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Court of Appeals
Division III
State of Washington
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No. 36885-8-III

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

STATE OF WASHINGTON

Respondent

vs.

GLEN CATHERS

Appellant

ON APPEAL FROM THE SUPERIOR COURT FOR KLICKITAT COUNTY
The Honorable Randall Krog
Superior Court No. 19—1-00024-20

APPELLANT'S REPLY BRIEF

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I. ISSUES RAISED BY RESPONDENT'S BRIEF

1. Was the evidence sufficient to establish beyond a reasonable doubt that Mr. Cathers had "abandoned" his fixed residence in Klickitat County and therefore had a duty to re-register with the sheriff?

II. FACTS RELEVANT TO REPLY ARGUMENT

The first witness for the prosecution established that Mr. Cathers had begun compliance with the registration statute in 1988. RP 10. He had maintained a stable residence during the entire period of time he had registered. RP 18. At his level of supervision, the sheriff's office checked on his residence only once a year. RP 10. Mr. Cathers had come into the sheriff's office voluntarily on past occasions to verify his address. RP 14. He had done so in March of 2019, shortly after his first appearance in this case in the Superior Court. RP 14.

The deputy who was conducting the annual visit did not speak to Mr. Cathers, but did speak to the person who was house-sitting for Mr. Cathers and taking care of his cats, Kathleen O'Brennan. The deputy obtained a statement from her, which the state did not offer into evidence. RP 35-36. The deputy did not see any evidence that anyone was moving out or had moved out of the residence. RP 38, FOF 10.

Kathleen O'Brennan was taking care of Mr. Cathers' cats while he was on vacation. RP 24, FOF 8. She had been employed for years as Mr. Cathers' pet sitter and took care of his animals whenever he was away from his fixed residence. FOF 4 and 5.

The trial court did not make either a finding of fact, nor a legal conclusion that Mr. Cathers had abandoned his fixed residence, or did not have one. Instead of relying on the statutory definition of “fixed residence”, the court relied instead on a dictionary definition. COL 11. The court concluded , without citing the portion of the statute it relied upon, that Mr. Cathers’ absence from his residence for up to 12 days was a violation of his duty to register. COL 12.

III. ARGUMENT IN REPLY

The state argues that although Mr. Cathers had met his initial duty to register with the sheriff, he had “abandoned” his fixed residence by traveling away from his home at the time the police were checking his residence, and therefore was under a duty to re-register at some new address. This argument should be rejected.

First, as argued previously in Appellant’s opening brief, the statute only imposes a specific requirement for travel notification on registrants who travel *outside* the United States. RCW 9A.44.130 (3). Such travelers must provide their itinerary to the county sheriff with whom they are registered even before embarking on the trip. There is no such statutory requirement for registrants who are on a vacation trip *within* the United States. Under the maxim of statutory construction, *expressio unius est exclusio alterius*, if the legislature intended a notification requirement for registrants who intend domestic travel, it would have said so. The state’s argument here that *any* travel away from home forfeits a person’s right to claim his home address as a

“fixed residence” runs afoul of the only expressed specific duty imposed on traveling registrants in the statute. There is no basis to argue that travel away from home for a short period of time means the traveler has abandoned his home base, the fixed residence where he has lived for nearly 30 years.

Secondly, the record in this trial did not prove beyond a reasonable doubt that Mr. Cathers had *in fact* abandoned his fixed residence. A “fixed residence” is defined by RCW 9A.44.128 in pertinent part as follows:¹

(5) "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.

The state appears to concede, as it must, that Mr. Cathers had a fixed residence in the county at which he was registered. Resp. Br at 5. Moreover, the state’s evidence showed that he had been registered, at this address or another within the county, for about the past 30 years. The state contends, however, that by being absent from his fixed residence for a period of up to 12 days, Mr. Cathers had forfeited his right to consider this residence to be his

¹ The trial court entered a conclusion of law (#11) that the statute has no definition of residence, and so it borrowed one from the dictionary. The dictionary definition was used in *State v. Stratton*, 130 Wn. App. 760 124 P.3d 660 (2005) which was decided before the “fixed residence” definition was added to the statute in 2011. Since that statutory definition was in force at the time of the trial here, the court’s conclusion of law was clearly erroneous. The use of an improper legal definition of “fixed residence” further undermines the trial court’s verdict.

