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Supreme Court No. 95516-6
Court of Appeals No. 49622-4-II

**Supreme Court
of the State of Washington**

State of Washington,

Respondent,

v.

Adrian Valencia,

Petitioner.

Amended Petition for Review

Kevin Hochhalter
Attorney for Petitioner

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008
kevin@olympicappeals.com
WSBA # 43124

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1. Identity of Petitioner

Adrian Valencia, Appellant, asks this Court to accept review of the Court of Appeals decision terminating review, specified below. This amended petition was authorized by notation ruling entered February 20, 2018.

2. Court of Appeals Decision

State v. Valencia, No. 49622-4-II (January 17, 2017) (published in part). A copy of the decision is included in the Appendix at pages 1-14.

3. Issues Presented for Review

1. Failure to register as a sex offender is an ongoing course of conduct that may not be divided into separate time periods to support separate charges, even when there is a short intervening period of compliance. Valencia's two prior convictions were for a single unit of prosecution and should have been considered a single offense. Did the trial court err in counting the prior convictions as two offenses when calculating the offender score?
2. Failure to register is ordinarily a Class C felony. When the offender has been convicted for failure to register on two or more prior occasions, the next conviction is a Class B felony. Valencia's two prior convictions were on the same day, for a single unit of prosecution that should have been considered a single offense. Did the trial court err in counting the prior convictions as "two or more prior occasions" when determining the seriousness level and standard sentence range?

4. Statement of the Case

4.1 Valencia failed to follow Washington's sex offender registration requirements because he did not understand them.

Adrian Valencia grew up in Astoria, Oregon. RP 77.

In 2010, he was convicted in Oregon of a sex offense that gave rise to a duty to register as a sex offender. RP 75. After moving to Thurston County, Washington, Valencia was convicted for failure to register. Ex. 5; *see* RP 23-25, 76.

Upon his release from Nisqually Jail in April 2016, Valencia moved in with his sister and registered under that address. RP 79. On about May 4, Valencia left his sister's house and registered with the sheriff's office as transient. Ex. 6; RP 79. Valencia failed to check-in in-person with the Thurston County Sheriff's Office. RP 50-51, 86-87.

On May 24, Valencia moved back to Astoria, Oregon, with the intent to live there permanently. RP 77. He did not check-in at the Thurston County Sheriff's Office on May 25 or June 1 because he was living in Astoria. RP 85. Valencia believed that he had ten days to notify Thurston County Sheriff's Office of the move. RP 90-92.

Ten days would have fallen on June 3. *See* RP 58. On June 2, Valencia was prepared to mail his notification letter to Thurston County Sheriff's Office. RP 81. That day, Valencia returned to Thurston County to visit with family. RP 77-78. He

planned to return to Astoria the same day. RP 78. However, Valencia was arrested before he could mail the letter or make the return trip. RP 81.

4.2 Valencia was convicted in a bench trial of failure to register as a sex offender.

At the urging of his defense attorney, Valencia reluctantly agreed to a bench trial. RP 126. The trial court found Valencia guilty of failure to register because he did not check-in weekly. RP 106-07.

At sentencing, the State argued for an offender score of eight, based in part on two prior failure to register convictions that had been entered on the same day, arising from an ongoing failure to properly register in Washington. Valencia argued that the prior failure to register convictions were a single offense for sentencing purposes. RP 114, 124. The State acknowledged that this would result in a lower offender score and a Class C felony instead of a Class B felony. RP 115-16. The trial court held, as urged by the State, that the two prior convictions counted as two offenses because there was an intervening act that separated them. RP 133. The trial court used an offender score of eight and imposed a sentence of 33 months of total confinement, followed by 36 months of community custody. RP 133-34.

4.3 The Court of Appeals affirmed the sentence.

Valencia argued again on appeal that his prior failure to register convictions were a single offense, relying on *State v. Durrett*, 150 Wn. App. 402, 208 P.3d 1174 (2009), and *State v. Green*, 156 Wn. App. 96, 230 P.3d 654 (2010). Br. of App. at 11-17; Reply Br. of App. at 4-7. Valencia argued that the offenses should have counted as only a single conviction for purposes of calculating his offender score, seriousness level, standard sentence range, and maximum sentence. *Id.*

In the published portion of its Opinion, the Court of Appeals affirmed the sentence. The Court reasoned that Valencia's prior failure to register occurred at different times. App. 4-5. The Court attempted to distinguish *Durrett* and *Green*, essentially holding that even though a second conviction for the same ongoing failure to register was improper under double jeopardy analysis, the conviction could still be counted twice under the "same criminal conduct" analysis applied in calculating offender scores. *See* App. 6-8.

