Filed
Washington State
Court of Appeals
Division Two

May 12, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JASON ALLAN LUSK-HUTCHINS, Appellant.	No. 52605-1-II UNPUBLISHED OPINION

LEE, C.J. — Jason A. Lusk-Hutchins appeals his conviction and sentence for failure to register as a sex offender. Lusk-Hutchins argues that (1) there was insufficient evidence to support his conviction because the statute does not require a sex offender to notify the Sheriff's Office when they obtain a fixed residence, (2) the superior court erred by failing to consider his request for an exceptional sentence below the standard range, and (3) the superior court erred by imposing certain legal financial obligations (LFOs). We affirm Lusk-Hutchins's conviction and standard range sentence. However, we reverse the imposition of LFOs and remand to the trial court to strike the interest on LFOs provision and to determine whether to impose the criminal filing fee or the DNA collection fee under the current LFO statutes.

FACTS

On December 18, 2017, the State charged Lusk-Hutchins with failure to register as a sex offender. The complaint alleged that Lusk-Hutchins had 2 or more prior convictions for failure to register. Lusk-Hutchins waived his right to a jury trial.

Christine Taff testified at Lusk-Hutchins's bench trial. Taff was the support specialist for the Cowlitz County Sheriff's Office (CCSO) Registered Sex Offender Unit. Taff testified that transient sex offenders were required to check in with the CCSO every Tuesday between 8:30 AM and 5 PM.

Taff also testified that, on June 26, 2017, she completed Lusk-Hutchins's registration and informed him of the statutory registration requirements. On October 24, Lusk-Hutchins returned to the CCSO and registered with a new address of "transient." Verbatim Report of Proceedings (VRP) at 61-62. Lusk-Hutchins again checked in with the CCSO on October 31. Taff noted that Lusk-Hutchins's registration log showed he stayed at 1000 17th Avenue Apartment 202 six nights between October 24 and October 31. Taff stated that Lusk-Hutchins failed to check-in with the CCSO November 7, 14, 21, 28, and December 5.

Lusk-Hutchins also testified at his trial. Lusk-Hutchins testified that on October 24, his corrections officer approved of him living at 1000 17th Avenue Apartment 202, with his friend.

Following the bench trial, the trial court entered the following findings of fact,

> 1. On June 26, 2017, based upon [] convictions for Rape of a Child in the Third Degree, Failure to Register as a Sex Offender (2nd conviction), Failure to Register as a Sex Offender [(]3rd conviction), Failure to Register as a Sex Offender (4th conviction), and Indecent Liberties without Forcible Compulsion [Domestic Violence (DV)], the Defendant registered with the Cowlitz County Sheriff's Office (CCSO) as a sex offender.

2. On October 24, 2017, the Defendant registered his address with CCSO as transient. The Defendant was provided notice of his requirements as a registered sex offender and his duty as a transient to check in with CCSO on a weekly basis. The Defendant was also provided with notice of his requirements if he were to obtain a fixed residence.

3. On October 31, 2017, the Defendant checked in with CCSO as required. He provided documentation of the addresses where he stayed during the previous week. The defendant indicated that he stayed at 1000 17th Ave Apt 202, Longview, WA six out of the seven nights.

4. The Defendant failed to check in with CCSO on November 7, 2017 as required.

5. The Defendant failed to check in with CCSO on November 14, 2017 as required.

6. The Defendant failed to check in with CCSO on November 21, 2017 as required.

7. The Defendant failed to check in with CCSO on November 28, 2017 as required.

8. The Defendant failed to check in with CCSO on December 5, 2017 as required.

Clerk's Papers (CP) at 22-23. The trial court concluded that, because Lusk-Hutchins was registered as transient, he was required to check in weekly with the CCSO. And if the Defendant intended 1000 17th Ave Apartment 202 to be his residence he was required to notify CCSO within three days and failed to do so. Therefore, the trial court concluded that Lusk-Hutchins was guilty of failing to register as a sex offender.

At sentencing, the State requested the trial court impose a standard range sentence. Lusk-Hutchins requested that the trial court impose an exceptional sentence downward. Lusk-Hutchins argued that his lifetime struggle with mental health issues justified an exceptional sentence downward.

The trial court declined to impose an exceptional sentence and explained,

> I'm going to impose a low-end sentence of 43 months plus 36 months of community custody. I think the exceptional sentence, while it has some traction, I just—am just not fully persuaded that that's the right thing to do here be—especially because of the concern for the safety and protection of the community.

