Supreme Ct. No. 910448
COA No. 31659-9-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

TOMMY AUSTIN ASHLEY, Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

B. COURT OF APPEALS DECISIONS

At issue is the unpublished court of appeals decision filed on July 14, 2014 in Division Three of the Court of Appeals.

C. ISSUE PRESENTED FOR REVIEW

1. Does the unpublished court of appeals decision meet the criteria for review under RAP 13.4(b)

D. STATEMENT OF THE CASE

The Appellant, Tommy Austin Ashley, was convicted of third degree assault with sexual motivation, a sex offense, on June 13, 2007 in Yakima County cause number 07-1-00909-0. RP 76, CP 63. As a result of this conviction, he was required to register pursuant to 9A.44.130. RP 65, 78. In 2009, he was convicted twice of failing to register as a sex offender. RP 108. He was released from prison in May, 2011. (Finding of Fact 10). After his release, he was on supervision with the Department of Corrections for his 2007 sex offense conviction. RP 118.

After release from prison in 2011, he was advised of his conditions of supervision, including the sex offender registration requirements. RP 65, 121. (Finding of Fact 11-12). In 2011, he complied with his registration requirement after being released, (Finding of Fact 15-16), but was very hostile when he reported, RP 111. However, Ashley told his community corrections officer (CCO) that he did not think that he should be on supervision and that he wanted to be homeless. RP 65, 111.

His CCO, Officer Munguia, confirmed that he was living at 2802 Beaudry Road #56A in Yakima. RP 110. Ashley last registered this address on November 16, 2012. RP 135, 138 (Finding of Fact 40). Officer Mungia tried to contact Ashley on November 28, 2012 for a home visit but was not able to do so. (Finding of Fact 17-18). On November 29, 2012, Officer Mungia spoke to Ashley and told him that he needed to register as a sex offender and report in person to him. RP 115 (Finding of Fact 20). Ashley did not do so and a warrant was issued. RP 115 (Finding of Fact 23, 24). The warrant was for failing to report to his CCO after being released from incarceration at the Yakima County jail. RP 69, 119.

Ashley was incarcerated on December 4, 2012 in Kittitas County on the DOC warrant under cause number 07-1-00909-0. RP 56, 67, 69. (Finding of Fact 5). He was released from the Kittitas County jail on December 19, 2012. RP 56. (Finding of Fact 5). Prior to his incarceration, Ashley had been told to register upon release if incarcerated for absconding from supervision. RP 121.

However, he did not register after being released from the Kittitas County jail on December 19, 2012. RP 70 (Conclusion of Law 12). He also did not report to his community corrections officer. RP 70. He was supposed to report within one day of his release to Officer Munguia. RP 116.

On February 6, 2013, Ashley was pulled over by Sergeant Mark Lewis with the Moxee Police Department. RP 142 (Finding of Fact 49). Ashley was arrested in the trailer court at 2802 Beaudry Road. RP 143. There was no testimony presented at trial as to where Ashley was actually residing between December 19 and his arrest on February 6, 2013. Officer Mungia did not know if Ashley had changed his address. RP 110.

On February 11, 2013, Ashley was charged with failing to register as a sex offender under 9A.44.132(1)(b), a class B felony. CP 3. The time period that he was charged with failing to register was "on, about, during, or between December 19, 2012 and December 30, 2012." Id.

After waiving a jury trial, a bench trial commenced. The State called four witnesses and Ashley did not call any witnesses. RP 145 (Finding of Fact 4). Ashley was found guilty on April 11, 2013. CP 72-80. The trial court found that he had a duty to register after being released from the Kittitas jail because he was being held there on a violation relating back to his 2007 sex offense. (Finding of Fact 32). The Court of Appeals affirmed the conviction.

E. ARGUMENT

In re Coats explained the standard for when review should be accepted by this court:

> ...[T]he petitioner must persuade us that either the decision below conflicts with a decision of this court or another division of the Court of Appeals, that it presents a significant question of constitutional interest, or that it presents an issue of substantial public interest that should be decided by this court. RAP 13.5A(a)(1), (b); RAP 13.4(b).

In re Pers. Restraint of Coats, 173 Wn.2d 123, 132-133, 267 P.3d 324 (2011).

Petitioner has not argued in any fashion how the decision of the Court of Appeal satisfies the criteria for discretionary review pursuant to RAP 13.4(b). He has not pointed to any case that conflicts with the decision at hand. Petitioner has not explained how this case involves any significant question of constitutional law or issue of substantial public interest. In fact, the Court of Appeal decision does not involve a significant question of constitutional or an issue of substantial public interest. As such, review should be denied.

