

NO. 65457-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

LEE BUTLER,

Appellant.

REC'D
OCT 08 2010
King County Prosecutor
Appellate Unit

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 OCT -8 PM 4:25

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Theresa Doyle, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The information was defective because it omitted an essential element of the crime. CP 1.

Issue Pertaining to Assignment Of Error

A charging document must properly notify a defendant of the charges against him by including the essential elements of the crime. Is reversal required because the information failed to allege the reporting deadline for the crime of failure to register?

B. STATEMENT OF THE CASE

Lee Butler was charged in King County Superior Court with felony failure to register as a sex offender. CP 1-5 (RCW 9.44.130(11)(a)). It was alleged that between May 4, 2009 and July 10, 2009, Butler, who had no fixed address, knowingly failed to report weekly with the sheriff's office. CP 1-5.

A jury found Butler guilty as charged. CP 21. Based on an offender score of 5, Butler was given a standard range sentence of 14 months. CP 23-33.

C. ARGUMENT

THE REPORTING DEADLINE IS AN ESSENTIAL ELEMENT OF THE CRIME OF FAILURE TO REGISTER AND THE INFORMATION IS CONSTITUTIONALLY INADEQUATE BECAUSE IT FAILED TO INCLUDE THE DEADLINE.

Butler's conviction for failure to register as a sex offender must be reversed because the charging document does not set forth the reporting deadline, which is an essential element of the crime.

The State charged Butler with the offense of failure to register as follows:

That the defendant, Lee Butler in King County, Washington, during a period of time intervening between May 4, 2009 through July 10, 2009, having been convicted of a sex offense that would be classified as a felony under the law of Washington, to-wit: Rape of a Child in the First Degree, and being required to register pursuant to RCW 9A.44.130, did knowingly fail to comply with the requirements of RCW 9A.44.130, to-wit: the requirement that the defendant, lacking a fixed residence, must report weekly, in person, to the sheriff of the county where the defendant is registered.

CP 1.

A charging document is constitutionally defective under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The purpose of the established "essential elements" rule is to

apprise the defendant of the charges against him and allow preparation of a defense. Id.

The day of the week that Butler must report is an essential element of the crime. Former RCW 9A.44.130 (11)(a) provides in relevant part "A person who knowingly fails to register or who moves within the state without notifying the county sheriff *as required by this section* is guilty of a class C felony."¹ (emphasis added).

RCW 9A.44.130(4)(b) states "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."

Butler was convicted of violating RCW 9A.44.130(6)(b), which provides: "A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be *on a day specified by the county sheriff's office*, and shall occur during normal business hours." (emphasis added).

Under the statute, a person cannot be convicted for failing to report to the county sheriff during some unspecified period of time. The statute identifies specific timeliness requirements that must be complied with in order to avoid conviction.

¹ Laws of 2006 ch. 129 § 2 (effective Sept. 1, 2006). All statutory references to RCW 9A.44.130 are to the version in effect as of the time of the offense.

"An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). The failure to comply with the reporting deadline is necessary to establish the very illegality of the registration offense. The failure to report weekly on a day specified by the county sheriff's office is therefore an essential element of the crime that needed to be contained in the charging document.

In concluding the deadlines in the failure to register statute are not alternative means, the Court of Appeals in State v. Peterson also concluded they are not elements of the crime. State v. Peterson, 145 Wn. App. 672, 678, 186 P.3d 1179 (2008). The Supreme Court, however, rejected the Court of Appeals' analysis. State v. Peterson, 168 Wn.2d 763, 771, 772, 230 P.3d 588 (2010). The Court recognized the alternative means question and the elements question are different and should be analyzed separately. Id. at 771.

The Court noted "[c]ommon sense suggests the statutory deadline is part of the State's burden of proof." Id. at 771 n.7 (not deciding question but noting it would be insufficient for the State to prove failure to register within 24 hours of relocating when the statutory deadline is 72 hours); cf. State v. Castillo, 144 Wn. App. 584, 588, 183 P.3d 355 (2008)

(in deciding sufficiency of evidence issue. "State must show that Mr. Castillo (1) changed his residence on or after August 8, 2006, (2) knowingly failed to provide written notice of the change of his address to the Yakima County sheriff's department within 72 hours of moving, and (3) had previously been convicted of a sex offense that required registration.").

Moreover, statutes will not be construed in a way that leads to unlikely, absurd, or strained results. State v. Ammons, 136 Wn.2d 453, 457, 963 P.2d 812 (1998). Absurd results follow if the reporting deadline is not an element of the crime. For example, an offender could report at some point after the specified weekly day for reporting and still not be guilty of a punishable offense, in contradiction to statutory mandate. Conversely, an offender could report any day before the specified weekly reporting date, fail to report on the specified day, and still not be guilty of an offense because he reported to the sheriff at some earlier point in time. Such senseless results flow from the premise that the failure to comply with the reporting deadline is not an essential element of the crime.²

² Absurd results follow in related contexts if the statutory deadlines are not elements of the crime. RCW 9A.44.130(5)(a), for example, requires notification of a county sheriff within 72 hours of moving. A person could fail to notify the sheriff within 24 hours of moving and yet still be found guilty of failing to register if the 72 hour deadline is not an essential element of the crime. See Peterson, 168 Wn.2d at 771 n.7 (it would be insufficient for the State to prove failure to register within 24 hours of relocating when the statutory deadline is 72 hours).

Where, as here, the adequacy of an information is challenged for the first time on appeal, the court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

The information did not allege Butler failed to register on a weekly basis on the day specified by the county sheriff. The information is deficient because it lacks the statutorily required reporting deadline, which is an element of the crime.

A charging document need not include the exact words of a statutory element; words conveying the same meaning and import are sufficient. Kjorsvik, 117 Wn.2d at 108. The charging document at issue here contains no words conveying the deadline element of the crime.

"If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal

reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the necessary element of when Butler must report is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse Butler's conviction. McCarty, 140 Wn.2d at 425.

D. CONCLUSION

For the above reason, Butler requests that this Court reverse his conviction.

DATED this 1 day of October, 2010.

Respectfully Submitted,

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v.)	COA NO. 65457-8-1
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LEE BUTLER,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF OCTOBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LEE BUTLER
DOC NO. 709607
WASHINGTON STATE CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF OCTOBER, 2010.

x *Patrick Mayovsky*

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