

No. 72158-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN BATSON JR.,

Appellant.

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

APPELLANT’S REPLY BRIEF

MICK WOYNAROWSKI
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. **ARGUMENT IN REPLY**1

1. **Like in State v. Dougall, the Legislature’s blind acceptance of how other states have in the past – and will in the future – determine what crimes require “sex offender” registration here in Washington is an unlawful delegation of the legislative function.....1**

2. **The State v. Ward decision – published in 1994 – does not foreclose Mr. Batson’s “as applied” ex post facto challenge to a 2010 amendment that retroactively burdened him with punitive registration requirements.....6**

3. **On these unique facts, Mr. Batson’s “as applied” Equal Protection challenge should be granted.....8**

4. **Erroneously admitted testimony about Mr. Batson’s custody status did materially affect the outcome of the trial.....11**

5. **Because the State did not prove that Mr. Batson lacked a fixed residence, it did not prove the charged offense.....12**

B. **CONCLUSION**.....15

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>Brower v. State</u> , 137 Wn.2d 44, 969 P.2d 42 (1998).....	1, 3, 4
<u>Diversified Inv. Partnership v. DSHS</u> , 113 Wn.2d 19, 775 P.2d 947 (1989).....	4
<u>Northwest Animal Rights Network v. State</u> , 158 Wn. App. 237, 242 P.3d 891 (2010).....	5
<u>State v. Dougall</u> , 89 Wn.2d 118, 570 P.2d 135 (1977).....	passim
<u>State v. Ward</u> , 123 Wn.2d 488, 869 P.2d 1062 (1994).....	passim
<u>Woodson v. State</u> , 95 Wn. 2d 257, 623 P.2d 683 (1980).....	2

Washington Court of Appeals Decisions

<u>State v. Drake</u> , 149 Wn App. 88, 201 P.3d 1093 (2009)	14
--	----

United States Supreme Court Decisions

<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	15
--	----

Washington Constitutional Provisions

Art. II, § 1.....	1
Art I, § 3.....	15

Statutes

RCW 9A.44.128.....	passim
RCW 9A.44.140.....	10
RCW 9A.44.142.....	10, 11

Other Authorities

<u>Doe v. Sex Offender Registry Bd.</u> , 456 Mass. 612, 925 N.E.2d 533 (2010)	8
<u>Raines v. State</u> , 805 So.2d 999, (Fla. Dist. Ct. App. 2001)	9
<u>State v. Lowery</u> , 230 Ariz. 536, 287 P.3d 830 (Ct. App. 2012).....	9
<u>Wallace v. State</u> , 905 N.E.2d 371 (Ind. 2009)	7

A. ARGUMENT IN REPLY

1. **Like in State v. Dougall, the Legislature’s blind acceptance of how other states have in the past – and will in the future – determine what crimes require “sex offender” registration here in Washington is an unlawful delegation of the legislative function.**

“The legislative authority of the State is vested in the Legislature, art. II, § 1, and it is unconstitutional for the Legislature to abdicate or transfer its legislative function to others.” Brower v. State, 137 Wn.2d 44, 54, 969 P.2d 42 (1998) (emphasis added). In State v. Dougall, 89 Wn. 2d 118, 570 P.2d 135 (1977), a unanimous Supreme Court struck down a law which allowed future federal designation, rescheduling or deletion of controlled substances, dictate what drugs would be illegal to possess in our state. Dougall controls.

While the legislature may enact statutes which adopt existing [non-Washington] rules, regulations, or statutes, legislation which attempts to adopt or acquiesce in future [non-Washington] rules, regulations, or statutes is an unconstitutional delegation of legislative power and thus void.

Dougall, 89 Wn. 2d at 122-23 (emphasis added).

In an attempt to distinguish Dougall, the State writes that “The challenged definition of sex offense is not changeable,” but this is simply untrue. BOR at 12. The definition of a “sex offense” under RCW 9A.44.128(10)(h) triggering a registration obligation in Washington is not limited to any particular set of laws known to exist today. To the contrary,

the statutory submission to laws of other states is ongoing and everlasting: “Any out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction.” RCW 9A.44.128(10)(h).

It is all well and good that Louisiana has abandoned its suspect practice of ordering convicted prostitutes to register as sex offenders and those sex workers now no longer have to register as such if living in Washington State. But all that change shows is that another state’s lawmakers are dictating who, and when, may be subject to criminal prosecution for failure to register here. (AOB at 18-19) (reviewing varying registry laws across the nation, including some with obligations to register for non-sexual crimes).

