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62749-C

NO. 62749-0-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

JOEL MCFARLANE

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable David Needy, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Mr. Joel McFarlane is a sex offender who is required to register his residence address. For years Mr. McFarlane registered his address with the Skagit County Sheriff's Office without issue. In November of 2007 Mr. McFarlane was snowed out of his home in Skagit County and moved to Diablo, in Whatcom County. Mr. McFarlane notified the Skagit County Sheriff's Office of his intent to temporarily stay in Diablo, but he never filled out any paperwork in writing. Mr. McFarlane turned his temporary sojourn to Diablo into a longer stay. In March of 2008 Skagit County Sheriff's Deputies Hamlin and Wilhonen located Mr. McFarlane at a basement apartment in Diablo where he admitted that he had been living for months. Mr. McFarlane had his clothing, work, radio equipment, and girlfriend in his apartment at the time of the arrest. When deputies checked his cabin in Skagit County prior to his arrest, it appeared as though no one had been there for quite some time. Mr. McFarlane was convicted of failing to register after a bench trial. Mr. McFarlane timely appeals his conviction.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to prove beyond a reasonable doubt that Mr. McFarlane was guilty of failure to register as a sex offender.
2. Whether the term “residence” is unconstitutionally vague such that the registration statute should be deemed void.

III. STATEMENT OF THE CASE

1. Statement of Procedural History

¹On March 3, 2008, Joel McFarlane was charged by with failure to register as a sex offender. CP 1-2.

Mr. McFarlane waived his right to a jury trial on June 25, 2008. CP 10. On November 17, 2008, Mr. McFarlane was found guilty of failure to register as a sex offender by the Honorable Judge David Needy. CP 11-43. On December 5, 2008, Mr. McFarlane timely filed his notice of appeal. CP 53-55.

2. Statement of Facts

It is undisputed that Mr. McFarlane is a convicted sex offender. He has been required to register as a sex offender since 1996. See

attached Exhibit A; findings of fact. Mr. McFarlane had registered for years in Skagit County without issue. 11/17/2008 RP 19. In early and late February 2008, Mr. McFarlane called the Skagit County Sheriff's Office to report that he was snowed out of his Skagit County address. 11/17/2008 RP 23. Mr. McFarlane indicated he would be staying in Diablo, but he did not provide a phone number or address in Diablo, Whatcom County. 11/17/2008 RP 19-21. Other than Mr. McFarlane calling in to the Skagit County Sheriff's Office, there is no indication he ever changed his address in writing from his Skagit County address to a Whatcom County address. 11/17/2008 RP 17-27.

In March of 2008, Deputies Wilhonen and Hamlin travelled to Diablo, Whatcom County, to see if they could locate Mr. McFarlane based on a tip that Mr. McFarlane was living in Diablo. 11/17/2008 RP 41-42. Deputies had checked the Skagit County residence that Mr. McFarlane had been registered at prior to arriving in Diablo only to find the cabin deserted with no sign of anyone having been there—no tire tracks in the snow, no foot prints in the snow, nothing to indicate anyone had been there for quite some time. 11/17/2008 RP 39-41. Even though snow was still on the ground at the Skagit

¹ The State will refer to the verbatim report of proceedings by using the date

County cabin, it appeared as though it had not been snowing for a couple of days. 11/17/2008 RP 41. On the day in March, 2008 that deputies looked for Mr. McFarlane in Diablo the roads had been plowed and were bare and wet. 11/17/2008 RP 34-35. Deputy Hamlin spoke with Mr. Knopf in Diablo who knew Mr. McFarlane and provided Deputy Hamlin with a phone number for the house in which Mr. Knopf believed Mr. McFarlane was staying. 11/17/2008 RP 44-45. Deputy Hamlin called the provided phone number and Mr. McFarlane answered. 11/17/2008 RP 45. Deputy Hamlin told Mr. McFarlane that he need to meet the deputy at the front door of the Diablo home, which Mr. McFarlane agreed to do. 11/17/2008 RP 44-45. Deputy Hamlin met Mr. McFarlane on the door step of the Diablo home and placed Mr. McFarlane under arrest for failure to register as a sex offender. Mr. McFarlane was Mirandized and waived his rights and agreed to speak with the deputy. Deputy Hamlin asked Mr. McFarlane how long he had been living up in Diablo and Mr. McFarlane said he had been there about nine months. 11/17/2008 RP 45. Later on, during court proceedings it was concluded that Mr. McFarlane had over-estimated the duration of his stay in Diablo and

followed by "RP" and the page number.

that in actuality he had likely been living there from November 2007 through March 3, 2008. See attached Exhibit A, findings of fact.