5. Argument

A petition for review should be accepted when the decision of the Court of Appeals is in conflict with other published decisions of the Court of Appeals or when the case involves a significant constitutional question. RAP 13.4(b)(2), (3). First, the

case presents a significant constitutional question. It defies logic to think that the State and Federal constitutions prohibit two convictions for a single, ongoing failure to register, and yet—according to the Court of Appeals—that same, single failure to register can count as two, separate offenses for purposes of calculating the offender score, seriousness level, or maximum sentence for a later offense. If a second conviction violates double jeopardy, it should never be chargeable against the defendant, for any purpose.

Second, the published portion of the decision of the Court of Appeals conflicts with that court’s prior decisions in *State v. Durrett*, 150 Wn. App. 402, 208 P.3d 1174 (2009), and *State v. Green*, 156 Wn. App. 96, 230 P.3d 654 (2010). Despite the clear message in those cases that an ongoing failure to register cannot be subdivided into separate offenses, even by a short term of compliance, the Court of Appeals did just that, based on nothing more than Valencia’s intervening compliance by registering as transient. This Court should accept review, reverse the Court of Appeals, and remand for resentencing.

5.1 This case involves a significant constitutional question.

“The double jeopardy clauses of the Fifth Amendment and Const. art. 1, § 9 protect a defendant against multiple punishments for the same offense.” *State v. Calle*, 125 Wn.2d

769, 772, 888 P.2d 155 (1995). Multiple convictions under the same statute are impermissible if the defendant has committed “only one unit of the crime.” *State v. Durrett*, 150 Wn. App. 402, 406, 208 P.3d 1174 (2009). A second conviction for the same offense carries “potential adverse collateral consequences,” such as increasing the sentence of a future offense, “that may not be ignored” under double jeopardy. *Calle*, 125 Wn.2d at 773 (quoting *Ball v. United States*, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)).

5.1.1 Under double jeopardy, Valencia’s prior failure to register should have been one conviction, not two. The impermissible, second conviction cannot increase the punishment for his current conviction.

Where, as here, the question is whether a defendant has been impermissibly convicted twice under the same statute, the court conducts a de novo analysis of the “unit of prosecution.” *Durrett*, 150 Wn. App. at 406. The purpose is to determine what the legislature intended as the boundaries of a single offense. *Id.* The court looks at the plain language of the statute, the legislative history (if necessary), and resolves any ambiguity under the rule of lenity to avoid turning a single transaction into multiple offenses. *Id.*

In *Durrett*, the Court of Appeals conducted this analysis for the crime of failure to register as a sex offender. The court

noted that the statute (now RCW 9A.44.130) imposes on sex offenders “a general duty to register with the sheriff of the county in which they live” and various procedures and reporting requirements that offenders must follow to remain in compliance. *Durrett*, 150 Wn. App. at 406-07. The operative language of the offense (now found in RCW 9A.44.132) is that the offender “knowingly fails to comply with **any of the requirements** of RCW 9A.44.130.” RCW 9A.44.132 (emphasis added); *Durrett*, 150 Wn. App. at 407. The court concluded, “the punishable offense would be a course of conduct—the failure to comply with the ongoing *duty* to report—rather than each separate failure to report.” *Durrett*, 150 Wn. App. at 410.

Having defined the unit of prosecution as an ongoing period of nonreporting, the *Durrett* court held that only one unit of prosecution was present in that case. *Durrett*, 150 Wn. App. at 411. *Durrett* had failed to report for two weeks, then reported for two weeks, then failed to report until his arrest many weeks later. The court held that *Durrett*’s short-term compliance could not be used to split his ongoing failure to report into two separate offenses. *Id.* The court noted that such an interpretation would be “contrary to the statutory goal of encouraging regular reporting.” *Id.*

The *Green* court followed the *Durrett* court’s unit of prosecution analysis in holding that a failure to comply with a

different registration requirement was a single ongoing and continuing offense. *State v. Green*, 156 Wn. App. 96, 101, 230 P.3d 654 (2010). No subsequent published decision has held any differently.

Here, Valencia was previously convicted twice for a single, ongoing failure to register, in violation of double jeopardy. Although the constitutional violation was apparently not detected before Valencia pleaded guilty to two counts, the impermissible double-conviction has now come back to haunt Valencia by increasing his offender score, seriousness level, standard sentence range, and maximum sentence. The increased sentence is just as much a violation of double jeopardy as was the original double-conviction. Even if the double-conviction cannot be remedied in this action, the impermissibly increased sentence **can and should** be remedied.

Valencia's two prior convictions arose from facts very similar to *Durrett*. Valencia failed to register his residence or transient status when he moved to Thurston County in December 2014. He remained unknown to local law enforcement until he registered as transient in February 2015. After registering as transient, he failed to report on a weekly basis from March 18 to 31. Like Durrett, Valencia failed to report his whereabouts to the sheriff for a time, then registered for a few weeks before disappearing for a few more weeks.