Under RCW 9A.44.128(10)(h), whatever other states choose to do with their “sex offender” registration requirements, Washington will blindly import into our law. Just like in Dougall, the statute has taken law-making power away from the people of this state and handed it over to others. This cannot be. Art. II, Sec. 1. Accord Woodson v. State, 95 Wn. 2d 257, 260-61, 623 P.2d 683 (1980) (discussing how the legislature may not authorize “a nongovernmental group or nonstate agency to ultimately define osteopathy and determine what healing procedures an osteopath could employ [in Washington State], both then and in the future,” without

violating the prohibition against unconstitutional delegation of legislative power).

The Court should reject the State's other equally weak arguments against the finding of an unlawful delegation of legislative power, the first of which begins with the false premise that the "legislature has defined the elements of [the crime of failure to register]; one element is the existence of an out-of-state conviction." BOR at 8. The claim that the legislature has "defined" anything about out-of-state convictions that trigger registration requirements in those states is irrational because the Washington State Legislature cannot define what the law is somewhere else. Therein lies the whole problem. The failure to define what gives rise to a requirement of registration in this state is precisely why RCW 9A.44.128(10)(h) constitutes an unlawful abdication of the legislative function.

The State also makes a feeble claim that the Legislature's decision to give up control over the substantive question of who in Washington should be registered as a sex offender was merely "the conditioning the operative effect of a statute on an event specified," rather than the abdication of what the State Constitution says must remain in the hands of the Legislature. BOR at 9-11. But just the opposite is true: the registration statute is triggered on an *un*-specified events, namely, the whims of other states' legislatures. The State's reliance here on Brower v. State, 137

Wn.2d 44, 969 P.2d 42 (1998) and Diversified Inv. Partnership v. DSHS, 113 Wn.2d 19, 775 P.2d 947 (1989) is out-of-place.

First, in Brower v. State, there was a real specific trigger that “validly conditioned” the effectiveness of the law in question, a “contingency that a third party reimburse the state and counties for their election costs” pertaining to a football stadium financing referendum. 137 Wn. 2d at 54. The Legislature put in that contingency, but retained ultimate control of what the law would be. The Diversified Inv. Partnership confirms that the Legislature violates the prohibition on legislative delegation when it hands over control to another legislative or administrative body:

Conditioning the operative effect of a statute upon the happening of a future specified event can be distinguished from a statute which attempts to adopt future federal law. When a statute attempts to adopt future federal law, the Legislature transfers the power to render judgment on an issue to a federal legislative or administrative body. For example, in State v. Dougall, 89 Wn.2d 118, 570 P.2d 135 (1977), the Legislature permitted future federal designation of drugs to be determinative of those drugs which would be proscribed by state law. The power of the State Legislature to determine which particular drugs would be controlled substances under the state statute was transferred to the federal government. The State Legislature's only judgment as to that statute was that it would defer to the judgment of the federal government. Such a transfer of the legislative power to render judgment is unconstitutional. See Dougall, at 123, 570 P.2d 135.

Diversified Inv. P'ship., 113 Wn.2d at 28 (emphasis added).

Here, like in Dougall, the Legislature’s “only judgment” of non-Washington State registration laws is checking to see if they exist and that is no judgment at all. There is no doubt that other states will pass laws that will require certain offenders to register as “sex offenders,” in fact, they already have. There is nothing uncertain or conditional about that. What is unknown is who they will require to register, now, and in the future. The problem with RCW 9A.44.128(10)(h) is that with each out-of-state registration law change, our laws will be automatically amended too.

While the State appropriately cites Northwest Animal Rights Network v. State, 158 Wn. App. 237, 245, 242 P.3d 891 (2010) for the proposition that it is “the responsibility of the legislature to balance public policy and enact laws,” (BOR at 12-13) a fuller quote from the opinion is worthy of consideration: “Washington State Constitution vests all legislative authority in the legislature and in the people... it is the function and responsibility of the legislature to define crimes.” Id. (internal citations and quotations omitted) (emphasis added).

This Court should find that RCW 9.44A.128(10)(h) constitutes an unlawful delegation of legislative authority and declare that Mr. Batson does not have a legal duty to register as a “sex offender” in Washington State simply because Arizona legislators would have him register there.

2. The State v. Ward decision – published in 1994 – does not foreclose Mr. Batson’s “as applied” ex post facto challenge to a 2010 amendment that retroactively burdened him with punitive registration requirements.