Petitioner argues that State v. Watson, 160 Wn.2d 1, 154 P.3d 909 (2007) does not control the issue in this case because it dealt with a void for vagueness challenge, rather than an ambiguity challenge. However, he does not indicate how the court's decision *conflicts* with Watson, only

arguing Watson does not control the issue. The court of appeal's decision is actually completely consistent with Watson. And Ashley has not identified any other case contrary to the court of appeal's decision. On that basis alone, review should be denied.

In Watson, a convicted sex offender challenged his conviction for failing to register when he failed to re-register after being released from jail after serving time on a community custody violation. 160 Wn.2d at 5. The court of appeals affirmed the conviction and this Court affirmed the court of appeals. Id. at 5, 12. This Court held that the statute was clear: "...the case law presumptively available to Watson explains in no uncertain terms that incarceration for probation violations is a result of the original conviction for which probation was granted." Id. at 9. The Court relied on 40 years of case law including State v. Eilts, 94 Wn.2d 489, 494 n.3, 617 P.2d 993 (1980); State v. King, 130 Wn.2d 517, 522, 925 P.2d 606 (1996); State v. Whitaker, 112 Wn.2d 341, 342, 771 P.2d 332 (1989), State v. Prado, 86 Wn. App. 573, 578, 937 P.2d 636 (1997); State v. Dupard, 93 Wn.2d 268, 276, 609 P.2d 961 (1980); and Standlee v. Smith, 83 Wn.2d 405, 407, 518 P.2d 721 (1974).

While the challenge was vagueness in Watson, much of the analysis is helpful to the ambiguity question in the case at hand. The first step in interpreting a statute is to examine its plain language. Id. at 263. In doing so, "the court should assume that the legislature means exactly what it says." State v. McCraw, 127 Wn.2d 281, 288, 898 P.2d 838

(1995). Plain words do not require construction. Id., see also State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991) ("Words are given the meaning provided by the statute or, in the absence of specific definition, their ordinary meaning").

The statute at issue is RCW 9A.44.130(3)(a)(i):

> (3) (a) Offenders shall register with the county sheriff within the following deadlines:
>
> (i) OFFENDERS IN CUSTODY. (A) **Sex offenders who committed a sex offense on, before, or after February 28, 1990, and who, on or after July 28, 1991, are in custody, as a result of that offense, 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, and (B) kidnapping offenders who on or after July 27, 1997, are 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, **must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender.** The agency shall within three days forward the registration information to the county sheriff for the county of the offender's anticipated residence. The offender must also register within three business days from the time of release 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. The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register.

RCW 9A.44.130(3)(a)(i) (emphasis added).

At issue is whether the specific language "as a result of" is ambiguous or not. A statute's "[p]lain meaning 'is to be discerned from

the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). If the statute is unambiguous, upon reviewing its plain meaning, the inquiry is at an end. Id. Although a statute is ambiguous when it is susceptible to two or more reasonable interpretations, a statute is not ambiguous merely because different interpretations are conceivable. Id.

Ashley argues that the plain language of the statute means *only* his release from prison on the underlying sex offense. However, the statute does not narrowly define release as only when one is being held on the underlying sex offense, and not on subsequent community custody violations related to that offense. The statute is worded more broadly than that. It does not specify *what* exactly the person is in custody for. It only specifies that it is a *result of* the sex offense.

There is no definition in the statute for the phrase "as a result of." When a statutory term is undefined, the courts give that word its ordinary meaning, and may look to a dictionary for such meaning. Gonzalez, 168 Wn.2d at 263; see also State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991) ("'Words are given the meaning provided by the statute or, in the absence of specific definition, their ordinary meaning.'" The definition of the word "result" is "to proceed or arise as a consequence, effect, or conclusion." Merriam Webster's Collegiate Dictionary 999 (10th ed.

1994). As applied here, Ashley's incarceration on the community custody violations was a consequence or result of the 2007 sex offense.

Ashley essentially wants the court to read something into the statute that is not there—he wants the court to narrowly limit the *type* of custody that the registration statute applies to. But this is not a reasonable interpretation of the statute. As explained in State v. Tili, the proffered alternative interpretation must be *reasonable*. See 139 Wn.2d 107, 115, 985 P.2d 365 (1999). A reviewing court "[is] not obliged to discern an ambiguity by imagining a variety of alternative interpretations. W. Telepage, Inc. v. City of Tacoma Dep't of Fin., 140 Wn.2d 599, 608, 998 P.2d 884 (2000). Furthermore, the ability to argue two interpretations of a statute does not necessarily render the statute ambiguous. State v. Taplin, 55 Wn. App. 668, 670, 779 P.2d 1151 (1989).

Had the legislature wanted to distinguish between different types of custody in terms of registration requirements, it very well could have delineating that in certain terms. The statute does not use the phrase, "as a result of the original conviction" or refer to an "initial sentence." As such, the legislature's use of the broad phrase "as a result of" does not create ambiguity. It is clear from the plain language of the statute that convicted sex offenders must register upon release from *any* type of custody that is "a result of" the sex offense. As indicated in Watson, this triggers the applicability of the registration requirement. See 160 Wn.2d 1, 5, 154 P.3d 909 (2007).