The unit of prosecution analysis should be no different here than it was in *Durrett*. Valencia's short-term compliance does not transform his ongoing failure to register into two separate offenses. Valencia, like Durrett, in a single, ongoing course of conduct, failed to comply with his ongoing duty to register and report. Under double jeopardy, there should have been only one conviction, not two, for Valencia's failure to register in 2014-15. The impermissible, second prior conviction cannot be used to increase the penalty for Valencia's current conviction.

Because only one of these prior convictions can be used to increase the penalty for Valencia's current conviction, his offender score should have been a seven (not eight) and his current conviction should have been a Class C felony (not Class B).

5.1.2 The Court of Appeals failed to address the double jeopardy analysis.

The Court of Appeals failed to recognize that the double jeopardy analysis of *Durrett* and *Green* must also have an impact on the sentencing issue here. The court stated four reasons for declining to apply *Durrett* and *Green*. The second through fourth reasons given by the court are attempts to distinguish the cases on their facts, but the court's reasoning in

doing so conflicts with the reasoning in *Durrett* and *Green*, as will be discussed below in Part 5.2 below. The court's first reason, the distinction between double jeopardy analysis and same criminal conduct analysis, defies logic and is simply wrong.

The Court of Appeals notes in its opinion that the same criminal conduct analysis and double jeopardy analysis are distinct inquiries. App. 7 (citing *State v. Chenoweth*, 185 Wn.2d 218, 222, 370 P.3d 6 (2016)). As this Court stated in *Chenoweth*,

“The two analyses are similar. Under double jeopardy analysis, we determine whether one act can constitute two convictions. Under the same criminal conduct analysis, we determine whether two convictions warrant separate punishments. Even though they may be separate, albeit similar, analyses, a determination that a conviction does not violate double jeopardy does not automatically mean that it is not the same criminal conduct.”

Chenoweth, 185 Wn.2d at 222. In other words, it is possible for two convictions to be not double jeopardy (and therefore permissible) but count only once for sentencing purposes because they are the same criminal conduct.

From this, the Court of Appeals fallaciously concludes that the inverse is also true: “As a result, two convictions that violate double jeopardy might not encompass the same criminal conduct [under the sentencing statutes].” App. 7. That is to say,

according to the Court of Appeals, it is possible for two convictions to be double jeopardy (and therefore forbidden) but still count twice for sentencing purposes because they are not the same criminal conduct. On this basis, the Court of Appeals ignores the double jeopardy problem and focuses only on the same criminal conduct analysis.

The Court of Appeals' logic flies in the face of the purpose of the double jeopardy clause. If two convictions violate double jeopardy, the result is that there are not two convictions; there is only one. Where there is only one prior conviction, there is no same criminal conduct analysis because there is only one prior conviction. One conviction cannot be counted twice for sentencing. As noted above, the impermissible, second conviction has collateral impacts that cannot be allowed under double jeopardy. *See Calle*, 125 Wn.2d at 773 (quoting *Ball*, 470 U.S. at 864-65). Because the second prior conviction for failure to register violated double jeopardy, it cannot be used to increase Valencia's offender score, seriousness level, standard range, or maximum sentence for the current conviction.

This Court should accept review of this significant constitutional question, reverse the trial court and Court of Appeals, and remand for resentencing.

5.2 The published portion of the Court of Appeals decision conflicts with that Court's decisions in *State v. Durrett* and *State v. Green*.

The Court of Appeals provided three other reasons for failing to address the double jeopardy problem. Each of these reasons conflicts with the court's prior decisions in *Durrett* and *Green*.

The Court of Appeals attempted to distinguish *Durrett* and *Green* because "both of those cases involved multiple violations of the *same* reporting requirement." App. 7. The Court of Appeals reasoned that Valencia violated two, different reporting requirements and therefore two, different duties. App. 7.

But the *Durrett* court specifically held that the failure to register statutes, while containing many, varied reporting requirements, created only a single, ongoing duty to register. *Durrett*, 150 Wn. App. at 406-407, 409, 410. The registration statute creates a single duty to register: "Any adult or juvenile ... who ... has been convicted of any sex offense ... shall register with the county sheriff." RCW 9A.44.130. The statute then describes in detail how the offender should fulfill this duty to register, depending on various circumstances. *Id.*; *Durrett*, 150 Wn. App. at 406.