“fixed residence” to comply with the statute. Resp. Br. At 5, 6.² The state cites no statute or any case law authority for this proposition.

The state provided no evidence that Mr. Cathers was no longer lawfully entitled³ to live at his Jenkins Creek Road address. There was no evidence provided that he had sold the residence. There was no evidence that he had moved away to another residence recently. There was no evidence that his personal property was no longer there. In fact, the presence of the cat sitter, Ms. O/Brennan on two of the occasions that the deputy stopped by demonstrated that he had left very precious property there, namely his cats. Ms. O’Brennan was staying at the property with Mr. Cathers’ permission as she had done on other occasions when Mr. Cathers was on a vacation. RP 23. In short, there was no evidence on which to base a finding that Mr. Cathers had abandoned his residence and moved to some other location.

The most recent published decision which discusses the “fixed residence” issue is *State v. Batson*, 194 Wn. App. 396, 377 P.3d 238 (2016). The court held that the evidence was not sufficient to prove that Batson lacked a “fixed residence” and had thereby failed to register.⁴ Batson used the St.

² “When the defendant left his fixed residence for longer than a week for whatever reason, he ceased to have a fixed residence.....” Resp. Br. At 5. “...[A]fter being gone for more than a week he no longer had a fixed residence.” Resp. Br at 6.

³ Cf. *State v. Jacobs* (unpublished slip opinion, February 2018), No. 34650-1-III (2018)(registrant living in shed on premises had no legal right to be there.) Cited here not as authority but as illustrative of the requirements of a “fixed residence.”

⁴ The Batson opinion notes that in this type of case, the state assumes the burden of proving a negative, i.e. that the defendant lacked a “fixed

Martin de Porres shelter as his registered residence. There was evidence that the shelter provided storage space for client's belongings, and that clients had designated sleeping places. The court first concluded that the shelter program could qualify as a "fixed residence" under the statute. The state then argued that even if the shelter qualified as a "fixed residence" under the statute, there was no evidence that Batson had actually been there during the charged period, based on the fact that he had been in custody just before the charged period and might have lost his place at the shelter as a consequence. The Court of Appeals rejected the argument and reversed the conviction based on the insufficiency of the evidence that Batson lacked a "fixed residence," and therefore was subject to the reporting requirements for homeless persons.

In the present case, the state does not dispute that Mr. Cathers had a "fixed residence" at his Jenkins Creek Road house. The state does not point to any evidence in the record to support its contention that Mr. Cathers no longer had a legal interest in the property, no longer kept his personal belongings there, no longer received mail there, and no longer paid utilities there. The only thing the state proved was that he was absent from his home for a short period of time during the summer of 2018. The presence of the pet sitter proves that this was a temporary absence while Mr. Cathers and his friend Naomi Fisher were on a trip. Since the state had the burden to prove beyond a reasonable doubt that Mr. Cathers had no "fixed residence" in order

residence." 194 Wn. App. at 330. The state failed in the present case to prove the negative.

to trigger one of the alternative reporting obligations under the statute, the trial court erred in finding him guilty of a violation of the statute.

IV. CONCLUSION

The state provides no legal basis for its argument that by traveling away from his fixed residence for a short period of time during the summer of 2018, Mr. Cathers had “abandoned” his fixed residence on Jenkins Creek Road. The trial court made no such finding or conclusion either. There is no statute which imposes a duty on a domestic traveler to notify the sheriff of his travel plans, unlike the duty imposed on a registrant who wants to travel outside the United States. Factually, there was no evidence presented which proved beyond a reasonable doubt Mr. Cathers had abandoned his long standing home. The presence of his cats and the presence of his longstanding house sitter proved otherwise.

Since the evidence did establish that Mr. Cathers had registered at his Jenkins Creek Road home in Klickitat County, and no additional duty was imposed by the statute, the conviction was not supported by sufficient evidence. This court should reverse the conviction and remand to the trial court with directions to vacate the conviction and to dismiss the prosecution with prejudice.

Dated this 27th day of NOVEMBER, 2019

LAW OFFICE OF MARK W. MUENSTER

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of: Appellant's reply brief upon the Appellant at the addresses shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the 27th day of November, 2019 with postage fully prepaid.

DATED this 27th day of November, 2019



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