

65669-4

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NO. 65669-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MAURICE KUIT,

Appellant.



APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUES

1. Whether "substantial compliance" is available as a defense to a criminal charge of failure to register as a sex offender.
2. Whether the evidence supported a jury instruction on substantial compliance.

B. STATEMENT OF THE CASE

Defendant Maurice Kuit was charged by information with Failure to Register as a Sex Offender. The State alleged that Kuit, having previously been convicted of Voyeurism and Failure to Register, had once again failed to register his address as required under RCW 9A.44.130. The specific charging period was June 27 through July 30, 2009. CP 1-4.

The underlying facts were revealed at a jury trial. Bellevue Police Detective Fred Nunnelee described his duties with the Sex Offender Unit: send patrol officers to verify that an offender is living at the address at which he has registered, communicate with the Department of Corrections concerning restrictions applicable for

those on probation, and hold public meetings to notify communities about higher-risk sex offenders.¹ 2RP² 19-20.

Detective Nunnelee explained that sex offenders are required to register their addresses with the King County Sheriff's Office ("KCSO").³ 2RP 21. The KCSO then transmits the information to the local jurisdiction. Id.

Local jurisdictions invest considerable resources in community notification meetings. 2RP 64-65. These resources are wasted if the sex offender does not actually live at the registered address. Id. Moreover, in such a case, the community where the offender *does* live does not get the necessary notification. Id.

Sex offenses trigger registration requirements of varying lengths, depending on the classification of the offense. 2RP 23-24. Based on his prior sex offenses, Maurice Kuit was required to

¹ Maurice Kuit is a Level 3 sex offender, considered a high risk to reoffend. 2RP 57, 62; 3RP 70-71.

² The verbatim report of proceedings is contained in five volumes, which will be referred to in this brief as follows: 1RP (12/14/09), 2RP (12/15/09), 3RP (12/16/09), 4RP (12/17/09), and 5RP (6/4/10).

³ Initial registration must be done in person at the KCSO in the King County Courthouse; subsequent changes may be registered by mail, and no particular form is required. 2RP 110.

register as a sex offender during the period from June 27 - July 30, 2009. 2RP 23-24, 33-34; Ex. 1, 2; RCW 9A.44.140(1)(c).

Kuit had last registered at a Bellevue address, 15015 SE 15th Street, on September 29, 2008. 2RP 27. Officers had on occasion been sent to that address to verify Kuit's residency. Id. When they found Kuit absent, Detective Nunnelee would call him, and Kuit would say that he was out of town. Id. On August 5, 2009, Nunnelee received an e-mail from Iris Peterson, Kuit's community corrections officer, notifying Nunnelee that Kuit had actually been living at an address in Redmond, not at his registered address of 15015 SE 15th Street in Bellevue. 2RP 41, 76.

Iris Peterson, in turn, described her duties as a community corrections officer ("CCO") in the Special Assault Unit: plan the release of adult felons from the institutions, assess their risk to reoffend, develop a case plan to supervise them and prevent reoffense, and help them transition back into the community. 2RP 75-76.

Kuit was taken into custody for a probation violation on June 2, 2009.⁴ 2RP 50, 70-72; Ex. 3. He was released from custody on

⁴ The cause was Kuit's termination from sexual deviancy treatment. 2RP 94-95.

June 27, 2009. Id. Kuit was required to register his address with KCSO within 24 hours of his release. 2RP 79; Ex. 2 at App. J.

Peterson met with Kuit on June 30, 2009 at her office. 2RP 78. Kuit told Peterson that he had been staying at his office. 2RP 79. Peterson told Kuit that this was not acceptable. Id.

On July 8, 2009, Kuit contacted Peterson and informed her that he was staying with an acquaintance at 6667 138th Ave. NE in Redmond. 2RP 80-82. Peterson visited the residence and verified that Kuit was staying there. 2RP 80-81.

Peterson visited Kuit at his work location on July 30, 2009. 2RP 83. She asked Kuit if he had registered his new address. Id. Kuit initially said that he thought he had done so, but upon further questioning admitted that he had not. Id. Peterson told Kuit that he was in violation, and that he should register the address right away. 2RP 84. He agreed to do so. Id. Peterson then informed Detective Nunnelee that Kuit had failed to register at his most recent address. Id.

Kuit registered his change of address at the King County Courthouse on July 30, 2009. 2RP 115-16.

