NO. 33416-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN YOUNG,

Appellant.

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

The Honorable Scott Gallina, Judge

AMENDED BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

Page

A. ASSIGNMENTS OF ERROR

1. Former RCW 9A.44.130(3)(a)(i) (2011) violates due process because is unconstitutionally vague as applied to appellant.

2. Former RCW 9A.44.130(3)(a)(i) (2011) is ambiguous and must be construed in appellant's favor.

3. The court erred in entering Conclusions of Law 1 and 2.

4. The information was constitutionally deficient because it failed to provide appellant adequate notice of the charge against him.

5. The court erred in calculating appellant's offender score.

Issues Pertaining to Assignments of Error

1. Is former RCW 9A.44.130(3)(a)(i) (2011) unconstitutionally vague as applied to appellant because it fails to specify with sufficient definiteness that appellant must reregister as a sex offender at the same address after being released from incarceration for a community custody violation related to a subsequent sex offense and not the original sex offense that triggered the duty to register?

2. Where there are multiple reasonable interpretations of former RCW 9A.44.130(3)(a)(i) (2011), is it ambiguous, requiring it to be construed in appellant's favor under the rule of lenity?

3. The charging document alleged appellant "knowingly failed to comply with any of the requirements of RCW 9A.44.130." Did

this fail to provide appellant sufficient notice of the charges against him when the State sought a conviction on inconsistent alternative means of failing to register as a sex offender?

4. Appellant was convicted of escape from community custody. RCW 9.94A.525(14) specifies that only prior escape convictions be counted in his offender score. However, the general terms of RCW 9.94A.525(19) also require one point to be added to an offender score when the offender committed the crime while on community custody. Do these statutes conflict, requiring the specific statute, RCW 9.94A.525(14), to supersede the general statute, RCW 9.94A.525(19)?

5. When read together, are these statutes ambiguous as to whether RCW 9.94A.525(19) applies when an offender is sentenced for escape from community custody?

6. When read together, are these statutes ambiguous as to whether RCW 9.94A.525(19) applies when an offender has a current escape from community custody conviction and is sentenced for another current offense?

B. STATEMENT OF THE CASE

1. Procedural History

On May 4, 2015, the Asotin County prosecutor charged Steven Young by amended information with failure to register as a sex offender

(third or subsequent conviction) (Count 1), witness tampering (Count 2), and escape from community custody (Count 3). CP 19-21. On the failure to register charge, the State alleged that between July 8 and November 14, 2014, Young "knowingly failed to comply with any of the requirements of RCW 9A.44.130." CP 19. After a bench trial, the court found Young guilty of failing to register and escape from community custody.[1] CP 22-28. The court found insufficient evidence of witness tampering and dismissed the charge. CP 27-29.

Young was convicted of second degree child molestation on February 5, 2004, an offense that requires him to register as a sex offender. Ex. 1. He was sentenced to 20 months confinement and 36 to 48 months of community custody. Ex. 1. Young was subsequently convicted of failing to register as a sex offender on October 1, 2007 (Ex. 4), September 3, 2008 (Ex. 5), and October 29, 2012 (Ex. 6). On the 2012 conviction, Young was sentenced to 14 months confinement and 36 months community custody "or for a period of earned released awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer." Ex. 6 at 4.

2. Substantive Evidence

On November 25, 2013, Young registered with the Asotin County Sheriff's Office his fixed address of 611 7th Street, Clarkston, Washington.

[1] Young did not contest the escape charge. RP 227.

Ex. 2. Young rented the house from Marilyn Jones with his mother as a cosigner. RP 37-39, 46, 147. Jones testified Young was a good tenant and always paid his rent on time. RP 44.

At trial, the State argued there were three alternative ways Young failed to register as a sex offender between July and November 2014. RP 223-24; CP 25-26. First, the State asserted Young no longer physically resided at 611 7th Street in Clarkston, but had moved to Culdesac, Idaho, to live with his girlfriend, Sheila Hassett. Second, the State argued Young continued to reside at 611 7th Street, but was no longer living there lawfully because his sister had taken over the lease. Third, the State asserted Young continued to lawfully reside at 611 7th Street, but failed to reregister at that address when he was released from jail in August 2014, pursuant to State v. Watson, 160 Wn.2d 1, 154 P.3d 909 (2007). RP 223-25.

In July 2014, Young was on community custody for the 2012 failure to register conviction. RP 84-85. When he failed to report to the Department of Corrections (DOC) as part of his community custody, two community corrections officers (CCOs) went to his home on July 8. RP 74-75. One CCO testified they encountered several people at Young's residence who said Young no longer lived there. RP 95. Young's assigned

CCO, Amanda Renzelman, also testified the two other CCOs spoke with three to four people at Young's residence who said he had moved.[2] RP 75.