When Deputy Hamlin made contact with Mr. McFarlane he was not dressed with many clothes on and he retreated into the house to get fully dressed, indicating he had his own personal belongings in the Diablo home. 11/17/2008 RP 46. Mr. McFarlane appeared to have been living in the Diablo home for quite some time; in addition to his personal belongings and radio equipment being present in the home, his girlfriend had also been living in the Diablo residence with him. 11/17/2008 RP 65. Mr. McFarlane was booked into jail on the failure to register charge and upon being released on bond he provided the same Diablo residence address as his current residence. 11/17/2008 RP 59.

IV. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE BEYOND A REASONABLE DOUBT TO PROVE THAT MR. MCFARLANE FAILED TO REGISTER AS A SEX OFFENDER.

The test for reviewing a defendant's challenge to the sufficiency of evidence in a criminal case is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime

beyond a reasonable doubt.” *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995). 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. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068, 1074 (1992); *State v. Partin*, 88 Wn.2d 899, 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. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068, 1074 (1992); *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980).

In order to convict Mr. McFarlane of Failure to Register as a Sex Offender, the State must prove that Mr. McFarlane was required to register as a sex offender and that he knowingly failed to register within the proscribed times limits per RCW 9A.44.130(5)(a). The pertinent part of RCW 9A.44.130 is as follows:

1)(a) Any adult or juvenile residing whether or not the person has a fixed residence, or who is a student, is employed, or carries on a vocation in this state who has been found to have committed or has been convicted of any sex offense or kidnapping offense, or who has

been found not guilty by reason of insanity under chapter 10.77 RCW of committing any sex offense or kidnapping offense, shall register with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation, or as otherwise specified in this section. Where a person required to register under this section is in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility as a result of a sex offense or kidnapping offense, the person shall also register at the time of release from custody with an official designated by the agency that has jurisdiction over the person.

b) Failure to register within the time required under this section constitutes a per se violation of this section and is punishable as provided in subsection (11) of this section. The county sheriff shall not be required to determine whether the person is living within the county.

(5)(a) If any person required to register pursuant to this section changes his or her residence address within the same county, the person must send signed written notice of the change of address to the county sheriff within seventy-two hours of moving. If any person required to register pursuant to this section moves to a new county, the person must send signed written notice of the change of address at least fourteen days before moving to the county sheriff in the new county of residence and must register with that county sheriff within twenty-four hours of moving. The person must also send signed written notice within ten days of the change of address in the new county to the county sheriff with whom the person last registered. The county sheriff with whom the person last registered shall promptly forward the information concerning the change of address to the county sheriff for the county of the person's new residence. Upon receipt of notice of

change of address to a new state, the county sheriff shall promptly forward the information regarding the change of address to the agency designated by the new state as the state's offender registration agency.

(11)(a) A person who knowingly fails to comply with any of the requirements of this section is guilty of a class C felony if the crime for which the individual was convicted was a felony sex offense as defined in subsection (10)(a) of this section or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony sex offense as defined in subsection (10)(a) of this section.

In order for the State to prove that an individual failed to register as a sex offender, the State must prove that the individual was required to register and knowingly failed to register within the time proscribed within the statute. See RCW 9A.44.130. The term “knowingly” means [1] he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or [2] he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.” RCW 9A.08.010(1)(b); See *State v. Castillo*, 144 Wn.App. 584, 183 P.3d 355 (2008).

In *State v. Stewart* the court found that there was sufficient evidence to support a conviction for failure to register as sex offender when the officer located the defendant at a residence in the county

where he had not registered and defendant admitted he had been living there for a couple weeks. *State v. Stewart*, 141 Wn. App. 791, 796, 174 P.3d 111 (2007). In *State v. Castillo* the court found that there was sufficient evidence to convict Mr. Castillo of failure to register as a sex offender when: 1) Mr. Castillo was not living at the address in which he had registered; 2) Mr. Castillo had not been at the address in which he registered for over a month; 3) Mr. Castillo had no personal belongings at the old address; and 4) Mr. Castillo had registered an address several times before showing knowledge of the requirement. *State v. Castillo*, 144 Wn. App. 584, 589-590, 183 P.3d 355 (2008).