"A person commits the crime of failure to register as a sex offender if the person has a duty to register ... and knowingly

fails to comply with any of the requirements of RCW 9A.44.130.” RCW 9A.44.132. The *Durrett* court interpreted “any of the requirements” to mean that “the punishable offense would be a course of conduct—the failure to comply with the ongoing *duty* to report—rather than each separate failure to report.” *Durrett*, 150 Wn. App. at 410. In other words, it makes no difference which particular requirements an offender fails to comply with—all that matters is that the offender failed to carry out his duty to register in some way.

As this Court has previously held,

The failure to register statute contemplates a single act that amounts to failure to register: the offender moves without alerting the appropriate authority. His conduct is the same—he either moves without notice or he does not. The fact that different deadlines may apply, depending on the offender’s residential status, does not change the nature of the criminal act: moving without registering.

State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010).

Failure to register is not an alternative means crime. *Id.* at 771.

“The different deadlines in the statute, while presented in the disjunctive, do not implicate alternate criminal acts. There is only one method by which an offender fails to register, and that is if he moves from his residence without notice.” *Id.* at 770.

The attempt by the Court of Appeals to distinguish *Durrett* and *Green* based on violation of multiple requirements conflicts with that court's prior decisions in *Durrett* and *Green* and with this Court's decision in *Peterson*. The Court of Appeals is wrong. Valencia committed one act in his prior failure to register: he failed to notify the proper authorities of his whereabouts.

The next reason given by the Court of Appeals was that both *Durrett* and *Green* involved repeating reporting requirements. App. 8. In *Durrett*, it was the requirement for a transient sex offender to report weekly to the sheriff's office. In *Green*, it was the requirement to report every 90 days. The Court of Appeals reasoned that Valencia's prior convictions were based on first, a one-time registration requirement, and second, a weekly reporting requirement.

However, this attempted distinction is foreclosed by the same reasoning discussed above. Under *Durrett*, *Green*, and *Peterson*, there is only one, ongoing duty to register. The various requirements simply tell the offender how to comply depending on their particular circumstances. There is only one way to commit the offence of failure to register: by failing to notify the proper authorities of the offender's whereabouts. *See Peterson*, 168 Wn.2d at 770-71; *Durrett*, 150 Wn. App. at 410.

Viewed in this way, Valencia violated a single, ongoing duty. When he moved into Thurston County, he failed to notify the proper authorities of his whereabouts. He continued to fail to notify the authorities until he registered as a transient for two weeks. Then he resumed failing to notify the authorities until he was arrested a few weeks later. This is no different from *Durrett*. The Court of Appeals' decision conflicts with *Durrett*, *Green*, and *Peterson*.

The last reason given by the Court of Appeals was that intervening events ended one course of conduct and began another. The court cites two possible intervening events: change in residential status from fixed residence to transient and the timing of the charges for failure to register.

Change in residential status has been addressed above. Although the change in residential status changes the reporting requirements that apply, it does not change the single, ongoing duty to register. *See Peterson*, 168 Wn.2d at 770-71; *Durrett*, 150 Wn. App. at 410. This change cannot support splitting the offense into two separate charges. *See Durrett*, 150 Wn. App. at 409.

Using the timing of the charges as an intervening event is no different from using a short period of compliance as an intervening event—and argument expressly rejected in *Durrett*.

Had he not reported at all during this period, he would have been subject to conviction for one count of failure to register. But under the State's theory, because he partially complied by interrupting the noncompliance with two weeks of compliance, he became subject to conviction on two counts. Had he reported weekly on more occasions during this period, he could have become subject to even more charges. That interpretation is contrary to the statutory goal of encouraging regular reporting.

Durrett, 150 Wn. App. at 411. Similarly, if the State can create an intervening event simply by bringing charges, the State could easily multiply the number of offenses, for example by charging a transient offender with a new failure to register every week. But multiplying the charges in this manner would still violate double jeopardy under *Durrett* because all of the charges would still relate to a single, ongoing breach of a continuing duty to register. *See Durrett*, 150 Wn. App. at 410.

The Court of Appeals' attempts to distinguish *Durrett* and *Green* all conflict with the reasoning in those earlier decisions. Valencia's prior failure to register convictions should have counted as one prior offense, not two, for purposes of sentencing. This Court should accept review, reverse the trial court and Court of Appeals, and remand for resentencing.

6. Conclusion

Valencia's two prior convictions, arising from the same, ongoing failure to register, violated double jeopardy. The

impermissible second conviction should not have been counted against Valencia in determining his offender score and sentence for his current offense. This is a significant constitutional question that should be resolved by this Court.

Durrett and *Green* made it clear that the crime of failure to register as a sex offender cannot be subdivided into two separate offenses due to a short period of compliance. The Court of Appeals' attempts to distinguish these cases are foreclosed by the reasoning in those prior decisions. The Court of Appeals decision in this case is in conflict with prior published decisions of that court.