However, on July 23, Renzelman and CCO Michael Grimm went to 611 7th Street and found Young there. RP 76-77. Renzelman testified there were boxes of clothing in the laundry room, but the house otherwise appeared vacant because the furniture was gone. RP 76-77, 98. Young informed Renzelman he had been burglarized. RP 87. Young was arrested that day for violating the terms of his community custody. RP 98-99.

While Young was incarcerated, his mother and sister co-signed a new lease and his sister began renting the 611 7th Street house on August 2, 2014. RP 40-41. Jones never evicted Young or informed him he was evicted, but claimed he was not allowed to be on the property because it would be illegal subleasing. RP 40-46, 173-74.

Young was released on August 11, 2014 and reported to DOC within 24 hours.[3] RP 12, 68, 88. Renzelman was unavailable that day, so Young spoke with CCO Kevin Vogeler. RP 64-65. Vogeler testified Young said he was homeless, so Vogeler instructed him to report back to Renzelman within

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[2] Defense counsel inexplicably failed to object to this hearsay and hearsay-within-hearsay.

[3] Witnesses offered conflicting testimony whether Young reported to DOC on August 11 or 12. RP 64-65, 79, 88. But they all appeared to agree it was within 24 hours of his release from custody. RP 68, 88.

48 hours. RP 64-65. Young did not report to Renzelman thereafter. RP 79-80, 189-91. A warrant issued for his arrest on September 2. RP 80.

Renzelman attempted to contact Young at 611 7th Street on September 3. RP 80. Renzelman testified she spoke with Young's sister, who "stated at that time that he was not living there. I asked her if she knew where he was; she stated, 'No.' And she further stated that she didn't have a phone number or way to contact him, as each time he called her it was from a different phone number."[4] RP 81; see also RP 13-14.

On November 14, 2014, Corporal Rod Taylor, from the Nez Perce County Sheriff's Department, was patrolling Culdesac, Idaho, around 2:00 a.m. RP 52. He made contact with a man walking down the street who identified himself as Young. RP 53. Taylor testified Young said he was staying at 110 Ponderosa Loop in Culdesac and was looking for his lost dog. RP 54. Taylor did not ask Young how long he had been staying at Ponderosa Loop, but testified, "I took it he was living there." RP 56, 61. Taylor discovered Young had an outstanding warrant in Washington, so he arrested him and took him to the Nez Perce County Jail. RP 54-55. Young was then transferred to Asotin County Jail.[5] RP 19.

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[4] Defense counsel again inexplicably failed to object to this hearsay and likely Confrontation Clause violation, as Young's sister did not testify at trial.

[5] CCO Grimm testified he contacted Young in jail and asked him what happened and what was going on. RP 99-100. Young stated he was in Culdesac, to which

Young called his mother from jail on November 19, 2014. RP 15. Regarding his sister, Young said, "I need her to have my back on this," RP 20-21, and "I need to get her fuckin' testimony – you know – all she has to tell them (inaudible) they came looking for me and I was fuckin' high, so she told them I wasn't there." RP 32. Young's mother asked if that would get his sister in trouble. RP 21. Young replied, "No. How's that get her in trouble?"[6] RP 21.

Both Young and Hassett testified at trial. Hassett explained she lived at 611 7th Street with Young until he was arrested in July. RP 133-35. Hassett then broke up with Young, moved out, and took most of the furniture and household items with her to 110 Ponderosa Loop in Culdesac. RP 134-35. Hassett verified they never received any eviction notices while they

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Grimm asked him why he was there, telling him "[DOC] demands that you stay in Washington when you're on probation unless you have special permission." RP 100. Grimm testified Young responded, "Well, living there, getting high." RP 100. The court never held a CrR 3.5 hearing to consider the admissibility of Young's statements, though they were ostensibly made in response to custodial interrogation. See State v. Kidd, 36 Wn. App. 503, 509, 674 P.2d 674 (1983) ("CrR 3.5 is a mandatory rule. Before introducing evidence of a statement of the defendant, the court must hold a hearing to determine if the statement was freely given."). But the court also did not rely on Young's custodial statements in making its ultimate findings and conclusions. See CP 23-27; In re Detention of Strand, 167 Wn.2d 180, 203, 217 P.3d 1159 (2009) ("[W]here a defendant ha[s] not received such a voluntariness hearing, the conviction which relied upon the statements must be reversed.")..

[6] This telephone call was the basis for the witness tampering charge. RP 225-26. Defense counsel pointed out, though, the very simple explanation that Young just wanted his sister to testify truthfully for him. RP 228. The trial court found this was "a reasonable explanation, one that is sufficient enough to give me pause with respect to the witness tampering charge." RP 242

lived at 611 7th Street. RP 138. She testified Young returned to that address when he was released in August; "As far as I know he never moved out." RP 142. Hassett visited Young at the house in Clarkston after his release and he visited her in Culdesac a couple times. RP 142-45.

