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NO. 68441-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Appellant,
v.
JERRY NELSON,
Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE SUZANNE BARNETT

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it failed to require Nelson to meet the threshold requirement of ten consecutive years in the community without committing any disqualifying offenses prior to considering a petition for relief of registration.

2. The trial court erred when it disregarded Nelson's criminal conviction and entered an order relieving Nelson of the duty to register as a sex offender.

B. ISSUE PERTAINING TO THE ASSIGNMENTS OF ERROR

A convicted sex offender may petition for relief from the duty to register only when the offender has spent ten consecutive years in the community without being convicted of a disqualifying offense. The superior court in this case considered and granted Nelson's petition even though the court specifically found that Nelson did not meet this requirement. Did the court abuse its discretion when it failed to require Nelson to meet the statutory threshold requirement before considering and granting his petition?

C. FACTS

In 1997, 31-year-old Jerry Nelson hired a 15-year-old neighbor girl to babysit his young children. When Nelson returned home, the babysitter was asleep on the couch. Nelson helped her to a bedroom in his home where she laid down and went back to sleep. At 3 AM, the babysitter awoke to find Nelson having sexual intercourse with her. Nelson claimed that he thought he was having sex with his fiancé, but later admitted that he knew he was having sex with the 15-year-old babysitter. CP 2-3.

Nelson was charged under King County Cause Number 97-1-09183-3 KNT with Rape of a Child in the Third Degree. CP 1. The defendant pled guilty as charged and was sentenced by The Honorable Judge Barnett on February 20, 1998 to 12 months and one day in prison. CP 4-10. Nelson was informed in the Judgment and Sentence of his duty to register as a sex offender. CP 9.

On May 9, 2011, Nelson mailed the court a letter from Brookhaven, Mississippi containing a Petition for Relief from the Duty to Register. CP 15-19. On May 12, 2011, the court mailed a letter back to the defendant indicating that the court could not act on his request unless he scheduled a hearing. CP 20.

Nelson eventually scheduled a hearing on February 7, 2012 before The Honorable Judge Barnett. He did not file any formal briefing to support his motion and relied on his May 2011 letter to the court.

On February 7, 2012, the court heard Nelson's motion. Nelson appeared pro se and asked the court to relieve him of his duty to register. RP 3. The State argued that Nelson was not permitted to petition the court to be relieved of the duty to register because he had not met the statutory requirement of ten consecutive years in the community without being convicted of a disqualifying offense as outlined in RCW 9A.44.142(1)(b). RP 3-4. The State provided a copy of Nelson's criminal history and argued that Nelson's conviction for Failure to Register as a Sex Offender in Illinois in 2008 rendered him ineligible to petition. RP 3-4, 9; CP 35-40. Nelson did not dispute that he had been convicted of Failure to Register as a Sex Offender in Illinois in 2008, but instead argued that the circumstances were unfair. RP 5-7, 10.

The court acknowledged that Nelson did have a 2008 criminal conviction for Failure to Register. RP 10. The court also reviewed the record of his underlying sex offense in electronic court records (ECR) and noted that Nelson had multiple sentence

violation hearings and failed to complete treatment. RP 12, 13-14; CP 11, 12-13.

Despite these undisputed facts, the court then stated, "Mr. Nelson, you have been I think for all intents and purposes, crime-free not counting the registration offense and some misdemeanor offenses. I'm going to grant your request and give you relief from the duty to register in Washington." RP 16; CP 31-33. The court then warned Nelson that the State may very well appeal the court's order, that "somebody might call me on it," and that "I can't guarantee it's going to stick." RP 16. The State objected to the court's finding. RP 19.

D. ARGUMENT

For offenders convicted of a Class C felony sex offense, "the duty to register shall end ten years after the last date of release from confinement, if any (including full-time residential treatment), pursuant to the conviction, or entry of the judgment and sentence, if the person has spent ten consecutive years in the community without being convicted of a disqualifying offense during that time

period¹.” RCW 9A.44.140(3). RCW 9A.44.142 allows offenders to petition the court for relief from registration, but only “when the person has spent ten consecutive years in the community without being convicted of a disqualifying offense during that time period.” RCW 9A.44.142(1)(b). Offenders with Class C felony sex offense convictions typically have no need to petition the court for relief of registration under RCW 9A.44.142, because their duty ends by operation of law once they have met the ten year threshold requirement. RCW 9A.44.141. An offender may have the local sheriff’s office administratively remove the offender from sex offender registration once they have met the ten-year requirement. Id. A judge does not have discretion to relieve a sex offender of the duty to register prior to the threshold ten-year requirement.² RCW 9A.44.140, .142.

¹ An offender may also be prohibited from petitioning if they have certain offenses listed under RCW 9A.44.142(2). Nelson’s underlying sex offense does not fall under the provisions of RCW 9A.44.142(2).

² This applies to offenders convicted of a sex offense as an adult. Different standards for relief of registration apply to offenders convicted as juveniles and are outlined in RCW 9A.44.143.

A trial court has discretion to grant relief from registration and will not be overturned absent manifest abuse of discretion. State v. Hooper, 154 Wn. App. 428, 447 (2010), citing State v. Gossage, 138 Wn. App. 298, 306 (2007), rev'd in part on other grounds, 165 Wn.2d 1 (2008). An abuse of discretion exists “[w]hen a trial court’s exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.” State v. Stenson, 132 Wn.2d 668, 702 (1997).

The court’s decision to relieve Nelson is based on untenable grounds and reasons because it is in direct violation of the statutory requirements. The court acknowledged that Nelson must have ten consecutive years in the community without being convicted of a disqualifying offense during that time period. RP 14-16. The court found that Nelson was released from confinement for his underlying sex offense in August of 1999 and was convicted of a felony Failure to Register in 2008. RP 11, 15; CP 35-40. The court also acknowledged that Nelson had been non-compliant with treatment ordered pursuant to the underlying sex offense and was

incarcerated for 60 days in 2001 for this failure. CP 11-13; RP 13. Despite this, the court indicated that it would relieve Nelson of the duty to register. RP 16.

The trial court's decision to consider Nelson's motion and relieve him of the duty to register was an abuse of discretion and should be overturned. Nelson's probation violation in 2001 resulted in "confinement... pursuant to the conviction" and therefore, restarted his time in the community. RCW 9A.44.140(3). Nelson's 2008 conviction for Failure to Register was found by the court to be a felony, disqualifying offense. RP 16; CP 35-40. The court found that Nelson did not have ten consecutive years in the community without committing a disqualifying offense pursuant to RCW 9A.44.140(3) and 9A.44.142(1)(b). RP 16. Nonetheless, the court indicated that she would grant Nelson relief of registration. RP 16. The court's decision is directly contrary to the law; it was an abuse of discretion and should be reversed.

E. CONCLUSION

The court abused its discretion in relieving Nelson of the duty to register. The court's order should be reversed and Nelson's duty to register should be reestablished.

DATED this 31st day of July, 2012.

Respectfully submitted,

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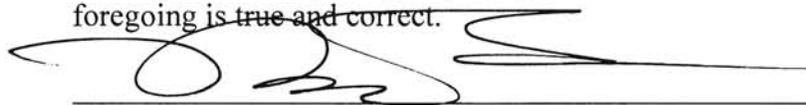
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, a properly stamped and addressed envelope directed to Respondent,

Jerry Nelson
2138 Madison Road
Brookhaven MS 39601

containing a copy of the Brief of Appellant in STATE V. JERRY NELSON, Cause No. 68441-8-I, in the Court of Appeals, Division I, for the State of Washington.

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

 08/01/12
Name Date

Done in Seattle, Washington