A court can infer requisite knowledge of a statute based on prior registrations or based on an individual being read portions of a statute. See *State v. Vanderpool*, 99 Wn. App. 709, 713-714, 995 P.2d 104 (2000). In *State v. Vanderpool*, Mr. Vanderpool argued that there was insufficient evidence to prove that he knowingly failed to register as a sex offender. *Id.* The court disagreed with this assertion and pointed to the fact that Mr. Vanderpool had relevant portions of the registration statute read to him and yet he still failed to register within ten days of moving. *State v. Vanderpool*, 99 Wn. App. 709,

713-714, 995 P.2d 104 (2000). The court also noted that ignorance of the law is no excuse. *Id.*

In *State v. Drake* the court held that there was insufficient evidence to show that Mr. Drake had knowingly failed to register as a sex offender when his landlord took action to evict Mr. Drake from the apartment, but no evidence was proffered at trial that he knew of the landlord's actions. *State v. Drake*, 149 Wn. App. 88, 201 P.3d 1093 (2009). In *Drake*, the police performed a routine check to make sure Mr. Drake was still residing where he was currently registered. *Id.* The police learned that Mr. Drake had defaulted on his rent and his landlord had taken steps to evict him. *Id.* Drake was convicted of failure to register as a sex offender at trial. *Id.*

The facts in *Drake* support the court's holding that the State failed to prove that Mr. Drake knowingly violated the registration statute. In *Drake*, there was no evidence that Mr. Drake was aware of his eviction. There was no evidence concerning Mr. Drake's whereabouts or activities between the alleged dates of violating the statute. There was no evidence that Mr. Drake changed addresses or maintained a residence elsewhere. Finally, there was no evidence from which it could be inferred that Mr. Drake did not intend to return to his apartment.

Drake is distinguishable from the instant case. While there was no evidence that Mr. Drake was residing anywhere beside his apartment, in the instant case, Mr. McFarlane made an admission to authorities that he had been living in Whatcom County for approximately nine months. In addition to his own admission, Mr. McFarlane was seen outside a residence in Whatcom County on numerous occasions; he reported to the Skagit County Sheriff's Office via telephone that he was unable to reside in his snow bound cabin in Skagit County; and he had personal belongings in the home in Whatcom County. Sufficient evidence supported the conviction.

B. THE STATE PROVIDED SUFFICIENT EVIDENCE TO PROVE THAT MR. MCFARLANE CHANGED HIS RESIDENCE TO WHATCOM COUNTY

As a convicted sex offender, Mr. McFarlane must register his address with the sheriff of his county of residence. RCW 9A.44.130(1). If Mr. McFarlane moves to a new county, he must register with the sheriff in the new county within twenty-four hours of changing his residence. RCW 9A.44.130(4)(a). The same statute requires that the individual provide *signed written* notice to the prior county of residence within ten days of the move. See RCW 9A.44.130 (5)(a) (emphasis added).

RCW 9A.44.130 does not specifically define the term “residence.” In *State v. Pickett* the court found that a homeless sex offender did not have a “residence” and therefore could not register an address with the county sheriff. *State v. Pickett*, 95 Wn. App. 475, 975 P.2d 584 (1999). In *State v. Pickett* the court held that a residence “is the place where a person lives as either a temporary or permanent dwelling, a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit.” *State v. Pickett*, 95 Wn. App. 475, 478, 975 P.2d 584 (1999).

In *State v. Pray* the court held that a temporary habitation can be a residence, thus triggering the registration requirement. *State v. Pray*, 96 Wn. App. 25, 980 P.2d 240 (1999). In *Pray*, the appellant abandoned his home in King County and lived in three different temporary housing situations in Whatcom County over a ten day period failing to register in Whatcom County. *Id.* Black’s Law Dictionary defines residence as, “a personal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for undetermined period...but not necessarily combined with design to stay permanently.” See also, *State v. Pray*, 96 Wn. App. 25, 980 P.2d 240 (1999).

