *Id.*

The Court of Appeals in its decision noted Chapter 9A.44 RCW does not define the phrase “fixed residence” so it relied on the standard dictionary definition for “residence.” *Id.* at 765. Based on that definition, the Court found Stratton's living situation fit the definition of residence as a “place” where he was abiding or dwelling, and it was “fixed” in that it was not subject to change or fluctuation. *Id.* at 766. Accordingly, the State failed to prove that the statute required him to register as a sex offender who had no fixed residence. *Id.* at 766-67.

The situation in the present case is indistinguishable from *Stratton*. The trial court correctly concluded, based on *Stratton*, Mr. Jacobs would not be guilty. RP 150.

In 2015, the legislature defined the term “fixed residence” for the purposes of RCW 9A.44.130:

“Fixed residence” means a building that a person *lawfully* and habitually uses as living quarters a majority of the week. Uses as living quarters means to conduct activities consistent with the common understanding of residing, such as sleeping; eating; keeping personal belongings; receiving mail; and paying utilities, rent, or mortgage. A nonpermanent structure including, but not limited to, a motor home, travel trailer, camper, or boat may qualify as a residence provided it is lawfully and habitually used as living quarters a majority of the week, primarily kept at one location with a physical address, and the location it is kept at is either owned or rented by the person or used by the person with the permission of the owner or renter . . .

RCW 9A.44.128(5) (emphasis added).

The trial court, herein, found since the legislature had defined “fixed residence” after *Stratton* was decided, Mr. Jacobs was guilty because he was not “lawfully” residing in the shed.

The trial court and both parties failed to note the effective date of the statutory definition was July 24, 2015. RCW 9A.44.128. Mr. Jacobs was charged with committing the offense between December 1, 2014 and April 13, 2015. CP 1. Thus, his offense dates occurred before the effective date of RCW 9A.44.128(5). Convictions based upon an act or acts occurring before the effective date of the relevant statute violate due process. *State v. Aho*, 137 Wash. 2d 736, 744, 975 P.2d 512 (1999). Therefore, RCW 9A.44.128(5) cannot be applied to this case and *Stratton* controls. Accordingly, the State failed to prove that the statute required Mr. Jacobs to register as a sex offender who had no fixed residence.

E. CONCLUSION

For the reasons stated, the conviction should be reversed.

Respectfully submitted March 27, 2017,

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on March 27, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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