The State writes that Mr. Batson’s argument contesting the application of a 2010 statute “has been rejected by the Washington Supreme Court,” all the way back in 1994. BOR at 14, citing State v. Ward, 123 Wn.2d 488, 496-511, 869 P.2d 1062 (1994). This is not so. Ward is twenty-one years old, did not deal with Mr. Batson, or the 2010 amendment that retroactively forced him to register as a sex offender, or the myriad of practicalities of today’s statute not in existence when the Community Protection Act was first enacted in 1990. As explained in the opening brief, the law today is not what it was back then. AOB at 19-34.

As sex offender registry laws have aged, they have grown more complex and more onerous. Prior to 2010, Mr. Batson had no duty to register in Washington because the Arizona conviction was not comparable, legally or factually. See 6/17/14 93-94 (Pierce County prosecutor testifying Mr. Batson’s out-of-state offense not comparable). While our Supreme Court has not revisited Ward since 1994, many other jurisdictions have continued to analyze whether similar sex offender registry statutes run afoul of the constitutional prohibition against ex post facto laws. The findings of those courts are instructive. Indiana, Maryland, Maine, Ohio, New Hampshire, Ohio, and Oklahoma appellate courts have

found laws similar to Washington’s statute to be punitive in part or in whole. E.g. Wallace v. State, 905 N.E.2d 371, 384 (Ind. 2009); See AOB at 22, 28-33. This Court should take note that the State’s response fails to acknowledge – let alone discuss – the wave of these appellate developments in our sister states.

Perhaps because the State recognizes that the underpinnings of Ward are not dispositive of the unique issues presented by Mr. Batson’s appeal, the State defends the statute by playing-up the notion that offenders classified as “level III” represent a “high risk to sexually reoffend within the community at large.” Resp. at 18. This is noise. First of all, it is concerning that Mr. Batson could have been classified as “level III,” where the conduct he was convicted of would be legal in Washington State. 5/15/14 RP 60 (motions judge discussing legality of conduct at pretrial hearing on defense motion to dismiss). Two, these “I, II, III” notification levels “do not classify sex offenders into groups that accurately reflect their risk for reoffending.”¹ Moreover, 95% of convicted sex offenders who fail to register, do not commit another sex offense.²

¹ Robert Baronski, 2005, *Sex Offender Sentencing in Washington State: Notification Levels and Recidivism*, Olympia: Washington State Institute for Public Policy, Document No. 05-12-1203 (available at: <http://www.wsipp.wa.gov/ReportFile/920>)

² Robert Baronski, 2006, *Sex Offender Sentencing In Washington State: Failure To Register As A Sex Offender—Revised*, Olympia: Washington State Institute for Public Policy, Document No. 06-01-1203A (available at

The State also fails to acknowledge the conviction at issue here happened over 30 years ago and that Mr. Batson recently turned 61 years old. Given his age and time in the community without a repeated sex offense, it is disingenuous to suggest that ancient history is evidence of ongoing risk. Accord Doe v. Sex Offender Registry Bd., 456 Mass. 612, 621-23, 925 N.E.2d 533 (2010) (holding that it was arbitrary and capricious to classify a 61 year old sex offender’s risk of reoffense and degree of dangerousness without consideration of scientific evidence regarding the effect of age on recidivism risk, where “research has shown that the risk of recidivism is significantly lower for offenders age sixty and over,” namely, this group of older offenders poses a 2.0% chance of reoffense) (internal citations omitted).

3. On these unique facts, Mr. Batson’s “as applied” Equal Protection challenge should be granted.

The Legislature’s poor choice to dilute our sex offender registries by including in them people – like Mr. Batson – who have not committed what would be a crime in Washington is not a “rational effort to ensure that dangerous sex offenders from other states would be required to register in Washington.” BOR at 20. Likewise, there is no support for the State’s claim that mere out-of-state requirement of registration means that

http://www.wsipp.wa.gov/ReportFile/926/Wsipp_Failure-to-Register-as-a-Sex-Offender-Revised_Failure-to-Register.pdf

someone “should be subject to the registration requirement in this state.” BOR at 22, 23. The decision to include in our sex offender registry everyone who has to so register out-of-state is nothing but a shortcut, and an irrational one at that. In Mr. Batson’s case, it orders him to register for conduct that is lawful here. CP 36; RCW 9A.44.079.