This Court should accept review, reverse the trial court and the Court of Appeals, and remand for resentencing, where only one prior failure to register conviction should be counted.

Respectfully submitted this 16th day of March, 2018.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Petitioner
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on March 16, 2018, I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

Thurston County Prosecuting Attorney's Office
Appeals Division
2000 Lakeridge Drive SW
Olympia, WA 98502
paoappeals@co.thurston.wa.us

DATED this 16th day of March, 2018.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN REYNA VALENCIA,

Appellant.

No. 49622-4-II

PART PUBLISHED OPINION

MAXA, A.C.J. – Adrian Valencia appeals his conviction for failure to register as a sex offender and his sentence. At sentencing following his conviction, the trial court included in Valencia’s offender score two prior convictions for failure to register: one for failing to register in December 2014 when he moved from Oregon to Washington and one for failing to report weekly in March 2015 when he had no fixed residence. These convictions were entered on the same day as each other and resulted in concurrent sentences. The trial court ruled that the two convictions did not constitute the same criminal conduct.

We hold that the trial court did not err in determining that Valencia’s two prior offenses were not the same criminal conduct when calculating his offender score. In the unpublished portion of this opinion, we reject Valencia’s other claims relating to his conviction. Accordingly, we affirm Valencia’s conviction for failing to register as a sex offender and his sentence.

FACTS

2015 Sex Offender Registration Convictions

In 2010, Valencia was convicted of attempt to commit sex abuse in Oregon. As a result, he was required to register as a sex offender in Washington.

In December 2014, the State charged Valencia with a violation of sex offender registration requirements. The State alleged that between December 2 and 4, 2014, Valencia failed to register with the sheriff's office within three days after moving to Thurston County from Oregon, as required under Washington law.

In February 2015, Valencia registered as transient in Thurston County. The State subsequently charged Valencia with a violation of sex offender registration requirements. The State alleged that between March 18 and 31, 2015 Valencia failed to report on a weekly basis, as required under Washington law.

In November 2015, Valencia pleaded guilty to two counts of violating sex offender registration requirements regarding the December 2014 and March 2015 violations. The sentencing court imposed concurrent sentences. The court did not address whether the two offenses encompassed the same criminal conduct and included both convictions in Valencia's offender score.

2016 Conviction and Sentencing

In 2016, Valencia again was charged with and convicted of failure to register as a sex offender. Following a sentencing hearing, the trial court found that Valencia's 2014 and 2015 failure to register offenses did not encompass the same criminal conduct. The trial court calculated Valencia's offender score as 8, counting the two convictions separately.

Valencia appeals his conviction and sentence.

ANALYSIS

Valencia argues that the trial court erred in ruling that the offenses underlying his two 2015 convictions for failure to register as a sex offender did not encompass the same criminal

conduct as defined in RCW 9.94A.589(1)(a). Therefore, he claims that both convictions should not have been included in his offender score. We disagree.

A. LEGAL PRINCIPLES – SAME CRIMINAL CONDUCT

1. Sentencing of Multiple Current Offenses

For purposes of calculating a defendant’s offender score, multiple current offenses that encompass the same criminal conduct are counted as one offense. RCW 9.94A.589(1)(a). Under RCW 9.94A.589(1)(a), two or more offenses constitute the “same criminal conduct” when they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” If any of these elements is not present, the offenses are not the same criminal conduct. *State v. Aldana Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). And the definition of “same criminal conduct” generally is applied narrowly to disallow most same criminal conduct claims. *Id.*

The defendant bears the burden of establishing that two or more offenses encompass the same criminal conduct. *Id.* at 539. “[E]ach of a defendant’s convictions counts toward his offender score *unless* he convinces the court that they involved the same criminal intent, time, place, and victim.” *Id.* at 540.

2. Calculation of Offender Score for Subsequent Conviction

When a trial court in a subsequent case calculates a defendant’s offender score, it must address whether any prior offenses constitute the same criminal conduct. Under RCW 9.94A.525(5)(a)(i), this process involves two parts. First, if a previous sentencing court had found that the prior offenses encompassed the same criminal conduct under RCW 9.94A.589(1)(a), that prior determination is binding. RCW 9.94A.525(5)(a)(i); *State v. Johnson*,

180 Wn. App. 92, 102-03, 320 P.3d 197 (2014). Second, for any other prior adult offenses for which sentences were served concurrently, the current sentencing court must determine “whether those offenses shall be counted as one offense or as separate offenses using the ‘same criminal conduct’ analysis found in RCW 9.94A.589(1)(a).” RCW 9.94A.525(5)(a)(i).