The registration requirement extends to incarceration for probation violations because they relate back to the original conviction for which probation was granted. Watson, 160 Wn.2d. at 8-9. The incarceration is not merely the result of the violation, but is "deemed punishment for the original crime." Id. (citing State v. Dupard, 93 Wn.2d 268, 276, 609 P.2d 961 (1980) ("Parole revocation... is a 'continuing consequence' of the original conviction."); Standlee v. Smith, 83 Wn.2d 405, 407, 518 P.2d 721 (1974) ("Parole is revoked... as part of the continuing consequences of the crime for which parole was granted."). Thus, case law supports the interpretation that jail time for probation violations is a result of the original conviction for which probation was granted. Id. at 9. This means that the release from custody for violations imposed on a sex offense conviction triggers the requirement to register. See id. Petitioner has cited no case to the contrary.

In sum, the phrase "as a result of" is not ambiguous. Without a threshold showing of ambiguity, the court derives the statute's meaning from the words of the statute itself, and does not engage in statutory construction or consider the rule of lenity. Geschwind v. Flanagan, 121 Wn.2d 833, 840-41, 854 P.2d 1061 (1993).

Alternatively, assuming *arguendo* that the plain language of the statute is ambiguous, the rule of lenity does not apply because legislative intent is completely contrary to Ashley's interpretation of the statute.

When the legislature enacted RCW 9A.44.130, it made the following findings:

> The legislature finds that sex offenders often pose a high risk of reoffense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction. Therefore, this state's policy is to assist local law enforcement agencies' efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in section 402 of this act.

LAWS OF 1990, ch. 3, § 401. From this declaration, the "purpose behind sex offender registration is to assist law enforcement agencies' protection efforts." Watson, 160 Wn.2d at 9. It does so by keeping law enforcement informed of the whereabouts of sex offenders who may reoffend. Id. at 10.

As explained in Watson:

> This purpose is served by requiring sex offenders to register their address when they are first released and requiring reregistration when they move. However, it is also served by requiring reregistration when they are released from jail after violating their probation on the sex offense. Registration at such a time informs law enforcement that a potentially dangerous offender is returning to a residence in their area, which enables law enforcement to take any precautions necessary to protect their community. This information does not lose its usefulness to law enforcement simply because, as in this case, the offender can still be found at the same address registered prior to incarceration. It still informs law enforcement of a change in the sex offender's whereabouts—from

> jail or prison to the previously registered address—and notifies law enforcement of the presence of a potential danger.

160 Wn.2d at 11. The Watson court noted that "just as local law enforcement needs to know when a sex offender moves to its community, it needs to know when a sex offender returns to the community." Id. The purpose behind the registration statute is served when law enforcement is alerted that someone is back in the community. Consequently, the offender remains obligated to reregister upon return to his residence. Id.

Ashley argues that registration is meaningless when an offender does not change his address after being released. In this case, he argues that his address remained unchanged. However, this fact is not in the record. Because Ashley did not testify or all call any witnesses, the record is void as to where he was residing upon release. The uncontested evidence at trial was that Officer Munguia was not able to reach Ashley at his address, (Finding of Fact 17-18), and that Ashley did not report as directed, RP 70. Officer Munguia further testified that he did not know if Ashley's address had changed after December 19. RP 110. Registration would certainly not be meaningless in this situation. Furthermore, there is no exception to the statute that exempts one from registering when his or her address remains the same after incarceration.

The rule of lenity only requires an interpretation of an ambiguous statute in the defendant's favor absent legislative intent to the contrary. State v. Mandanas, 168 Wn.2d 84, 87-88, 228 P.3d 13 (2010). In this

case, there is legislative intent to the contrary. The legislative history supports the interpretation that Ashley was required to register upon his release from jail. As such, the rule of lenity does not apply.

F. CONCLUSION

Petitioner has not pointed to any case that conflicts with the decision at hand. Petitioner has not explained how this case involves any significant question of constitutional law or issue of substantial public interest. The decision at hand does not meet any of the criteria in RAP 13.4(b). The Court of Appeals decision correctly affirmed the trial court's decision. As such, the petition for review should be denied.

Respectfully submitted this 15th day of December, 2014,

TAMARA A. HANLON, WSBA # 28345
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Yakima County, Washington

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on December 15, 2014, by agreement of the parties, I emailed a copy of Respondent's Answer to Petition for Review to Thomas Kummerow at wapofficemail@washapp.org.

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

DATED this 15th day of December, 2014 at Yakima, Washington.

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Attached for filing is State's Answer to Petition for Review

- case name: STATE OF WASHINGTON V. TOMMY AUSTIN ASHLEY
- case number: 91044-8

Sincerely,

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