Young testified his home was burglarized in July and Hassett took everything else when she moved out, leaving his house empty. RP 183, 196. He explained he returned to 611 7th Street after being released from custody in August, and lived there with his sister. RP 177. He never received an eviction notice, so he had no reason to believe he was living there unlawfully. RP 197.

Young further testified that on November 14, he rode out to Culdesac with a friend. RP 180. After several hours in Culdesac, Young got tired of waiting for his friend, so he tried to contact Hassett, but she did not respond because she was working early the next morning. RP 180, 206. Young then asked another friend to pick up him up and take him home, so he was walking down the highway waiting for her. RP 180. Young knew there was a warrant out for his failure to report for community custody, but not for failing to register as a sex offender. RP 181.

Young's friend, Mike Phillips, corroborated that Young returned to the 611 7th Street house after his release in August and continued to live there until his arrest in November 2014. RP 119. Young's mother also

testified Young returned to that address after his release, where she visited him once or twice a month after August. RP 150-51.

3. Trial Court's Ruling

The court addressed each of the State's three theories in its written findings and conclusions. CP 22-27. First, the court "decline[d] to decide whether the Defendant ceased residing at [611 7th Street, Clarkston, Washington] prior to his arrest on November 14, 2014." CP 25. Second, the court "decline[d] to decide whether the Defendant was lawfully allowed to reside at that address after August 1, 2014, and thereby utilize that address as a 'fixed residence' under the statute." CP 26. The court pointed to the conflicting testimony on both of these theories. CP 25-26.

On the third theory, however, the court concluded:

> 1. Regardless of whether the Defendant was or was not actually continuing to reside at or was lawfully allowed upon the premises of 611 Seventh Street, Clarkston after August 1, 2014, it is undisputed that on or about August 11, 2014, the Defendant was released from incarceration which was pursuant to his conviction in Asotin County Cause 12-1-00083-4 for Failure to Register as a Sex Offender (Third or Subsequent Conviction), a sex offense under RCW 9.94A.030(46). As such, he was required to register with the Asotin County Sheriff's Office upon release and certainly within seventy-two hours thereof. It is further undisputed that the Defendant did not register after his release on August 11, 2014.
>
> 2. The Defendant therefore failed to comply with the requirements of RCW 9A.44.130 when he failed to register with the Asotin County Sheriff's office after release

> from incarceration on August 11, 2014. The Defendant was aware of his obligation to register and had knowledge of the event (release) triggering his obligation to register, and further, the Defendant has been convicted of Failure to Register as A Sex Offender on three prior occasions. Finally, these acts occurred in Asotin County, Washington. The Defendant is therefore guilty beyond a reasonable doubt of Failure to Register as a Sex Offender (Third or Subsequent Conviction) in violation of RCW 9A.44.132(1)(b) as charged in Count 1 of the Second Amended Information.

CP 26.

The State calculated Young's offender score on the escape conviction as one, because he was on community custody on the date of that offense. CP 39. With an offender score of one, the standard range sentence is two to sixth months. CP 29, 39. The trial court imposed four months on this conviction. CP 31.

The State calculated Young's offender score on the failure to register conviction as eight. CP 38. Young received three points for having a prior felony sex offense and three more points for having three prior failure to register convictions. CP 38; RCW 9.94A.525(18). Young also received one point for the current escape conviction and one more point because he was on community custody when he failed to register. With an offender score of eight, the standard range sentence is 33 to 43 months. CP 29, 38. The trial court imposed 38 months on the failure to register conviction, to run concurrently with the four-month sentence on the escape conviction. CP 31.

At sentencing, Young asked for a lenient sentence because he was unaware of the duty to reregister upon release from custody:

> As I read the RCW and the duty to register forms I complied to it as I read it. I was unaware of State v. Watson, and, you know, nowhere in the duty to register or in the RCW does the word "re-register" appear. It only appears in State v. Watson. And I thought that by being at the address that I was registered at, I thought that I was in compliance.

RP 254. The court sentenced Young to 38 months confinement and 36 months of community custody. CP 31. Young timely appeals. CP 41.

C. ARGUMENT

1. FORMER RCW 9A.44.130 (3)(a)(i) (2011) IS AMBIGUOUS AND UNCONSTITUTIONALLY VAGUE AS APPLIED TO YOUNG, REQUIRING REVERSAL OF HIS CONVICTION.