We review a sentencing court’s determination of whether two offenses encompass the same criminal conduct for an “abuse of discretion or misapplication of law.” *Aldana Graciano*, 176 Wn.2d at 537. In this context, a sentencing court abuses its discretion if the record supports only the opposite conclusion. *Id.* at 537-38. “But where the record adequately supports either conclusion, the matter lies in the court’s discretion.” *Id.* at 538. In addition, a sentencing court abuses its discretion by applying the wrong legal standard. *Johnson*, 180 Wn. App. at 100.

B. FAILURE TO REGISTER AS A SEX OFFENDER

Valencia argues that his two prior offenses that were sentenced concurrently – failing to register within three days when he moved to Washington in December 2014 and failing to report weekly in transient status in March 2015 – constituted the same criminal conduct. The question here is whether under RCW 9.94A.589(1)(a) these offenses involved the (1) same criminal intent, (2) same time and place, and (3) same victim. *Aldana Graciano*, 176 Wn.2d at 540. The primary issue here is whether Valencia’s two offenses occurred at the same time.

1. Offenses at Different Times

Multiple offenses will be treated as occurring at the same time if they are “part of a continuous, uninterrupted sequence of conduct over a very short period of time.” *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). On the other hand, multiple offenses do not occur at

the same time if the defendant fails to show that they were continuous, simultaneous, or occurred in a short time frame. *Aldana Graciano*, 176 Wn.2d at 541.

On initial review, it seems clear that Valencia's two offenses occurred at different times. The first offense occurred in December 2014 and Valencia was charged with that offense shortly thereafter. The second offense occurred in March 2015, over two and a half months later. There is no indication that the offenses were continuous, and they did not occur over a short period of time.

2. Ongoing Course of Conduct Argument

However, Valencia argues that he did not commit separate offenses at all. He claims that his failure to register involved an ongoing course of conduct that constituted a single ongoing offense throughout the period between December 2014 and March 2015.

No Washington case has addressed the application of the RCW 9.94A.589(1)(a) elements to multiple failure to register as a sex offender offenses. Valencia argues by analogy from two double jeopardy cases holding that repeated failures to register constitute a single ongoing and continuing offense rather than multiple offenses. *See State v. Green*, 156 Wn. App. 96, 99-101, 230 P.3d 654 (2010); *State v. Durrett*, 150 Wn. App. 402, 410-11, 208 P.3d 1174 (2009).

In *Durrett*, the defendant was a sex offender who was required to report weekly to the sheriff's office because he had no fixed residence. 150 Wn. App. at 405. He failed to report for two weeks in a row, reported in the next two weeks, and then failed to report again until being arrested seven weeks later. *Id.* The State charged the defendant with two counts of failure to register based on the two separate periods of noncompliance, and he was found guilty of both charges. *Id.*

On appeal, Durrett argued that his two convictions violated double jeopardy because the failure to report was a single criminal act or one unit of prosecution. *Id.* at 405-06. Division One of this court rejected the State’s argument that the statutory reporting requirements created a discrete and separate offense each week the defendant failed to report. *Id.* at 409. Instead, the court stated:

[I]t is reasonable to view the “requirement” to report weekly as an ongoing obligation or duty rather than a collection of discrete actions. Viewed in this manner, the duty to report weekly is more appropriately described as an ongoing course of conduct that may not be divided into separate time periods to support separate charges.

Id. The court concluded that “the punishable offense would be a course of conduct – the failure to comply with the ongoing *duty* to report – rather than each separate failure to report.” *Id.* at 410.

Applying this unit of prosecution analysis, the court determined that the period of the defendant’s failure to report ran from the date of his first failure to report until his arrest. *Id.* at 411. The court stated that the fact that the defendant reported for two weeks in the middle of that period of noncompliance did not subject him to two convictions. *Id.*

In *Green*, the defendant was a sex offender who was required to register every 90 days. 156 Wn. App. at 98. He registered as required in April 2007, but he failed to report again for over a year. *Id.* The State charged the defendant with failing to register, stating the violation date as July 2007. *Id.* After the trial court found the defendant not guilty in September 2008, the State again charged him with failing to register, this time stating the violation date as October 2007. *Id.* The trial court dismissed the second charges on double jeopardy grounds. *Id.*

On appeal, this court addressed the unit of prosecution for a violation of RCW 9A.44.130. *Id.* at 99-100. Relying on *Durrett*, the court stated that “we construe the duty to register every 90 days as creating an ongoing course of conduct that cannot support separate charges.” *Id.* at 101. The court concluded that the defendant “committed an ongoing and continuing offense” from the time he first failed to report until he registered again. *Id.*

3. Same Criminal Conduct Analysis

We decline to apply *Durrett* and *Green* in our same criminal conduct determination for four reasons.