VRP at 144. The court imposed a standard range sentence of 43 months confinement. The court stated that it was imposing "standard non-discretionary costs" and imposed a $500 crime victim's assessment, $200 criminal filing fee, and $100 DNA collection fee. VRP at 144. The judgment and sentence also included a provision imposing interest on all the imposed LFOs.

Lusk-Hutchins appeals.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

1. Legal Principles

Evidence is sufficient to support a conviction if, after viewing the evidence and all reasonable inferences in the light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In claiming insufficient evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *Id.* at 106 (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

Generally, "following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *Id.* at 105-06. "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the findings are true." *State v. Smith*, 185 Wn. App. 945, 956, 344

P.3d 1244, *review denied*, 183 Wn.2d 1011 (2015). Unchallenged findings of fact are verities on appeal. *Homan*, 181 Wn.2d at 106.

A person commits the crime of failure to register if he or she has a duty to register for a felony sex offense and knowingly fails to comply with the requirements of RCW 9A.44.130. RCW 9A.44.132(1). RCW 9A.44.130(1)(a) requires all adults convicted of a sex offense to "register with the county sheriff for the county of the person's residence." RCW 9A.44.130(6)(b) provides the registration requirements for persons with a duty to register who lack a fixed residence,

> A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The person must keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request.

And RCW 9A.44.130(5)(a) requires a person to notify the county sheriff within three days of moving when a person changes his or her residence address. "Fixed residence" means,

> a building that a person lawfully and habitually uses as living quarters a majority of the week. Uses as living quarters means to conduct activities consistent with the common understanding of residing, such as sleeping; eating; keeping personal belongings; receiving mail; and paying utilities, rent, or mortgage. A nonpermanent structure including, but not limited to, a motor home, travel trailer, camper, or boat may qualify as a residence provided it is lawfully and habitually used as living quarters a majority of the week, primarily kept at one location with a physical address, and the location it is kept at is either owned or rented by the person or used by the person with the permission of the owner or renter.

RCW 9A.44.128(5).

2. Sufficient Evidence Supports the Conviction

Lusk-Hutchins does not dispute that he was required to register as a sex offender or that he has prior convictions for failure to register. Instead, Lusk-Hutchins argues that there is no registration requirement that is triggered when a person required to register lacks a fixed residence

and subsequently acquires a fixed residence without moving.[1] Specifically, Lusk-Hutchins contends that,

> Nothing in [RCW 9A.44.130] requires notification of a change of status from lacking to obtaining a fixed residence. In those perhaps rare circumstances where one's so-called status changes but one's address does not, the statute imposes no notification requirement.

Br. of Appellant at 17. Lusk-Hutchins argues that he complied with all registration requirements because he obtained a fixed residence without moving. We disagree with Lusk-Hutchins's interpretation of RCW 9A.44.130.

We review questions of statutory interpretation de novo. *State v. Weatherwax*, 188 Wn.2d 139, 148, 392 P.3d 1054 (2017). "Our 'fundamental objective . . . is to ascertain and carry out the legislature's intent.'" *Weatherwax*, 188 Wn.2d at 148 (alteration in original) (internal quotation marks omitted) (quoting *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d

[1] Lusk-Hutchins assigns error to findings of fact 2 and 4-8. However, Lusk-Hutchins does not argue that those findings of fact are not supported by substantial evidence. Instead, Lusk-Hutchins argues that he actually complied with the requirements of the statute and, therefore, the trial court erred by finding him guilty. For example, Lusk-Hutchins does not dispute that he failed to check-in with CCSO November 7, 14, 21, 28, or December 5. Lusk-Hutchins argues only that he was not required to check in with CCSO on those days. Because Lusk-Hutchins does not argue that the challenged findings of fact are not supported by substantial evidence, we need not address these assignments of error. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

However, we note that the trial court's findings were supported by substantial evidence. Here, Taff testified that Lusk-Hutchins registered as transient and checked in October 24 and October 31. And Taff testified that Lusk-Hutchins's log sheet showed that one week he stayed at 1000 17th Ave Apartment 202 six out of seven nights. Therefore, Taff's testimony provides substantial evidence to support the trial court's finding of fact 2. And Taff testified that Lusk-Hutchins did not check in November 7, 14, 21, 28, or December 5. Therefore, Taff's testimony provided substantial evidence for the trial court's findings of fact 4-8. Accordingly, the trial court's findings of fact are supported by substantial evidence.