Former RCW 9A.44.130(3)(a)(i) (2011) specifies "[s]ex offenders who committed a sex offense" and who "are in custody, as a result of that offense . . . must register at the time of release from custody." The Washington Supreme Court has held this provision is not unconstitutionally vague in requiring sex offenders to reregister when they return to their original address after being released from custody based on a probation violation for their original sex offense that triggered the duty to register. Watson, 160 Wn.2d at 8, 11-12.

This is not what happened here. Young was no longer on supervision for the original 2004 sex offense that triggered his duty to

register. Instead he was on supervision for a 2012 failure to register conviction. He was then found guilty of failing to reregister when he returned to the same address after being released from incarceration for a community custody violation based on the 2012 conviction. Former RCW 9A.44.130(3)(a)(i) (2011) is unconstitutionally vague and ambiguous as to whether it required Young to reregister under this circumstance. His conviction should be reversed and the charge dismissed.

a. The statute is unconstitutionally vague as applied.

The due process vagueness doctrine of the Fourteenth Amendment and article I, section 3 of the Washington Constitution require the State to provide citizens fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The doctrine also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001). A statute is therefore unconstitutionally vague if it either (1) does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is proscribed; or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Id. The first is at issue here.

Vagueness does not mean mere uncertainty; "'[s]ome measure of vagueness is inherent in the use of language.'" Watson, 160 Wn.2d at 7 (quoting Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 740, 818 P.2d

1062 (1991)). Therefore, "a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." City of Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988). Instead, a statute fails to provide the required notice if it forbids conduct "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Watson, 160 Wn.2d at 7 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)).

The constitutionality of a statute is an issue of law this Court reviews de novo. Id. at 5-6. Because the registration statute does not involve First Amendment rights, "the vagueness challenge is to be evaluated by examining the statute as applied under the particular facts of the case." Id. (quoting State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992)). A statute is presumed constitutional and the challenger bears the burden of proving vagueness beyond a reasonable doubt. State v. Hunley, 175 Wn.2d 901, 908, 287 P.3d 584 (2012).

Young was convicted of failing to register as a sex offender pursuant to former RCW 9A.44.130 (3)(a)(i) (2011), which states in relevant part:

> 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, . . . must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender. . . . 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.

(Emphasis added.) This requires "that convicted sex offenders must register upon release from custody, if they were in custody 'as a result of' the sex offense that triggered the applicability of the statute." Watson, 160 Wn.2d at 8. The Watson court considered whether the statute was vague as to whether a sex offender must reregister after being released from custody for a probation violation on the original sex offense. Id.

Watson analyzed former RCW 9A.44.130(4)(a)(i) (2006). In 2010, the legislature amended RCW 9A.44.130(4)(a)(i) to give individuals three business days to register upon release from custody instead of just 24 hours. Laws of 2010, ch. 267, § 2. In 2011, the legislature recodified this provision at RCW 9A.44.130(3)(a)(i). Laws of 2011, ch. 337, § 3. In 2015, the legislature again amended the statute to read:

> Sex offenders or kidnapping offenders who 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.

Laws of 2015, ch. 261, § 3 (also recodifying this provision at RCW 9A.44.130 (4)(a)(i)).

The 2015 amendment deleted the "as a result of" language at issue in Watson. However, crimes must generally be prosecuted under the law in effect at the time they were committed. RCW 10.01.040; State v. Pillatos, 159 Wn.2d 459, 472, 150 P.3d 1130 (2007) (recognizing RCW 10.01.040 applies to substantive changes in the law). The law in effect at the time of Young's purported failure to register included the "as a result of" language, just as in Watson. Former RCW 9A.44.130(3)(a)(i) (2011).

Watson was convicted of a sex offense that required registration. Watson, 160 Wn.2d at 4. When he was released from incarceration for that conviction into community custody, he registered an address in Graham, Washington. Id. Several months later, he was convicted of three community custody violations and served an additional 60 days in jail. Id. Upon release, he returned to the same address, but did not reregister as a sex offender. Id. at 5. He was subsequently convicted of failure to register. Id.

The supreme court explained that, because of the inherent vagueness of language, citizens may need to refer to other statutes and court rulings to clarify the meaning of a statute. Id. at 8. Such sources are considered presumptively available to all. Id. Washington case law is clear that incarceration for probation violations "'relates back to the original

conviction for which probation was granted.'" Id. (quoting State v. Eilts, 94 Wn.2d 489, 494 n.3, 617 P.2d 993 (1980)). It is therefore deemed punishment for the original crime. Id. at 8-9.

The Watson court agreed "the legislature could have worded the sex offender registration statute more clearly," but ultimately concluded:

> [T]he case law presumptively available to Watson explains in no uncertain terms that incarceration on probation violations is a result of the original conviction for which probation was granted. In this case, that means that Watson's 60 days in custody for violation of his community custody conditions were a result of his sex offense, triggering the requirement that he reregister upon release.

