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Court of Appeals
Division I
State of Washington

NO. 73730-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JASON HOFF,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

In August 2014, the Snohomish County Sheriff's office made a policy decision which only allowed registered sex offenders to register new addresses on Tuesday or Thursday. This policy was in effect until mid to late September, when it was rescinded and the former policy, which allowed for changes of address during business hours, was reinstated. The relevant section of RCW 9A.44.130 required Mr. Hoff to register his new address within three business days of the change.

Jason Hoff had been residing at a fixed address and complying with the conditions of his community supervision until he did not take a drug test requested by his housing manager, which resulted in him being suspended from his housing for three days. He ultimately was evicted from his residence on Wednesday, September 17, 2014. He notified his community correction officer he needed to register as homeless on Thursday, September 18, 2014. He attempted to register on Friday, September 19, 2014, but was then given notice that the Sheriff only allowed registrants to change their address on Tuesday and Thursday. He was arrested on Tuesday, September 23, 2014, before the Sheriff's office was open.

Mr. Hoff's due process rights were violated by the arbitrary decision of the State to restrict registration to only two days a week and then the failure of the State to provide him with notice of this restriction until it was too late for him to comply with the restrictions. Mr. Hoff did not knowingly fail to register his change of address. His attempts to comply with his registration requirements were frustrated and made impossible by the decision of the Sheriff's office to restrict the time in which he could register. The State failed to prove an essential element of the crime and this substantial violation of his due process rights entitles him to dismissal.

B. ASSIGNMENTS OF ERROR

1. Because the Sheriff was only open one business day for persons attempting to register as homeless between when Mr. Hoff lost his fixed address and when he was arrested, the State failed to establish Mr. Hoff failed to register as homeless within three business days of losing his fixed address. (Findings of Fact 21, 22, and 24).

2. Mr. Hoff's due process right were violated by the Sheriff's arbitrary policy of restricting registration to two days a week, instead of the office's regular business hours, in light of RCW 9A.44.130's

requirement he notify the Sheriff of a change of address within three business days of the change.

3. Mr. Hoff's due process rights were violated by the State's failure to notify him that he could only change his registration address on Tuesday and Thursday, rather than during the Sheriff's regular business hours.

4. The State failed to establish Mr. Hoff knowingly failed register his change of address, an essential element of the crime charged. (Finding of Fact 24).

5. The trial court violated due process and committed legal error in failing to consider whether it could impose an exceptional sentence below the standard range.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Due process protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Evidence is only sufficient where a rational trier of fact can find the essential elements of the crime charged beyond a reasonable doubt. RCW 9A.44.130 provides registrants with three business days to register as homeless when they have lost their fixed address. Is the definition of "business

day” limited to days when the Sheriff is “open” for business to persons attempting to register their change of address? Does the State fail to establish sufficient evidence of failure to register when the State is only able to establish the Sheriff was only open for business for persons attempting to register their loss of a fixed address for one day between the time Mr. Hoff lost his fixed address and when he was placed into custody?

2. The state and federal constitutions require that no person shall be deprived of life, liberty, or property, without due process of law. The due process clause bars wrongful and arbitrary government conduct and requires that government action be implemented in a fundamentally fair manner. Where the Sheriff restricted the ability to register in such a way as to make it impossible to comply with RCW 9A.44.130, was Mr. Hoff’s right to due process violated?

3. Due process guarantees the right to notice, reasonably calculated to reach the intended person. Where the Sheriff restricted the ability to register a change of address to only two days a week without providing notice to Mr. Hoff, were his rights to due process denied?

4. The failure of a person required to register as a sex offender to report a loss of their fixed address must be knowing and unlawful.

While RCW 9A.44.130 allows for registration during the Sheriff's business hours, the Snohomish County instituted a policy where a registrant could only change their address on a Tuesday or Thursday. Mr. Hoff attempted to change his registration address on a Friday, but was unable to do so. The following Tuesday would have been beyond the three business day limit in which a person must register, which made it impossible for him to comply with the statute. Does the State fail to establish an essential element of the crime of failure to register where a person attempts to register a change of address, but that attempt is made impossible because of the Sheriff's policy of being only open for business on limited days?

