

COA NO. 65215-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES O. WIGGIN,

Appellant.

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

The Honorable Gerald L. Knight, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE REPORTING DEADLINE IS AN ESSENTIAL ELEMENT OF THE CRIME OF FAILURE TO REGISTER AND THE INFORMATION IS DEFECTIVE IN FAILING TO INCLUDE IT.

The State does not dispute the reporting deadline is an essential element of the crime of failure to register that must be set forth in the information. The State's lack of response concedes the point. State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005).

Instead, the State asserts the information included the requisite timing element because it alleges Wiggin was transient. Br. at 5. The State cites the Supreme Court's decision in State v. Peterson for the proposition that "[t]he sex offender's residential status *informs the registrant* of the deadline by which he must register." Br. at 5 (emphasis added) (citing State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010)).

Peterson, however, does not stand for this proposition. The State's citation is misplaced. The Court in Peterson did not claim, as the State does, that an offender's residential status informed the offender of the applicable deadline in relation to challenging the sufficiency of the charging document or in relation to any other challenge.

This is what the Court actually stated: "Although Peterson is correct that a registrant's residential status *informs the deadline* by which he must register, it is possible to prove that a registrant failed to register within any applicable deadline without having to specify the registrant's particular residential status." Peterson, 168 Wn.2d at 772 (emphasis added). The Court observed "a registrant's residential status informs the deadline by which he must register" in response to Peterson's argument that a person's residential status determines that person's legal obligations to register under the statute and that the State cannot prove an obligation to register within a certain deadline with certain authorities as required by statute if it cannot prove residential status. Id. at 771-72. In other words, the Court agreed an offender's residential status triggers the deadline by which he must register. Id. at 772. This is the sense in which the Court used the word "informs." It had nothing to do with providing proper notice of the essential elements of the crime in the charging document.

The issue in Peterson was whether residential status constituted an element of the offense of failure to register and whether there was sufficient evidence to convict. Id. at 771-74. After determining residential status was not an element, the Court concluded there was sufficient evidence to convict where the evidence showed Peterson was

outside of any of the statutorily prescribed deadlines when he finally registered. Id. at 774.

Unlike Peterson, the issue here is not sufficiency of the evidence to convict. The issue, rather, is sufficiency of the charging document. A charging document is fatally defective if an essential element cannot be found on the face of the charging document itself. State v. Kjorsvik, 117 Wn.2d 93, 106, 812 P.2d 86 (1991); State v. McCarty, 140 Wn.2d 420, 425-26, 998 P.2d 296 (2000).

The State claims informing Wiggin of his transient residential status adequately apprised him of all the essential elements of the charged crime. Br. at 5. The information alleges Wiggin had registered as not having a fixed residence. CP 36. The information, however, does not state the timing requirement for reporting that attaches to his transient residential status. The reviewing court does not look beyond the face of the charging document in determining whether it contains all the essential elements of the crime. Kjorsvik, 117 Wn.2d at 105-06.

The information does not even cite to RCW 9A.44.130(6)(b), which contains the weekly reporting requirement that Wiggin was convicted of violating. But even if it did, the information would still be defective. "Merely citing to the proper statute and naming the offense is insufficient to charge a crime unless the name of the offense apprises the

defendant of all of the essential elements of the crime." State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995) (citing City of Auburn v. Brooke, 119 Wn.2d 623, 635, 836 P.2d 212 (1992)). Defendants should not have to search for the statutes they are accused of violating to determine the essential elements of the crime. Kjorsvik, 117 Wn.2d at 101 (citing State v. Jeske, 87 Wn.2d 760, 765, 558 P.2d 162 (1976)). The correct rule is that *all* essential elements of an alleged crime must be included in the charging document in order to afford the accused notice of the nature of the allegations. Kjorsvik, 117 Wn.2d at 101-02.

The State asserts charging document language that Wiggin knowingly failed to report in person to the county sheriff's office "on or about the week of April 7, 2009 through May 30, 2009" included the necessary timing element because "[t]his time period included the weekly reporting period set forth in the statute." Br. at 5. But again, Wiggin should not have to search the statute to figure out the elements of the charged offense, including the timing requirement. Kjorsvik, 117 Wn.2d at 101; Jeske, 87 Wn.2d at 765; Vangerpen, 125 Wn.2d at 787; Brooke, 119 Wn.2d at 635. The essential element must appear in the charging document itself. Kjorsvik, 117 Wn.2d at 105-06. If the element is missing, looking to the relevant provision of a statute cannot cure such deficiency.

The fatal defect is that the face of the charging document does not allege the reporting period was "weekly." Nor does it allege the day on which Wiggin was supposed to have reported on a weekly basis. In determining whether the accused is reasonably apprised of the elements of the crime, "[w]ords in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied." Kjorsvik, 117 Wn.2d at 109. The fact that Wiggin needed to report to the sheriff's office every Tuesday on a weekly basis is not necessarily implied by the language of the charging document when read as a whole in accordance with common sense. There is no way to fairly determine from the face of the charging document that the reporting period was not daily rather than weekly, or monthly rather weekly. There is no way to fairly determine from the face of the charging document that he was required to report every Tuesday, as opposed to some other day. The timing requirement cannot be fairly implied from the charging document.

The State nonetheless cites Peterson for its claim that it is unnecessary to show a particular deadline to prove a violation of the statute when an offender reports outside any deadline contained in the statute. Br. at 5 (citing Peterson, 168 Wn.2d at 772). The State, however, conflates two separate issues. The State's argument properly addresses

whether evidence is sufficient to convict, which was the issue in Peterson.
Peterson, 168 Wn.2d at 772-74.

Whether evidence is sufficient to convict is a different issue from whether the charging document on its face apprises the defendant of all essential elements of a crime. The legal tests are different. Compare State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (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) with Kjorsvik, 117 Wn.2d at 105-06 (threshold test for determining sufficiency of charging document is whether the necessary facts appear in any form, or by fair construction can be found, in the charging document).

B. CONCLUSION

For the reasons stated, Wiggin requests that this Court reverse the conviction.

DATED this 17th day of November 2010

Respectfully Submitted,

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Certificate of Service of brief of appellant by Mail

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Containing a copy of the reply brief of appellant, in State v. James Wiggin,
Cause No. 65215-0-I, in the Court of Appeals, Division I, for the state of Washington.

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



John Sloane
Done in Seattle, Washington

11-17-10

Date

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U.S. DISTRICT COURT
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