Id. at 9. The court further explained reregistration serves the legislative purpose behind sex offender registration "by keeping law enforcement informed of the whereabouts of sex offenders who may reoffend." Id. at 10. The court held the provision was not unconstitutionally vague under the circumstances. Id. at 11-12.

Young's circumstances are different and significantly more attenuated than Watson's. On February 2, 2004, Young was convicted of a class B felony sex offense that required him to register as a sex offender for at least 15 years. Ex. 1; RP 9; RCW 9A.44.140(2). He was sentenced to 20 months confinement with 37 days credit for time served and 36 to 48 months community custody. Ex. 1. Though Young had a continuing duty to register

at the time of the current offense in 2014, community custody for the original sex offense had long ended.

Instead Young was on community custody for a 2012 failure to register conviction. Ex. 6; RP 74. Felony failure to register is considered a sex offense. RCW 9.94A.030(46)(a)(v). Young was then arrested on July 23, 2014 for violating the terms of his community custody on the 2012 conviction and incarcerated until August 11, 2014. CP 23-26. The trial court expressly declined to decide whether Young ceased residing at 611 7th Street or whether he was living there unlawfully. CP 25-26. Rather, the court concluded Young "was required to register with the Asotin County Sheriff's Office upon release and certainly within seventy-two hours thereof." CP 26. This presumes that even if Young returned to the same registered residence, he needed to reregister as a sex offender.

But former RCW 9A.44.130(3)(a)(i) (2011) does not specify with sufficient definiteness that Young needed to reregister under these circumstances, particularly when read in conjunction with Watson. The statute contemplates registering upon release from custody when a sex offender is in custody "as a result of" the original sex offense that triggered the duty to register. Watson held this also requires reregistering when released from custody for a probation violation on the original offense.

By contrast, the statute says nothing about reregistering upon release from custody for a subsequent sex offense that was not the original sex offense. Young's 2012 failure to register conviction was a separate conviction, filed under a separate cause number. Exs. 1, 6. Child molestation and failing to register are distinct crimes, penalized under different provisions of the criminal code. See, e.g., RCW 9A.44.086 (second degree child molestation); RCW 9A.44.132 (failing to register as a sex offender); RCW 9A.44.130 (registration requirements). A failure to register conviction is not punishment for the original sex offense, but rather punishment for failing to comply with the statutory registration requirements.

A community custody violation for the 2012 offense does not relate back to the original offense, as did the community custody violation for the original sex offense in Watson. Reading the statute and reading Watson would not have put Young on notice that he needed to reregister the same address under these circumstances. In fact, Watson suggests Young did not need to reregister because he was not in custody as a result of the original 2004 sex offense

Former RCW 9A.44.130 (3)(a)(i) (2011) is vague as applied to Young because it does not define the criminal offense with sufficient definiteness such that an ordinary person in Young's position would

understand he needed to reregister. Indeed, Young explained at sentencing that he was unaware of the duty to reregister, despite having studied the statute. RP 254. This Court should so hold.

b. The statute is ambiguous, requiring it to be interpreted in Young's favor.

In addition to being unconstitutionally vague, the statute is ambiguous as to whether it requires reregistration when an individual is incarcerated for a subsequent sex offense, not the original sex offense that triggered the duty to register, as in Watson.

The court's primary duty in construing a statute is to determine the legislature's intent. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Statutory interpretation begins with the statute's plain meaning, which is discerned from the ordinary meaning of the language used in the context of the entire statute, related statutory provisions, and the statutory scheme as a whole. Id. If the statute remains susceptible to more than one reasonable interpretation, it is ambiguous, and courts may look to the statute's legislative history and circumstances surrounding its enactment to determine legislative intent. Id.

The Watson court did not decide whether the statute was ambiguous, noting there was "no separate ambiguity challenge before us in this case." 160 Wn.2d at 12 n.4. Young assumes, arguendo, that the statute

unambiguously requires reregistration upon release from a probation violation for the original sex offense that triggered the duty to register. See id. at 8 (noting this is "clear from the statute"). The statute is silent, however, as to whether an individual must reregister upon release from a probation violation for a subsequent failure to register offense.

The statutory language instead suggests the reregistration requirement attaches only when incarcerated "as a result of" the original sex offense. This was the linchpin in Watson. Washington law is clear that a probation violation is a continuation of the original offense. But a subsequent conviction for failure to register is a distinct offense. Young was charged with and pleaded guilty to failure to register under a different cause number. Exs. 1, 6. His 2012 conviction for failing to register was not a continuation of the original 2004 offense. The statute is ambiguous as to whether he was required to reregister in this circumstance.