1283 (2010). "We discern a statute's meaning 'from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *Weatherwax*, 188 Wn.2d at 149 (quoting *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)). "A nontechnical statutory term may be given its dictionary meaning." *State v. Smith*, 189 Wn.2d 655, 662, 405 P.3d 997 (2017), *cert. denied*, 139 S. Ct. 324 (2018). In interpreting statutes, we avoid interpreting statutes to have absurd results because we presume the legislature did not intend them. *Weatherwax*, 188 Wn.2d at 148.

Here, Lusk-Hutchins's interpretation of the provisions of RCW 9A.44.130 fails to apply the ordinary meaning of the terms "change of residence address" and "move" within the context of the statutory scheme. Furthermore, Lusk-Hutchins's interpretation of the statute leads to an absurd result that defies the purpose of the statute and could not have been intended by the legislature. Finally, Lusk-Hutchins's interpretation is contrary to our Supreme Court's reading of the failure to register statute in *State v. Peterson*, 168 Wn.2d 763, 230 P.3d 588 (2010).

Lusk-Hutchins argues that because he stayed six nights at 1000 17th Ave Apartment 202 during the week of October 24, he did not "move" or have a "change of residence address" when that address became his fixed residence. But this argument is contrary to the ordinary meanings of those terms.

Lusk-Hutchins contends that RCW 9A.44.130(5)(a) does not apply to him because he did not move or change residence address. However, the statute uses the phrase "changes his or her residence address" not "changes his or her fixed residence." "[C]hange" means "to make different." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 373 (2002). "[R]esidence" means "the act or fact of abiding or dwelling in a place for some time: an act of making one's

home in a place." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1931. And "address" means "the designation of a place (as a residence or place of business) where a person or organization may be found or communicated with." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 25.

When a person who lacks a fixed residence goes on to obtain a fixed residence, that person has made their home in a place and has designated that place as a location where they may be found—a residence address. And when that residence address is different than what it was before, the residence address has changed. Prior to obtaining a fixed residence, a transient person's residence address is nothing. Therefore, when a person who has no fixed residence obtains a fixed residence, the person's residence address has changed.

Under RCW 9A.44.130(5)(a), the person is required to register the new residence address within three days of "moving." Lusk-Hutchins argues that if a person is already at a physical address temporarily, then the person did not move for the purposes of the statute, and therefore, there is no requirement to register with the Sheriff's office. But "move" means "change one's abode or location." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1479. Therefore, the ordinary meaning of the statute would be that the person is required to register with the Sheriff's office within three days of the *change* of residence address. Thus, even if a person has already been physically at an address, once that address goes from a temporary place to stay to a fixed residence, the person has changed his or her residence address and that person has moved for the purposes of the statute. Accordingly, Lusk-Hutchins's interpretation is not consistent with the ordinary meanings of the terms in the statute.

Lusk-Hutchins's interpretation of the statute is also contrary to the purpose of the sex offender registration statute and creates an absurd result. "The purpose of the sex offender registration statute is to aid law enforcement in keeping communities safe by requiring offenders to divulge their presence in a particular jurisdiction." *Peterson*, 168 Wn.2d at 773-74. Based on Lusk-Hutchins's interpretation of the statute, a transient person would not be required to register a fixed residence address when that person stays at an address while being on transient status and that address later becomes his fixed residence, and the person would not be required to regularly check in with the Sheriff's Office. Under this circumstance, the Sheriff's Office would have no knowledge of where that particular sex offender is living. This result is absurd, could not have been intended by the legislature, and is contrary to the purpose of aiding law enforcement in keeping communities safe.

Finally, Lusk-Hutchins's argument is essentially that either the State was required to prove that he lacked a fixed residence or that he moved to a fixed residence, but this is contrary to our Supreme Court's interpretation of RCW 9A.44.130 in *Peterson*. In *Peterson*, our Supreme Court held that residential status is not an element of failure to register. *Id.* at 773. The Supreme Court explained, "[i]n this case, [the defendant's] specific residential status was not essential to proving the criminal act at issue: that he failed to provide timely notice of his whereabouts under any of the statutorily defines deadlines after vacating his registered address." *Id.* at 772. The same reasoning applies here.

Here, regardless of Lusk-Hutchins's residential status, he did not comply with any requirement of the statute. If Lusk-Hutchins continued to lack a fixed residence, then he was required to check in weekly and he failed to do so. If Lusk-Hutchins had changed his residence

address from transient or no fixed residential address to having a fixed residential address, then he was required to provide notice to the Sheriff's Office within three days. Lusk-Hutchins had no contact with the Sheriff's Office from October 31 to December 5. Therefore, regardless of his residence status he failed to comply with any requirement of the statute. Accordingly, the State presented sufficient evidence to support Lusk-Hutchins's conviction.