First, the Supreme Court has repeatedly noted that the same criminal conduct analysis and double jeopardy analysis are distinct inquiries. *State v. Chenoweth*, 185 Wn.2d 218, 222, 370 P.3d 6 (2016). “Under double jeopardy analysis, we determine whether one act can constitute two convictions. Under the same criminal conduct analysis, we determine whether two convictions warrant separate punishments.” *Id.* As a result, two convictions that violate double jeopardy might not encompass the same criminal conduct.

Second, *Durrett* and *Green* are factually different than this case because both of those cases involved multiple violations of the *same* reporting requirement. In *Durrett*, the defendant failed multiple times to report weekly in violation of RCW 9A.44.130(6)(b). 150 Wn. App. at 407. In *Green*, the defendant failed multiple times to register every 90 days in violation of RCW 9A.44.130(7). 156 Wn. App. at 98-99. Here, Valencia violated two different reporting requirements: a duty to register after moving to Washington under RCW 9A.44.130(4)(a)(iv) in December 2014 and a duty to report weekly as a transient under RCW 9A.44.130(6)(b) in March 2015. Because these duties were different, the two offenses were different.

Third, in *Durrett* and *Green* the defendants violated a *repeating* duty to report under RCW 9A.44.130. A failure to report every week or register every 90 days logically might be considered an ongoing course of conduct. But for Valencia's 2014 offense, he had a duty to register one time within three days of moving to Washington. He had no obligation to register more than once and that duty could be violated only once. It would be incongruous to suggest that Valencia's one time failure to register and his subsequent failure to report weekly were a single ongoing offense.

Fourth, even if an ongoing offense approach was appropriate, there were two intervening events that ended one course of conduct and began another. Valencia was charged with the December 2014 offense before his March 2015 duty arose. And Valencia had a change of residential status from a fixed residence to a transient in February 2015, with a corresponding change in reporting requirements. These intervening events negate a finding that the offenses committed later were part of an ongoing course of conduct.

We distinguish *Durrett* and *Green* and decline to rule that Valencia's two violations constituted a single continuing offense. Instead, Valencia's separate violations occurred at different times. As a result, we hold that the trial court did not abuse its discretion in ruling that Valencia's December 2014 offense and March 2015 offense did not encompass the same criminal conduct.¹

¹ Valencia also cites to *State v. Peterson*, 168 Wn.2d 763, 230 P.3d 588 (2010). In that case, the Supreme Court addressed the elements of the crime of failure to register as a sex offender and whether failure to register is an alternative means crime where the defendant moved without reporting. *Id.* at 765-67. But *Peterson* does not apply here because the court did not address same criminal conduct.

CONCLUSION

We affirm the trial court's calculation of Valencia's offender score. Accordingly, we affirm Valencia's conviction for failing to register as a sex offender and his sentence.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Regarding Valencia's conviction, we hold that (1) the State presented sufficient evidence to prove that Valencia knowingly failed to register as a sex offender and (2) there is insufficient information in the record to evaluate Valencia's claim in a statement of additional grounds (SAG) that he received ineffective assistance of counsel.

ADDITIONAL FACTS

2016 Sex Offender Registration Violation

On April 25, 2016 Valencia was released from jail for an unrelated arrest. He was informed of his duty to register as a sex offender and he signed a form acknowledging this duty.

On May 4, Valencia changed his resident status to transient. He signed a form acknowledging that he was required to report in person to the sheriff's office every Wednesday. The form also stated that if Valencia moved out of Thurston County, he had to give notice to the sheriff's office within three business days. Valencia initialed both provisions.

On May 18, Valencia failed to report in person to the sheriff's office as required. On May 24, Valencia moved to Oregon. He did not notify the Thurston County Sheriff's Office. On June 2, he returned to Thurston County for the day and was booked into jail on unrelated

warrants. The State charged Valencia with a failure to comply with sex offender registration requirements between May 18 and June 1.

Competency Evaluation

While awaiting trial, Valencia underwent a mental competency evaluation. The evaluation noted that Valencia had reported a history of traumatic brain injuries, but stated that there were no indications of symptoms. The evaluation also noted that Valencia was concerned about ineffective assistance of counsel and that he had a misunderstanding with his attorney about wanting an evaluation for diminished capacity rather than a competency evaluation.

Bench Trial

At trial, the State presented Valencia's acknowledgement of his duty to report weekly because of his transient status and the requirement that he give notice to the sheriff's office within three business days after moving to another state. A legal assistant from the Thurston County Sheriff's Office testified that Valencia had not reported for his mandatory check-ins on May 18 and May 25. She testified that she talked to Valencia over the telephone and reminded him that he had to report in person every week and clarified that he could not check-in by phone or by mail. A detective from the sheriff's office testified that Valencia did not report on June 1 and that there was no indication in the file that Valencia had given notice that he had moved to Oregon.