The 2015 amendment to the statute demonstrates the ambiguity of the 2011 version. In 2015, the legislature removed the "as a result of language" and instead very plainly required sex offenders to register upon release from any custody: "Sex offenders . . . who are in custody . . . must register at the time of release from custody." Laws of 2015, ch. 261, § 3. The final bill report explained the 2015 amendment "close[d] various loopholes" and "provide[d] clarification with regard to sex offender

registration." Final B. Rep. on S.S.B. 5154, at 3, 64th Leg., Reg. Sess. (Wash. 2015). This indicates the legislature recognized the ambiguity in former RCW 9A.44.130 (3)(a)(i) (2011) and intended to fix it.

Under the rule of lenity, ambiguous criminal statutes must be construed in the accused's favor.[7] State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 281 (2005); see also United States v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) ("[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."). Former RCW 9A.44.130 (3)(a)(i) (2011) is susceptible to at least two reasonable interpretations. It is therefore ambiguous, triggering the rule of lenity and requiring it to be interpreted in Young's favor.

Young's conviction is based on an unconstitutionally vague and ambiguous statute. As such, this Court should reverse and dismiss his conviction for failing to register as a sex offender. State v. Jenkins, 100 Wn. App. 85, 91-93, 995 P.2d 1268 (2000).

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[7] The four-member dissent in Watson believed the statute was both vague and "at worst . . . ambiguous." 160 Wn.2d at 14 (Sanders, J., dissenting). The dissent explained, "the statute does not say Watson must reregister after each release from custody nor reregister the same address for the same offense." Id. at 13. Further, "[a] person of reasonable understanding would certainly be forced to guess at the statute's silence to know he must register, again, even though his address is the same." Id. at 14. The dissent would therefore have applied the rule of lenity and construed the ambiguous statute in Watson's favor. Id.

2. THE INFORMATION CHARGING YOUNG WITH FAILURE TO REGISTER WAS CONSTITUTIONALLY DEFICIENT.

Under the federal and state constitutions, a defendant has the right to be informed of the charges against him, including the manner of committing the crime. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). Furthermore, "[o]ne cannot be tried for an uncharged offense." Bray, 52 Wn. App. at 34.

"The primary goal of a charging document is to give notice to the accused so that he or she can prepare an adequate defense, without having to search for the violated rule or regulations." State v. Armstrong, 69 Wn. App. 430, 433, 848 P.2d 1322 (1993) (citing State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991)). Merely citing to the pertinent statute and naming the offense is insufficient unless that name informs the defendant of each of the essential elements. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

Young was charged with felony failure to register as a sex offender, third or subsequent conviction. CP 19. RCW 9A.44.132(1) specifies: "A person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130." Further, "[i]f a person has been convicted of a felony failure to

register as a sex offender . . . on two or more prior occasions, the failure to register under this subsection is a class B felony." RCW 9A.44.132(1)(b).

The amended information in this case accused:

> STEVEN K. YOUNG, Transient, of the crime of FAILURE TO REGISTER AS A SEX OFFENDER (FELONY) (Third or Subsequent Conviction), a crime committed as follows:
>
> That on or about and between the 8th day of July, and the 14th day of November 2014, in Asotin County, Washington, the Defendant, having previously been convicted of a felony level sex offense, being required to register pursuant to RCW 9A.44.130, and having been convicted in this state of a felony failure to register as a sex offender on two or more prior occasions, knowingly failed to comply with any of the requirements of RCW 9A.44.130.
>
> Contrary to RCW 9A.44.132(1)(b) . . . .

CP 19 (emphasis added).

"When a statute provides that a crime may be committed in alternative ways or by alternative means, the information may charge one or all of the alternatives, provided the alternatives are not repugnant to one another." Bray, 52 Wn. App. at 34; accord State v. Chino, 117 Wn. App. 531, 539, 72 P.3d 256 (2003).

In State v. Peterson, Peterson argued failure to register is an alternative means crime because it can be accomplished by failing to register (1) after becoming homeless, (2) after moving between fixed residences within a county, or (3) after moving from one county to another. 168 Wn.2d

763, 769-70, 230 P.3d 588 (2010). The court rejected this argument and held failure to register is not an alternative means crime: "the failure to register statute contemplates a single act that amounts to failure to register: the offender moves without alerting the appropriate authority." Id. at 770.

But Peterson does not end this Court's inquiry. In State v. Mason, the Court of Appeals clarified "Peterson dealt only with the requirements of former RCW 9A.44.130 that required registration after moving, i.e., former RCW 9A.44.130(5)(a) and .130(6)(a)." 170 Wn. App. 375, 382, 285 P.3d 154 (2012). The Mason court cautioned that applying "Peterson's narrow factual circumstances to other factual circumstances leads to results contrary to the statutory language." Id. at 381. Specifically, RCW 9A.44.130 "clearly and expressly establishes multiple circumstances that trigger the registration requirement that do not involve moving from one residence to another (or to none) without notice."[8] Id.