5. While no defendant is entitled to a sentence below the standard range, every defendant is entitled to have their request for a sentence below the range considered by the court. Was Mr. Hoff's right to due process violated where the court determined it has no basis to consider an exceptional sentence below the standard range?

D. STATEMENT OF THE CASE

Jason Hoff is a formerly convicted sex offender who, until Wednesday, September 17, 2014, registered with the Snohomish County Sheriff's Office at a fixed address. CP 2 (Finding of Fact 5, 19).

According to CCO John Fenton, Mr. Hoff had been in compliance with the conditions of his community supervision until at least Wednesday, September 10, 2014. CP 2 (Finding of Fact 7). On Friday, September 12, 2014, Mr. Hoff reported to CCO Fenton that he had been suspended from living at his address because he had refused to take a drug test. CP 2 (Finding of Fact 10).

On Wednesday, September 17, 2014, CCO Fenton spoke with Mr. Hoff's housing manager, who told him Mr. Hoff had been permitted to return to his residence but had now been evicted. CP 2 (Finding of Fact 12). No evidence was introduced to demonstrate Mr. Hoff ever returned to the residence after Wednesday, September 17, 2014. CP 2 (Finding of Fact 14). The trial court found Mr. Hoff knew he could no longer reside at his fixed address on Wednesday, September 17, 2014. CP 3 (Finding of Fact 19). The court further found Mr. Hoff ceased to have a fixed address on Wednesday, September 17, 2014. CP 3 (Finding of Fact 21).

On Thursday, September 18, 2014 Mr. Hoff contacted CCO Fenton and informed him he was going to register as homeless with the Sheriff's Office. CP 2 (Finding of Fact 17). On Friday, September 19, 2014, Mr. Hoff contacted CCO Fenton and told him he had been unable

to register with the Sheriff's office, which was only open for change of address registration on Tuesday and Thursday. CP 3 (Finding of Fact 20). Mr. Hoff was arrested on Tuesday, September 23, 2014 at 12:05 a.m., prior to the Sheriff's office business hours. CP 3 (Finding of Fact 23).

At trial, the State's witnesses testified the Sheriff's office had in fact restricted days in which a person required to register could change their address. In August, 2014, the Sheriff's Office created a policy which allowed address changes for those obliged to register only on Tuesday and Thursday. RP 29. The policy was ended sometime in late September, after the restrictions on registration were discovered by a bureau chief in the Sheriff's office. RP 33. While Det. Scott Berg could not be sure of the exact date when the policy reverted to allow for registration during business hours, it was sometime from mid to late September. RP 105. CCO Fenton confirmed that the Sheriff was only open for business to allowing persons to register as homeless on Tuesdays and Thursdays when Mr. Hoff attempted to change his registration. RP 67.

Mr. Hoff was charged with failing to register as a sex offender and violating community custody. CP 56 (Second Amended

Information). Mr. Hoff waived his right to a jury trial. CP 55. The court found him guilty of both charges. CP 4.

E. ARGUMENT

1. INSUFFICIENT EVIDENCE EXISTS TO ESTABLISH MR. HOFF FAILED TO REGISTER AS HOMELESS WITHIN THREE BUSINESS DAYS OF LOSING HIS FIXED ADDRESS.

a. A person registering as homeless or registering a change of address must notify the Sheriff within three business days of the change.

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing U.S. Const. amend. XIV; Const. art. I, § 22; *Jackson v. Virginia*, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). When viewing evidence in the light most favorable to the State, evidence is only sufficient where a rational trier of fact could find the essential elements of the crime charged beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 192, 414 (2000). There must be substantial evidence to support the court's findings of fact in order for them to be sufficient. *State v. Mewes*, 84

Wn. App. 620, 622, 929 P.2d 505 (1997) (*citing Rae v. Konopaski*, 2 Wn. App. 92, 95, 467 P.2d 375 (1970)).