B. EXCEPTIONAL SENTENCE

Lusk-Hutchins argues that resentencing is required because the trial court failed to meaningfully consider his request for an exceptional sentence downward. We disagree.

When a defendant requests an exceptional sentence below the standard range, "review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998). Defendants are not entitled to an exceptional sentence, but "every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (emphasis omitted). Failure to consider an exceptional sentence downward or the erroneous belief that the trial court lacks the authority to consider an exceptional sentence downward is an abuse of discretion that warrants remand. *Grayson*, 154 Wn.2d at 342; *Garcia-Martinez*, 88 Wn. App. at 329-31. However, "a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion and the defendant may not appeal that ruling." *Garcia-Martinez*, 88 Wn. App. at 330.

Here, the trial court considered Lusk-Hutchins's request for an exceptional sentence downward and weighed that request against the safety and protection of the community. Contrary to Lusk-Hutchins's assertion, the trial court did not misunderstand its authority to impose an exceptional sentence downward. Rather, the trial court concluded that the basis for the exceptional sentence did not outweigh the risk to the community. Here, the trial court clearly considered the facts and determined that, based on the risks to the community, there was no basis for an exceptional sentence. Therefore, the trial court properly exercised its discretion. *Id*. Accordingly, we affirm Lusk-Hutchins's standard range sentence.

C. LFOs

Lusk-Hutchins argues that the trial court erred by imposing the $200 criminal filing fee and the $100 DNA collection fee. Lusk-Hutchins also argues that the trial court erred by imposing interest on the LFOs that were imposed. We agree.

The 2018 amendments to the LFO statutes prohibit sentencing courts from imposing a criminal filing fee on defendants who are indigent as defined in RCW 10.101.010(3)(a)-(c). RCW 36.18.020(2)(h). Also, the amendments to RCW 43.43.7541 state that the trial court must impose a DNA collection fee unless the defendant's DNA has already been collected because of a prior conviction. And no interest shall accrue on nonrestitution LFOs. RCW 10.82.090(1). These amendments went into effect June 7, 2018. LAWS OF 2018, ch. 269. Lusk-Hutchins was sentenced on August 6, 2018, after the amendments to the LFO statutes went into effect.

1. Criminal Filing Fee

The trial court appears to have found Lusk-Hutchins indigent because it specifically intended to impose only "standard non-discretionary" costs. VRP at 144. The text of the judgment

and sentence states that "[t]he court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change." CP at 31. But the trial court did not make a specific finding that Lusk-Hutchins was indigent for the purposes of LFOs and, there is no indication that the trial court applied the definition of indigency in RCW 10.101.010(3)(a)-(c).

Under RCW 10.101.010(3)(a)-(c), a person is "indigent" if he or she receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual after tax income of 125 percent or less of the current federally established poverty level. Also, the trial court is not prohibited from imposing the criminal filing fee if the defendant is found indigent under RCW 10.101.010(3)(d) (i.e., unable to pay the anticipated costs of counsel based on available funds). RCW 36.18.020(2)(h). The record fails to show the basis of the trial court's indigency finding under RCW 10.101.010(3). Therefore, we remand for the trial court to determine whether to impose the criminal filing fee under the current version of RCW 36.18.020(2)(h).

2. DNA Collection Fee

Lusk-Hutchins has an extensive criminal history, including a convictions for third degree rape of a child and indecent liberties without forcible compulsion. Lusk-Hutchins also has four prior convictions for failure to register as a sex offender. However, there is no evidence in the record as to whether a DNA collection fee had been collected from Lusk-Hutchins as a result of these convictions. Therefore, we remand to the trial court to determine whether a DNA collection fee is appropriate under the 2018 amendments to RCW 43.43.7541. On remand, the State will have the burden of proving that Lusk-Hutchins's DNA has not previously been collected because

of a prior conviction. *State v. Houck*, 9 Wn. App. 2d 636, 651, 446 P.3d 646 (2019), *review denied*, 194 Wn.2d 1024 (2020).

3. Interest on LFOs Provision

Interest may no longer accrue on nonrestitution LFOs. RCW 10.82.090. Because there was no restitution ordered, the trial court erred by ordering interest to accrue on the nonrestitution LFOs that were imposed.

We affirm Lusk-Hutchins's conviction and standard range sentence. However, we reverse the imposition of certain LFOs and remand to the trial court to strike the interest on LFOs provision and to determine whether to impose the criminal filing fee or the DNA collection fee under the current LFO statutes.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

, C.J.

Lee, C.J.

We concur:

Worswick, J.

Sutton, J.