Between the charging document and trial, the State advanced four alternative theories to support the charge. First, the information alleged Young was a transient. CP 19. This informed Young the State would be

[8] See, e.g., RCW 9A.44.130(1)(b)(i)-(ii) (registered sex offenders must notify county sheriffs of their enrollment in and intent to attend certain public or private schools or institutions of higher education); RCW 9A.44.130(5)(b) (transient registered sex offenders must report weekly to the county sheriff); RCW 9A.44.130(6) (registered sex offenders applying to change their legal name must submit a copy of the application and a subsequent order granting the name change, if any, to the county sheriff and state patrol).

proceeding under the theory that Young was homeless, triggering the registration requirements for those who lack a fixed residence. RCW 9A.44.130(5). At trial, the State advanced three more mutually exclusive theories: that Young returned to the same address but failed to reregister; that Young returned to the same address but was living there unlawfully; and that Young moved to Idaho. See RP 225 (arguing Young failed to register "on either of those three alternatives, alternative means"). It is factually impossible that Young could have failed to register in all four ways.

Under Peterson, failing to register as a homeless person and failing to register upon moving to a new address are not alternative means of committing the crime. However, returning to the same address after being released from custody then failing to reregister does not involve the act of moving without registering, at issue in Peterson. See Watson, 160 Wn.2d at 10 (explaining that failing to reregister does not involve moving to a new community, but simply returning to the same community). Therefore, failing to reregister, as Young was convicted of, is an alternative means of committing the crime.

This exposes the charging document's constitutional deficiency. The State charged Young with knowingly failing to comply with any of the requirements of RCW 9A.44.130, but then sought a conviction on inconsistent alternative means. Young could not have moved without

registering (either by becoming homeless or moving to a new home) *and* returned to his original registered address. An information may not charge an individual with inconsistent alternative means. Bray, 52 Wn. App. at 34.

Where a challenge to the constitutional sufficiency of a charging document is raised for the first time on appeal, courts apply the "liberal construction" test. Kjorsvik, 117 Wn.2d at 103-04. Under that standard, if the information is missing an essential element, it passes constitutional muster only if the missing element is "fairly implied from language within the charging document." Id. at 104. However, "[i]f 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). Therefore, if the missing elements are not found or fairly implied, prejudice is presumed and dismissal without prejudice is the proper remedy. State v. McCarty, 140 Wn.2d 420, 425-26, 998 P.2d 296 (2000).

The information is missing the essential element of the manner in which Young failed to register (or reregister, according to the trial court's single finding). Bray, 52 Wn. App. at 34. This Court should therefore dismiss Young's conviction without prejudice. McCarty, 140 Wn.2d at 428.

3. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING YOUNG'S SENTENCES BASED ON AN ERRONEOUS OFFENDER SCORE.

A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). Thus, "a challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal." Id.; accord State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) ("[I]llegal or erroneous sentences may be challenged for the first time on appeal."). A sentencing court's interpretation of a sentencing statute and calculation of an offender score are both reviewed de novo. State v. Ervin, 169 Wn.2d 815, 821, 239 P.3d 354 (2010); State v. McCraw, 127 Wn.2d 281, 289, 898 P.2d 838 (1995).

The court's primary duty in construing a statute is to determine the legislature's intent. Ervin, 169 Wn.2d at 820. Statutory interpretation begins with the statute's plain meaning, which is discerned from the ordinary meaning of the language used in the context of the entire statute, related statutory provisions, and the statutory scheme as a whole. Id. If, after that examination, the statute remains susceptible to more than one reasonable interpretation, it is ambiguous. State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005).

RCW 9.94A.525 sets forth the rules for calculating offender scores. The specific subsection for Young's escape conviction (Count 3) states: "If the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as 1/2 point." RCW 9.94A.525(14). However, RCW 9.94A.525(19) generally provides, in relevant part: "If the present conviction is for an offense committed while the offender was under community custody, add one point."

These statutes are in conflict. Subsection (14) requires that *only* prior escape convictions be counted in the offender score when the current offense is escape from community custody. "Only" means solely or exclusively. Webster's Third New Int'l Dictionary 1577 (1993). But subsection (19) also requires one point to be added if the current offense was committed while the offender was on community custody. Escape from community custody necessarily requires the offender to be "in community custody." RCW 72.09.310. Under subsection (19), then, an offender convicted of escape from community custody would always have one point added to his or her offender score. This is contrary to the plain language of subsection (14), which demonstrates legislative intent to count only prior escape convictions toward the individual's offender score.