Just as the State did not respond to the series of out-of-state cases finding ex post facto violations, the State does not address appellant’s citation to Raines v. State, 805 So.2d 999, 1003 (Fla. Dist. Ct. App. 2001), where the Florida appellate courts found that a law was “not rationally related to the paramount governmental objective of protecting the public from sexual offenders,” as applied to an offender forced to register for a false imprisonment conviction that carried no sexual component. The State does invite this Court to consider State v. Lowery, 230 Ariz. 536, 540, 287 P.3d 830, 834 (Ct. App. 2012). But, not only is that jurisdiction’s ruling not binding, the case is also plainly distinguishable from this appeal.

Lowery argued the Arizona law “is facially unconstitutional,” not that the Arizona law was unconstitutional as applied to him, in the way that Mr. Batson does now. Id., at 540. Furthermore, what Lowery did in Michigan appears to have still been a crime in Arizona, just not a registerable sex offense. Id. at 542. Consequently, unlike Mr. Batson, Lowery does not appear to have argued that the conduct which led to his

Michigan registration requirement would have been lawful in Arizona. Similarly, the claim that Ward forecloses Mr. Batson's arguments is not well taken. BOR at 23. Ward did not raise an as applied challenge and he was not protesting being ordered to register for lawful conduct.

Undersigned counsel needs to briefly address the State's claim that Mr. Batson's opening brief includes an "inaccurate" reproduction of RCW 9A.44.140. BOR at 25, citing AOB at 38. The State is right that the current version of RCW 9A.44.140(4) reads: "Except as provided in 9A.44.142, for a person required to register for a federal, tribal, or out-of-state conviction, the duty to register shall continue indefinitely," but the State fails to clarify that the "Except as provided in 9A.44.142" language reflects an amendment to the statute that went into effect after the filing of the appellant's opening brief.³

As explained in the opening brief, the problem here is that Mr. Batson is being treated differently because of the out-of-state nature of the conviction and even the amendment does not change that. AOB at 36-40. Washington offenders ordered to register because of Class B and C offenses see their duty to register fall away automatically, after 15 or 10 years, respectively. RCW 9A.44.140(2), (3). Even with the amendment, the duty to register because of an out-of-state conviction continues

³ The opening brief was filed June 29, 2015 and the effective date of Substitute Senate Bill 5154 was July 24, 2015.

indefinitely. All that RCW 9A.44.142 does is give the individual the ability to petition for relief of the duty to register after spending 15 consecutive years in the community without being convicted of a disqualifying offense. And, the petition will be granted “only if the petitioner shows by clear and convincing evidence that [he] is sufficiently rehabilitated to warrant removal from the central registry of sex offenders and kidnapping offenders.” RCW 9A.44.142(3). It is not rational to force someone like Mr. Batson, who did not even violate a Washington criminal prohibition, to register in the first place, and to register for a longer term than another person who actually committed a Class C sex offense, and to make gaining relief from that registration requirement so onerous.

4. Erroneously admitted testimony about Mr. Batson’s custody status did materially affect the outcome of the trial.

The State’s concession that Detective Knudsen should have never been permitted to make sweeping generalities about Mr. Batson’s custody status – based on hearsay from “databases” – comes too late and does not go far enough. Mr. Batson stands by his assertion that this testimony was, in fact, prejudicial, and requires a new trial. The State cannot marginalize the error by pointing out that defense counsel adapted to an uneven

playing field.⁴ (E.g. BOR at 28.) But for the prosecution pushing to admit this inadmissible hearsay, defense could have put forth a fuller defense, one that went beyond a challenge to the knowledge element of the charge.

The exhibits referenced by the State's response may show that Mr. Batson was released on April 18, 2013 – and then again on August 21, 2013 at his arraignment on the instant charge – but Detective Knudsen testified to more than that. For example, relying on these “databases,” he testified that Mr. Batson “had not gone back into custody at that time.” 6/12/14 RP 41. This wrongfully admitted testimony clearly helped the State prove that Mr. Batson had, during the charging period, an ongoing duty to register which would not have existed had he been in jail. And, the prosecutor specifically relied on this testimony in closing argument. 6/17/14 RP 170 (“You will recall that when the detective testified in this case, he told you that the defendant during that time frame was out of custody and that he went back into custody on September 8.”)

The error requires reversal.