RCW 9A.44.130 (5)(a) and (b), requires a person obligated to register with the Sheriff to notify the Sheriff of a change of address “*within three business days of moving.*” Likewise, RCW 9A.44.130 (6)(a) requires a person who lacks a fixed address to provide written notice to the Sheriff “*within three business days*” after ceasing to have a fixed residence. RCW 9A.44.128 (1) defines a business day as any day other than Saturday, Sunday, or a legal local, state or federal holiday.

In 2010, the legislature amended RCW 9A.44.130 from requiring notification of losing a fixed address from 72 hours to three business days. Laws of 2010, ch. 267, § 2. This change indicates an intention by the legislature to provide a registrant with time during which the Sheriff is open for registration to notify the Sheriff of the loss of their fixed address. Had the legislature intended to require a person to register within a fixed period of time which was not dependent upon the Sheriff being open, RCW 9A.44.130 would not have been amended to exclude times in which the Sheriff was not available for person’s to register as homeless.

Furthermore, courts have specifically excluded days when the Sheriff is not open, such as weekends and holidays. *State v. Peterson*, 168 Wn.2d 763, 768, 230 P.3d 588 (2010). A business day is commonly understood to mean every official working day of the week. DAY, Black's Law Dictionary (10th ed. 2014). This has come to mean, for example, the days which banks are open and does not include public holidays and weekends. *Id.* “Open” likewise has a plain meaning. Within the context of a business day, open is defined as “ready for business, patronage, or use.” Open, *Merriam-Webster.com* (2016), available at <http://www.merriam-webster.com/dictionary/open>. RCW 9A.44.130’s requirement that a person notify the Sheriff when they lose a fixed address within three business days of losing the fixed address presumes the Sheriff will be open during regular business hours. Days which the Sheriff is not open to persons attempting to register their loss of a fixed address should not be defined as business days.

b. Only one business day elapsed from when Mr. Hoff lost his fixed address and when he was placed in custody.

The hours in which a person could register with the Sheriff as homeless or register a change of address was restricted to two business days a week, rather than the regular business hours contemplated by the

statute. RP 67. Because of the Sheriff's policy, the only days which Mr. Hoff could register when he attempted to do so were Tuesdays and Thursdays. CP 3 (Finding of Fact 20); RP 67.

The trial court found Mr. Hoff became aware he lacked a fixed address on Wednesday, September 17, 2014. CP 3(Finding of Fact 19). Mr. Hoff ceased to have a fixed address on that date. CP 3 (Finding of Fact 21). He notified CCO Fenton that he needed to register as homeless on Thursday, September 18, 2014. CP 2 (Finding of Fact 17). Mr. Hoff attempted to register on Friday, September 19, again calling CCO Fenton and informing him the Sheriff would only allow registration on Tuesdays and Thursdays. CP 3 (Finding of Fact 19). CCO Fenton confirmed that this was the Sheriff's policy during this time period. RP 67. Mr. Hoff was arrested on Tuesday, September 24, 2014 at 12:05 a.m., prior to another business day elapsing. CP 3 (Finding of Fact 23).

While the Sheriff may have been open during the relevant time period, it was not open for the business of allowing registrants to notify the Sheriff of their loss of a fixed address. Instead, the only days the Sheriff was open for business for persons attempting to register as

homeless when Mr. Hoff attempted to register as homeless were Tuesdays and Thursdays. RP 67.

c. The State failed to present sufficient evidence three business days elapsed before Mr. Hoff was charged with failure to register.