In the instant case, the appellant argues that he was keeping dual residences and because he was keeping two separate residences he was not required to report the second residence. This argument is inapposite to the standard Black's Law definition of residence as "a personal presence at some place of abode." In the nine months that Mr. McFarlane lived and slept in Whatcom County what personal presence did he maintain in Skagit County? Mr. McFarlane admittedly was not keeping any personal presence in Skagit County. He may have *wanted* to be in his own cabin, but snow and weather conditions kept him elsewhere. His actual presence was *not* in Skagit County for months on end. The evidence supports that Mr. McFarlane was keeping a residence in Whatcom County, even if his intention all along was to someday return to Skagit County.

**C. THE TERM "RESIDENCE" IS NOT
UNCONSTITUTIONALLY VAGUE, THUS THE STATUTE
SHOULD NOT BE DEEMED VOID FOR VAGUENESS.**

A statute is presumed constitutional and the party challenging the constitutionality of a legislative enactment has the burden of proving it is unconstitutionally vague. *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996, 998 (1984); *State v. Rhodes*, 92 Wn.2d 755, 600

P.2d 1264 (1979); *Seattle v. Drew*, 70 Wn.2d 405, 423 P.2d 522 (1967). A statute or ordinance should not be declared unconstitutional unless it appears unconstitutional beyond a reasonable doubt. *State v. Dixon*, 78 Wn.2d 796, 479 P.2d 931 (1971); *State v. Primeau*, 70 Wash.2d 109, 422 P.2d 302 (1966). Therefore, RCW 9A.44.130 is presumed constitutional with a heavy burden placed on the appellant to prove the statute is unconstitutional. *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996, (1984); *Spokane v. Vaux*, 83 Wn.2d 126, 516 P.2d 209 (1973). To meet this burden the appellant must prove that the statute does not satisfy the requirements of due process. The test for evaluating the vagueness of legislative enactments contains two components: adequate notice to citizens and adequate standards to prevent arbitrary enforcement. *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996, (1984); *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *State v. Hilt*, 99 Wn.2d 452, 662 P.2d 52 (1983). "Common intelligence" is the test of what is fair warning. *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984). Thus, if men of ordinary intelligence can understand a penal statute, notwithstanding some *possible areas of disagreement*, it is not wanting in certainty.

See *Spokane v. Vaux*, 83 Wn.2d 126, 129, 516 P.2d 209 (1973)(emphasis added).

There are statutes which contain both precisely worded prohibitions and prohibitions of uncertain application, and such a statute, though potentially vague as to some conduct, may nevertheless be constitutionally applied to one whose act clearly falls within the statute's "hard core." *Bellevue v. Miller*, 85 Wn.2d 539, 541, 536 P.2d 603 (1975); See also, *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984).

The concept of residency arises in several legal contexts such as adoption, dissolution of marriage, service of process, validity of wills, as well as voting and holding office and in some criminal statutes as well. The Restatement (Second) of Conflict of Laws, states: "Residence is an ambiguous word whose meaning in a legal phrase must be determined in each case." Our State Supreme Court has observed that "[e]ach of the terms "reside," "residing," "resident," and "residence" is elastic. *Dumas v. Gagner*, 137 Wn.2d 268, 971 P.2d 17 (1999). To interpret the sense in which such a term is used, we should look to the object or purpose of the statute in which the term is employed. *Id.* at 286. To interpret the sense in which such a

term is used, we should look to the object or purpose of the statute in which the term is employed.’ ” *Id.* at 286

RCW 9A.44.130 does not define “residence.” In the absence of a specific statutory definition, words in a statute are given their ordinary meaning. See *State v. Alvarez*, 128 Wash.2d 1, 11, 904 P.2d 754 (1995). A nontechnical word may be given its dictionary meaning. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). Webster’s Dictionary defines “residence” as:

1 a the act or fact of abiding or dwelling in a place for some time ... **2 a** (1) the place where one actually lives ... (2) a *temporary* or permanent dwelling place, abode or habitation *to which one intends to return* as distinguished from a place of temporary sojourn or transient visit. WEBSTER’S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1931 (1993) (emphasis added). Under this definition, even a temporary dwelling may be considered a “residence.”

State v. Pray, 96 Wn. App. 25, 29, 980 P.2d 240, 242 - 243 (1999)

In the instant case, the average person would be able to ascertain what a residence is: where someone is personally present; an abode. The term “residence” should not be deemed unconstitutionally vague because even if it potentially vague as to some instances it may be constitutionally applied to one whose act clearly falls into the statute’s “hard core.” In this case, Mr.