Valencia testified that he understood that he was required to report to the sheriff's office in person every week. He admitted that he did not appear in person on May 18. He also admitted that he received a form on May 4, which he signed and initialed, that stated that he had

to give notice within three days if he moved to another state. But he claimed that he also had been told different reporting requirements and deadlines.

The trial court found Valencia guilty of failure to comply with sex offender registration requirements.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Valencia argues that the State did not present sufficient evidence to prove that he *knowingly* failed to register as a sex offender. Specifically, he argues that the State did not present evidence that he was aware that he was violating the registration requirements. We disagree.

1. Legal Background

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In a sufficiency of the evidence claim, the defendant admits the truth of the State’s evidence and all reasonable inferences drawn from that evidence. *Id.* at 106. Credibility determinations are made by the trier of fact and are not subject to review. *State v. McClure*, 200 Wn. App. 231, 234, 402 P.3d 355 (2017).

RCW 9A.44.132(1) states, “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.” In this context, the

term “knowingly” relates to the defendant’s duty to register, not to the result of failing to register. *See State v. Castillo*, 144 Wn. App. 584, 589-90, 183 P.3d 355 (2008).

The statute does not define the term “knowingly.” However, RCW 9A.08.010(1)(b) defines acting with knowledge as either of the following:

- (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
- (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

The definition of knowingly in RCW 9A.08.010(1)(b) applies generally throughout the criminal code. RCW 9A.04.090.

2. Sufficiency Analysis

The evidence was undisputed that Valencia failed to report on May 18, 2016 and that he failed to give notice within three days after he moved to Oregon on May 24. The only issue is whether these were “knowing” failures.

Regarding Valencia’s failure to report weekly, the State presented a form Valencia signed on May 4, 2016 acknowledging that he had to report in person on a weekly basis if he ceased to have a fixed residence. Valencia initialed that paragraph, and he confirmed that he read it. He also stated that he understood that he actually had to show up every week at the sheriff’s office. And he admitted that he did not show up on May 18.

Regarding his failure to give notice when he moved to Oregon, the State presented the form Valencia signed on May 4, 2016 that stated that he had to give notice within three days if he moved to another state. Valencia initialed that paragraph, and he confirmed that he read it.

And he admitted that this form was more recent than the April 25 form that stated that he had 10 days to give notice.

Valencia testified that he was given conflicting information about his reporting requirements and that he did not understand the requirements. But that testimony was inconsistent with the State's evidence. We must view the evidence in the light most favorable to the State. *Homan*, 181 Wn.2d at 106.

Based on the evidence presented, any rational juror could have found beyond a reasonable doubt that Valencia knowingly failed to register. Accordingly, we hold that there was sufficient evidence to support Valencia's conviction.

B. SAG CLAIMS

Valencia asserts in his SAG that (1) he received ineffective assistance of counsel because defense counsel did not pursue a theory that Valencia was unable to understand the reporting requirements because he had a traumatic brain injury and a learning disability and (2) the trial court erred in failing to find ineffective assistance when Valencia raised the issue at sentencing.²

However, there is no information in the record about the nature and extent of Valencia's brain injury or learning disability, and whether or to what extent those conditions affected his ability to understand the reporting requirements. Therefore, Valencia has not established that defense counsel was deficient in failing to present this evidence or whether that failure caused

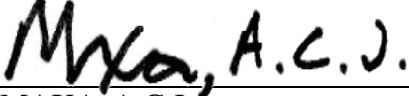
² Valencia also asserts that the trial court violated his due process right by not allowing him to present evidence that his brain injury made him mentally incapable of properly understanding the sex offender registration requirement. However, the court did not disallow this evidence – it was never offered. Therefore, we reject this claim.

prejudice. Similarly, the record is insufficient to determine if the trial court erred at sentencing regarding this issue. If material facts outside the record exist to support this claim, Valencia's recourse is to file a personal restraint petition. *State v. Estes*, 188 Wn.2d 450, 467, 395 P.3d 1045 (2017).

Accordingly, we decline to address Valencia's ineffective assistance of counsel claim.

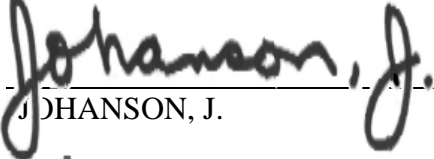
CONCLUSION

We affirm Valencia's conviction for failing to register as a sex offender and his sentence.




MAXA, A.C.J.

We concur:



JOHANSON, J.



SUTTON, J.

OLYMPIC APPEALS PLLC

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