Kuit testified on his own behalf. He said that he was overwhelmed by financial, medical, psychological and legal

problems. 3RP 100-01; 4RP 28-29. Kuit cited his depression, claiming that it led to episodes of confusion and memory loss. 3RP 101. Kuit admitted that he knew about his registration requirement, and he knew how to fulfill it. 4RP 43-44.

C. ARGUMENT

1. SUBSTANTIAL COMPLIANCE IS NOT AVAILABLE AS A DEFENSE TO A CRIMINAL CHARGE OF FAILURE TO REGISTER AS A SEX OFFENDER.

Kuit contends that "substantial compliance" with statutory registration requirements is a valid defense to a criminal charge of Failure to Register as a Sex Offender, and that the trial court accordingly erred in refusing to so instruct the jury. Kuit cites no cases in which courts have found this defense available in a criminal case. Even if "substantial compliance" were a defense to a criminal charge in theory, it would not be a defense to this charge. The purpose of the sex offender registration statute, to assist law enforcement in protecting the community from known sex offenders, cannot be effected by means short of those specified in the statute itself.

a. Relevant Facts.

After the State rested, Kuit moved to dismiss, arguing that he had constructively complied with the reporting requirements by notifying CCO Iris Peterson of his new address. 2RP 134-37. The trial court denied the motion, finding that the legislature required strict compliance with the notification requirements; i.e., that registration be with the sheriff, and not some other person. 2RP 145-49.

Kuit nevertheless proposed a jury instruction on substantial compliance: "Substantial compliance is a defense to the reporting requirements of a state agency[.]"⁵ CP 33. The trial court refused the instruction, noting again that this defense was not available under the relevant statute. 4RP 23. Kuit excepted to the court's failure to give the instruction. 4RP 25. In his closing argument, Kuit's counsel asked the jury to make an "accommodation" for his client's "substantial compliance." 4RP 121-23.

⁵ Kuit did not propose a definition of "substantial compliance," nor did he hazard an opinion on what the burden of proof should be, or on whom that burden should rest.

b. Substantial Compliance Is Not A Defense.

A criminal defendant is entitled to have the jury fully instructed on his theory of the case. State v. Fernandez-Medina, 141 Wn.2d 452, 461, 6 P.3d 1150 (2000). Where the trial court's refusal to give an instruction is based on a ruling of law, the decision is reviewed *de novo*. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

"Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of the statute. It means a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted." James v. Kitsap County, 154 Wn.2d 574, 588, 115 P.3d 286 (2005) (quoting In re Habeas Corpus of Santore, 28 Wn. App. 319, 327, 623 P.2d 702 (1981) (citation omitted)).

The purpose of the sex offender registration requirement is to assist law enforcement agencies in their efforts to protect the community. State v. Watson, 160 Wn.2d 1, 9, 154 P.3d 909 (2007). The statute furthers this purpose by keeping law enforcement informed of the whereabouts of sex offenders who may reoffend. Id. at 10. "The objective of registration is to allow

law enforcement to remain aware of the residence of sex offenders for reasons of public notification." State v. Pickett, 95 Wn. App. 475, 480, 975 P.2d 584 (1999).

The legislature has specified the manner of registration: a sex offender "shall register with the county sheriff for the county of the person's residence." RCW 9A.44.130(1)(a). The system of public notification has been set up accordingly. When a sex offender comes to the KCSO to register, either for the first time or for a change of address, an administrative specialist with the KCSO Registered Sex Offender Unit verifies that the address given is an actual address. 2RP 103. The file on that sex offender is then updated. 2RP 104. This information is then made available to the public, to law enforcement, and to the Department of Corrections ("DOC"). Id.

There is no alternative means set out in the statute for disseminating this information. There is thus no alternative means for fulfilling the objective of the sex offender registration statute -- making law enforcement aware of the whereabouts of sex offenders so police can keep the public apprised.

If substantial compliance were a defense to failure to register as a sex offender, it would likely be an affirmative defense. See

State v. Riker, 123 Wn.2d 351, 368, 869 P.2d 43 (1994)

("Generally, an affirmative defense which *does not negate an element of the crime charged, but only excuses the conduct*, should be proved by a preponderance of the evidence.") (emphasis added). But the sex offender registration statute explicitly allows for an affirmative defense: that the person required to register did not meet the statutory timeliness requirement because he did not know the location of his new residence in time to conform to the statutory requirement. RCW 9.94A.130(5)(b). Under the statutory canon of *expressio unius est exclusio alterius*, express inclusion in a statute of the situations in which it applies implies that other situations are intentionally omitted. In re Detention of Strand, 167 Wn.2d 180, 190, 217 P.3d 1159 (2009).

