

68120-6

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No. 68120-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

DONNIE WAYNE DURRETT,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

FAILURE TO COMPLY WITH THE STATUTORY
TIME REQUIREMENT IS AN ESSENTIAL
ELEMENT OF THE CRIME OF FAILURE TO
REGISTER AS A SEX OFFENDER THAT MUST BE
INCLUDED IN THE INFORMATION AND TO-
CONVICT INSTRUCTION

The State contends failure to comply with the statutory time requirement is not an essential element of the crime of failure to register as a sex offender. Instead, the State contends the statutory time requirements are merely “definitional” provisions of the statute. SRB at 6. To the contrary, the “gravamen” of the offense is the failure to report or register within the time provided by statute. State v. Caton, 174 Wn.2d 239, 242, 273 P.3d 980 (2012). The State must prove beyond a reasonable doubt the defendant failed to comply with the time requirement. It is an essential element that must be included in the information and the to-convict instruction.

In Caton, the defendant reported to the sheriff’s office within 90 days after he registered as a sex offender but he did not report on the date specified by the sheriff.¹ Id. at 240-41. The Supreme Court reversed the conviction, holding the evidence was insufficient. Id. at

¹ Former RCW 9A.44.130(7) (2008) required Caton to report “every ninety days . . . on a day specified by the county sheriff’s office.” Caton, 174 Wn.2d at 241-42.

242-43. The court explained, “[t]he gravamen of the offense is failure to report every 90 days, not failure to report on a specific date.” Id. at 242. In other words, not every violation of the statute is a criminal offense. But failure to register or report within the time required by statute *is* a criminal offense. It is an essential element the State must prove beyond a reasonable doubt. The State ignores Caton.

The State relies on State v. Durrett, 150 Wn. App. 402, 406-07, 208 P.3d 1174 (2009) for the proposition that “[t]he subsections of the failure to register statute are definitional statements pertaining to the different ways an offender is required to register.” SRB at 6. That is not what Durrett stands for. Instead, the cited pages of Durrett provide:

Former RCW 9A.44.130 (2006) imposes on specified sex offenders a general duty to register with the sheriff of the county in which they live. In addition, the statute sets forth in great detail the various procedures and reporting requirements that offenders must follow, once registered, in order to remain in compliance, or if they move or become homeless. *Failure to register within the time required is a per se violation.*

Id. (emphasis added). Thus, Durrett supports Mr. Durrett’s position rather than the State’s. Like Caton, Durrett recognizes that not every failure to comply with the “various procedures and reporting requirements” of the statute is a criminal offense. Id. At the same

time, “[f]ailure to register [or report] within the time required” *is* a criminal offense. Id.

The State relies on State v. Bennett, 154 Wn. App. 202, 224 P.3d 849, review denied, 168 Wn.2d 1042, 233 P.3d 889 (2010). But Bennett does not apply to this case. Bennett held that “residential status” is not an element or alternative means of committing the crime. 154 Wn. App. at 207-08. That conclusion is not at issue. The issue is not whether the State was required to prove Mr. Durrett’s residential status. The issue is whether the State was required to prove he failed to comply with the statutory time requirement.

Bennett relied entirely on the Court of Appeals opinion in State v. Peterson, 145 Wn. App. 672, 186 P.3d 1179 (2008), aff’d, 168 Wn.2d 763, 230 P.3d 588 (2010), before the Supreme Court issued its opinion in Peterson. 154 Wn. App. at 677. As in Bennett, the Court of Appeals in Peterson held that “residential status” is not an element or alternative means of committing the crime. Peterson, 145 Wn. App. at 677-78. The Supreme Court affirmed the Court of Appeals but applied a different analysis. State v. Peterson, 168 Wn.2d 763, 770-71, 230 P.3d 588 (2010). The analysis the Supreme Court applied supports Mr. Durrett’s argument.

In Peterson, the defendant moved to an apartment in Everett and registered. 168 Wn.2d at 766. Later, when an officer tried to verify Peterson's address, he learned that Peterson had moved and his whereabouts were unknown. Id. Two months later, Peterson registered as homeless. Id. The Supreme Court concluded the State was not required to prove Peterson's residential status after leaving his Everett apartment and before registering as homeless. Id. at 772-74. What mattered was that the State pleaded and proved Peterson failed to re-register within 72 hours after leaving his Everett apartment. Id. at 771-72 & n.7. "Peterson registered outside of *any deadline* contained in the statute. It was therefore unnecessary to show his particular residential status in order to prove a violation of the statute."² Id. at 772.

Thus, in Peterson, the Supreme Court did *not* hold that failure to register within the statutory time deadline is not an element of the crime. Instead, the court held the State is not required to prove an offender's residential status *as long as* the State proves the offender failed to comply with the statutory time deadline. Id. at 771-72. Peterson therefore supports Mr. Durrett's argument that failure to

² "Following a move, the longest grace period available to an offender is 10 days." Peterson, 168 Wn.2d at 768 (citing former RCW 9A.44.130(5)(a) (2003)).

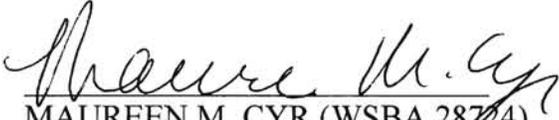
register (or report) within the statutory time deadline is an element of the crime.³

Here, unlike in Peterson, the information and to-convict instruction contained *no* mention of the statutory time requirement. But the State was required to prove beyond a reasonable doubt that Mr. Durrett failed to report weekly to the sheriff. Because the information and to-convict instruction omitted this essential element, for the reasons provided in the opening brief, they were constitutionally deficient and require reversal.

B. CONCLUSION

Because the information and to-convict instruction omitted an essential element of the crime, the conviction must be reversed.

Respectfully submitted this 14th day of August, 2012.


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³ Notably, in Peterson, both the information and the to-convict instruction contained this essential element. 168 Wn.2d at 767.

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I, NINA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] DONNIE DURRETT DOC #241083 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF AUGUST, 2012.

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