5. Because the State did not prove that Mr. Batson lacked a fixed residence, it did not prove the charged offense.

The issue of the failure of the State's proof in this case was discussed at length in the appellant's opening brief. Op. Br. 46-56. In its response the State correctly notes that “there are many registration

⁴ Defense counsel certainly fought to keep this evidence out. CP 322-24;

requirements” and “[t]he State elected to proceed based on one theory: that Batson lacked a fixed residence and failed to report weekly, in person, to the county sheriff where he was registered. CP 448-49 (jury instructions); RCW 9A.44.130(6)(a).” BOR at 32. As such, it was the State’s burden to prove that Mr. Batson was residing somewhere other than at a fixed residence. At trial, and on appeal, the State continues to conflate the idea that Mr. Batson’s past acknowledgment of being homeless was proof of him lacking a fixed residence. E.g. BOR at 3-4, 29, 33. This is not accurate.

The plain language of RCW 9A.44.128(5) distinguishes between what it means to lack a fixed address and what it means to be homeless. Some homeless shelter programs are fixed residences. CP 454, instruction No. 13 specifying that “A shelter program may qualify as a residence provided it is a shelter program designed to provide temporary living accommodations for the homeless, provides an offender with a personally assigned living space, and the offender is permitted to store belongings in the living space.”

In arguing that the St. Martin de Porres Shelter was not a fixed residence of Mr. Batson’s, the State resorts to a strained misreading of the statute. The State’s argument can be reduced to a complaint that this

6/12/14 RP 33, 34.

particular Shelter was not a fixed residence because Mr. Batson was not provided with his very own private bedroom or apartment. BOR at 34-35. But the statute is not that restrictive. The “personally assigned *living* space” language has to be read in a manner consistent with the rest of the provision where the term “*living quarters*” refers to a place where a resident conducts “activities consistent with the common understanding of residing, such as sleeping; eating; keeping personal belongings; receiving mail; and paying utilities, rent, or mortgage.” RCW 9A.44.128(5) (emphasis added). Below, the Shelter director testified that a resident is assigned a designated place to sleep and a place to keep their things. 6/17/14 RP 111-12.⁵ That is enough.

RCW 9A.44.128(5) recognizes that the most vulnerable among us at times rely on homeless shelters for transitional housing. The State’s proposed limitation on what type of homeless shelter constitutes a “fixed residence” is at odds with the statute itself and how this Court has already approached it. Accord State v. Stratton, 130 Wn. App. 760, 763, 124 P.3d 660 (2005).

⁵ Furthermore, the director never testified that Mr. Batson was not living there after his release from Pierce County jail and the State had to disprove this possibility in order present sufficient evidence to sustain the charge. State v. Drake, 149 Wn App. 88, 94-95, 201 P.3d 1093 (2009) (reversing failure to register conviction for insufficient evidence, even though apartment manager testified defendant had lost the legal right to his apartment due to unpaid rent).

Last, in responding to Mr. Batson's challenge to the sufficiency of the evidence, the State makes a troubling attempt to lift the burden of proof from its shoulders and hoist it onto Mr. Batson's. "[T]he jury could infer that [Mr. Batson would have reregistered] again if he had a new address," the State responds. BOR at 37. This cannot be; the burden is theirs alone. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art I, § 3.

Here, the State's proof was insufficient. The conviction must be reversed and set aside.

B. CONCLUSION

Under State v. Dougall, the statutory provision that allows out-of-state law dictate what is – and what will be – a crime here, represents an unauthorized delegation of legislative authority. As applied to Mr. Batson, forcing him to register violates the prohibition against ex post facto laws and constitutes an equal protection violation. State v. Ward does not foreclose these arguments. The conviction below should be reversed and dismissed. Mr. Batson, whose underlying conduct would have been lawful had it occurred in Washington, must be relieved of any duty to register.

In the alternative, the conceded hearsay error commands reversal and the lack of sufficiency commands reversal and dismissal.

Respectfully submitted this 19th day of November, 2015

/s Mick Woynarowski

MICK WOYNAROWSKI (WSBA 32801)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 72158-5-I
v.)	
)	
BENJAMIN BATSON, JR.,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF NOVEMBER, 2015, 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:

[X] DONNA WISE, DPA	()	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	()	HAND DELIVERY
[donna.wise@kingcounty.gov]	(X)	AGREED E-SERVICE
KING COUNTY PROSECUTING ATTORNEY		VIA COA PORTAL
APPELLATE UNIT		
KING COUNTY COURTHOUSE		
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF NOVEMBER, 2015.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710