The other two divisions of the Court of Appeals have already concluded that substantial compliance with the sex offender registration requirements of RCW 9A.44.130 is not a defense to a criminal prosecution for failing to register as a sex offender. As Division Three correctly observed in State v. Vanderpool: "The policy of RCW 9A.44.130 is to allow law enforcement agencies to protect their communities, conduct investigations and quickly apprehend sex offenders. . . . Without strict compliance with the

registration requirements, this policy is undermined." 99 Wn. App. 709, 712, 995 P.2d 104, review denied, 141 Wn.2d 1017 (2000). Division Two has followed suit: "[W]e agree with Division Three in its *Vanderpool* decision and hold that substantial compliance is not a defense." State v. Prestegard, 108 Wn. App. 14, 22, 28 P.3d 817 (2001). This Court should similarly reject this defense.

2. KUIT DID NOT SUBSTANTIALLY COMPLY WITH THE SEX OFFENDER REGISTRATION STATUTE.

Even if "substantial compliance" were in theory a defense to failure to register as a sex offender, such an instruction was not supported by the evidence in this case. The trial court did not abuse its discretion in refusing to instruct the jury on this theory.

Each party in a criminal case is entitled to have instructions embodying that party's theory of the case *if there is evidence to support that theory*. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289 (1993). It is error for the court to give an instruction that is not supported by the evidence. Id. Evidence to support an instruction is sufficient where a jury could reasonably infer the necessary facts. State v. Vinson, 74 Wn. App. 32, 37, 871 P.2d 1120 (1994). What constitutes "substantial compliance" with a statute depends on the

particular facts of the case. In re Santore, 28 Wn. App. at 327. A trial court's refusal to instruct the jury based on the facts of the case is reviewed for abuse of discretion. Walker, 136 Wn.2d at 771-72.

The evidence here did not support a conclusion that Kuit substantially complied with the purpose of the sex offender registration requirement. Keeping his CCO apprised of his whereabouts did not further the intent of the statute; DOC has nothing to do with sex offender registration. 2RP 121. A CCO's duties do not include notifying the public of a sex offender's address of residence. 2RP 76. It is the KCSO that, upon receiving updated information on a sex offender's address, notifies the local jurisdiction. 2RP 21. The local jurisdiction, in turn, holds public notification meetings and sends officers out to the address of record on a regular basis to monitor compliance. 2RP 19-20.

Moreover, because the statute requires that a sex offender notify his CCO of his address upon release from custody, and because the CCO must know the offender's location in order to supervise him and help him in his transition back into the community, the CCO would have no reason to think that she had received the notice of change of address *in place of* the KCSO. 2RP 76; RCW 9A.44.130(1)(a). The CCO would thus be unlikely to

take it upon herself to notify the KCSO, and the community into which the offender had moved his residence would not receive the notification necessary to promote public safety.

Kuit's argument that he need only keep "the State" informed of his address in order to substantially comply with the statute is thus unavailing. Brief of Appellant at 8. It is not the duty of any State officer other than the KCSO's Registered Sex Offender Unit to update the file on each sex offender, and notify the local police agency. 2RP 21, 103-04. Notification of the CCO is no more a method designed to, or likely to, provide notice to the community where the sex offender is living, than notice to the governor, the attorney general, or some other State officer. Only strict compliance with the statutory registration requirements can fulfill the purpose of the sex offender registration statute.

D. CONCLUSION

For all of the foregoing reasons, this Court should find that "substantial compliance" is not a defense to a criminal charge of

Failure to Register as a Sex Offender. Kuit's conviction should be affirmed.

DATED this 27th day of April, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Jennifer J. Sweigert**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent** in **STATE v. MAURICE KUIT**, Cause No. **65669-4-1**, in the Court of Appeals for the State of Washington, Division I.

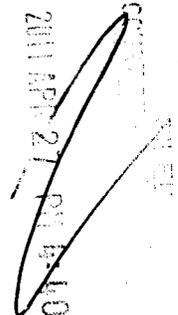
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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