McFarlane's acts of living, sleeping, working and keeping his personal belongings in a home other than the one in which he is registered is clearly conduct that speaks to his residence being other than the one in which he notified authorities about. Mr. McFarlane had been successfully registering his address with authorities for years indicating that there was no confusion that he was required to provide written notice of his address. When Mr. McFarlane was unable to make it back to his cabin due to snow conditions he called the Skagit County Sheriff's Office and left a message that he was going to be in Diablo due to snow. But, months went by and the snow started to thaw, the roads were plowed and Mr. McFarlane still never updated his residence address in Diablo with the proper authorities. In fact, he was living in a different county in Diablo and there is no indication that he ever gave any notice to Whatcom County about his presence. Mr. McFarlane was not at his cabin in Marblemount, Skagit County when authorities checked and it appeared as though no one had been there for quite some time. While Mr. McFarlane would argue that he was maintaining dual residences, the State would argue that his lack of personal presence at the Marblemount cabin defeats such an argument. Mr. McFarlane may have wanted to return to the cabin someday, but his stay in

Diablo was much more than a temporary sojourn—he had moved in his clothing and his girlfriend to his new abode in Diablo and had spent numerous nights there for at least five consecutive months.

Finally, it is worth mentioning that an individual's substantial compliance with statutory sex offender requirements concerning change of residence is not a defense for failing to provide actual notice. *State v. Prestegard*, 108 Wn. App. 14, 28 P.3d 817 (2001). It is clear from the record that Judge David Needy was somewhat reluctant to find that Mr. McFarlane was guilty of failing to register because of his prior compliance and the fact that Mr. McFarlane had been in contact via phone to the Skagit County Sheriff's Office. But Judge Needy also indicated that what may have started as a temporary stay in Diablo turned in to much more when he worked in Diablo, had his car there almost every day, had his girlfriend there and had a basement apartment with his belongings. 11/17/2008 RP 136. Judge Needy pointed out that, "The purpose of the sex offender registration statute is to assist law enforcement efforts to protect the community based on where a sex offender is residing." 11/18/2008 RP 135-36. Mr. McFarlane couldn't be found at his registered address because he had not been residing there—he was residing in

Diablo—a completely separate county than the one in which he was registered.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that the appellant's requests be denied. There was sufficient evidence to support Mr. McFarlane's conviction of failure to register and the term "residence" should not be deemed unconstitutionally vague because the appellant has failed to meet their burden of proving that the statute does not satisfy the requirements of due process.

DATED this 21st day of August, 2009.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
MELISSA W. SULLIVAN, WSBA#38067
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: VANESSA LEE, addressed as, 1511 3rd Avenue, Suite 701, Seattle, Washington 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 21st day of August, 2009.

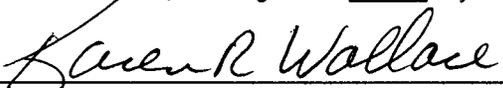

KAREN R. WALLACE, DECLARANT

EXHIBIT A

5. During that time period the defendant resided at an address in Diablo, WA (Whatcom County).
6. During that time period, the defendant did not send written notice to the Skagit County Sheriff's Office, within ten days of his change of address to Whatcom County, that he had moved from Skagit County to Whatcom County.
7. These events occurred in Skagit County, Washington.

II. CONCLUSIONS OF LAW

THE COURT CONCLUDES THAT, in Skagit County, Washington:

1. From November, 2007, through March 3, 2008, the defendant, having been convicted on or about the 11th day of July, 1996, of a sex offense that would be classified as a felony under the laws of Washington, To-wit: Child Molestation in the First Degree, Skagit County Superior Court Cause #96-1-00009-3, and being required to register pursuant to RCW 9A.44.130, did knowingly fail to comply with the requirements of RCW 9A.44.130.

DATED this 6 day of January, 2008.



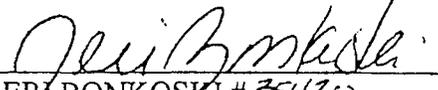
DAVID NEEDY
SUPERIOR COURT JUDGE

Presented by:



ROSEMARY H. KAHOLOKULA, # 25026
Deputy Prosecuting Attorney

Copy received and approved to form:



JERA BONKOSKI # 35470
Attorney for Defendant