"When more than one statute applies, the specific statute will supersede the general statute." In re Estate of Black, 153 Wn.2d 152, 164, 102 P.3d 796 (2004); accord Hallauer v. Spectrum Props., Inc., 143 Wn.2d 126, 146, 18 P.3d 540 (2001) ("If the statutes irreconcilably conflict, the more specific statute will prevail, unless there is legislative intent that the more general statute controls."). Subsection (14) is the more specific statute, because it applies only to escape from community custody. By contrast, subsection (19) encompasses all offenses that were committed while the offender was on community custody. Subsection (14) therefore supersedes subsection (19), and one point should not be added for being on community custody when an offender is sentenced for escape from community custody.

This result makes sense. In enacting subsection (14) and the relevant standard sentence ranges, the legislature already contemplated an offender was on community custody when he or she escaped from community custody. To add another point to the offender score for being on community custody essentially penalizes the offender twice, which is contrary to the legislative intent expressed in subsection (14).

State v. Nordby, 106 Wn.2d 514, 723 P.2d 1117 (1986), is instructive. There, the court concluded the severity of the victim's injuries was a factor "already considered in setting the presumptive standard range sentence for vehicular assault." Id. at 519. Therefore, the victim's injuries

could not be also basis for an exceptional sentence. Id.; see also State v. Cardenas, 129 Wn.2d 1, 6-7, 914 P.2d 57 (1996) (same). The same is true here: the necessary fact that an offender was on community custody when he escaped from community custody is a factor the legislature already considered in setting the standard range sentence for that offense.

Even if this Court determines that subsection (14) does not supersede (19), the provisions are ambiguous when read together. At best, it is unclear whether the legislature intended subsection (19) to apply to escape from community custody convictions. The rule of lenity requires ambiguous statutes to be interpreted in the Young's favor absent legislative intent to the contrary. Jacobs, 154 Wn.2d at 601.

The general-specific rule and the rule of lenity apply in two ways. First, in calculating Young's offender score for escape from community custody (Count 3), the State added one point because Young was on community custody. CP 39. RCW 9.94A.525 (14) does not allow for this. His offender score should be zero instead of one, because he has zero prior escape convictions. CP 38. Remand for resentencing on this conviction is required.[9] Ervin, 169 Wn.2d at 826-27.

[9] This four-month sentence runs concurrently with Young's 38-month sentence on the failure to register conviction. The miscalculation of his offender score on this count therefore does not impact his total confinement. It is nevertheless an error in the judgment and sentence, which should be corrected. CrR 7.8(a); In re

Second, in calculating Young's offender score for failure to register (Count 1), the State added one point for Young's escape from community custody conviction and one point because he was on community custody. CP 38. This essentially penalized Young twice for failing to register while on community custody. As discussed above, this contravenes the legislative intent behind RCW 9.94A.525 (14). The statutory ambiguity requires it to be interpreted in Young's favor: he should not receive an additional point for being on community custody when he was also received a point for escape from community custody. Because his offender score should therefore be seven instead of eight, remand for resentencing on this conviction is also required.

In State v. Miles, the court rejected due process and equal protection challenges to RCW 9.94A.525 (19).[10] 66 Wn. App. 365, 367-69, 832 P.2d 500 (1992). The court explained:

> The Legislature chose to deal with offenders on community placement differently and more strictly than other offenders. It is reasonable to conclude that a defendant who commits a crime while on community placement is more culpable than one who is not on community placement when the crime is committed.

Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005). Guidance from this Court could also prevent future similar errors.

[10] This provision was then codified at RCW 9.94A.360(17), but remained substantially the same: "'If the present conviction is for an offense committed while the offender was under community placement, add one point.'" Miles, 66 Wn. App. at 367 (quoting former RCW 9.94A.360(17)).

Id. at 368. The court concluded that "[p]rotecting society and deterring those on community placement from reoffending are substantial state interests which are furthered by" subsection (19). Id.

Miles does not answer the questions presented in this case: whether subsections (14) and (19) irreconcilably conflict and whether they are ambiguous when read in conjunction. This Court should hold Young's offender scores erroneously include an extra point for committing the current offenses while on community custody when he was also penalized for escape from community custody. An incorrectly calculated offender score requires remand for resentencing. Ervin, 169 Wn.2d at 826-27.

D. CONCLUSION

For the above stated reasons, this Court should reverse Young's conviction for failure to register as a sex offender. This Court should also remand for resentencing because Young's offender scores are incorrect.

DATED this 14th day of December, 2015.

Respectfully submitted,

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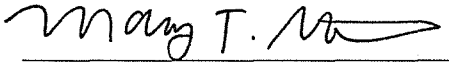

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State v. Steven Young

No. 33416-3-III

Certificate 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 14th day of December, 2015, I caused a true and correct copy of the **Amended Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 14th day of December, 2015.

X