This Court should find the restriction placed upon the time a person could register as homeless to only two business days a week by the Sheriff resulted in the Sheriff not being open for business on days they had a formal policy of turning away registrants. Before Mr. Hoff was arrested, only one “business day”, Thursday, had elapsed in which to complete his change of address. The Sheriff was closed for business on Wednesday, Friday on Monday. Even though the Sheriff may have been open for other business, it was not open for persons attempting to comply with RCW 9A.44.130. This Court should not find the intentional closure of the Sheriff’s office for person’s attempting to register as homeless satisfies RCW 9A.44.128 (1)’s definition of business day. Instead, this Court should find the Sheriff’s Office was not open for “business” for purposes of RCW 9A.44.128 during the days it would not accept a change of address and toll those days with respect to compliance with RCW 9A.44.130. Because the State presented insufficient evidence three business days elapsed between

when Mr. Hoff was required to notify the Sheriff of his change of address and the day he was arrested, this Court should reverse his conviction.

2. THE SHERIFF’S POLICY OF PERMITTING REGISTRATION TO ONLY TWICE A WEEK VIOLATES DUE PROCESS.

a. The State may not deprive a person of life, liberty or property without due process of law.

The due process clause of the Fourteenth Amendment provides that the State shall not “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1; *see also* Const. art. I, § 3. The right to due process confers both substantive and procedural protections. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006). The substantive component of the due process clause bars wrongful and arbitrary government conduct, notwithstanding the fairness of the implementing procedures. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.2d.2d 437 (1992). The procedural component of the due process clause requires that government action be implemented in a fundamentally fair manner. *State v. Beaver*, 184 Wn.2d 321, 331, 358 P.3d 385 (2015) (*citing United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). The analysis of whether due process is violated is

the same under the Washington constitution as it is under the federal constitution. *See O'Hartigan v. Department of Personnel*, 118 Wn.2d 111, 117-18, 821 P.2d 44 (1991); *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 104, 937 P.2d 154 (1997).

“Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the ... Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); U.S. Const. amend. XIV. Procedural due process requires the government to follow appropriate procedures to promote fairness in governmental decisions. *Rogers v. U.S.*, 696 F. Supp. 2d 472 (W.D. Pa. 2010); U.S. Const. amend. V. When governmental agencies make binding determinations which directly affect the rights of individuals, it is imperative that those procedures provide adequate due process. *Hannah v. Larche*, 363 U.S. 420, 442, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960). To prevail on a procedural due process claim, the court must weigh: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards and (3) the Government’s

interest, including the function involved and the fiscal and administrative burdens that the substitute or additional procedural requirements would entail. *Mathews*, 424 U.S. at 335; U.S. Const. amend. XIV; *see also Phillips v. McCollom*, 788 F.3d 650, 653-54 (6th Cir. 2015).

Under RCW 9A.44.130(5)(a) and (b), any person who is required to register under the sex offender registration statute must notify the county sheriff of an address change within three business days of moving. RCW 9A.44.130 (6)(a) requires a person lacking a fixed residence to provide written notice to the county sheriff within three business days after ceasing to have a fixed residence. All deadlines exclude weekends and holidays. *State v. Peterson*, 168 Wn.2d at 768. There are no other provisions within RCW 9A.44.130 which allows the Sheriff to limit the days a person may notify the Sheriff they have lost their fixed address.

b. Mr. Hoff's right to due process was violated by the Sheriff's policy of only allowing registration on Tuesday and Thursday.

Until Wednesday, September 17, 2014, Mr. Hoff resided at 11406 20th St. NE, in Lake Stevens. CP 3 (Finding of Fact 5, 19). He was evicted by the house manager for failing to follow house rules and

told he could not return on Wednesday, September 17, 2014. CP 2 (Finding of Fact 12). Mr. Hoff ceased to have a fixed address on Wednesday, September 17, 2014. CP 3 (Finding of Fact 21). Mr. Hoff had knowledge he could no longer reside at his registered address on that date. CP 3 (Finding of Fact 19). The next day, Mr. Hoff informed CCO Fenton that he intended to register as homeless. CP 2 (Finding of Fact 17). Mr. Hoff called CCO Fenton on Friday, September 19, 2014, to let him know he had attempted to register, but that the Sheriff only accepted registrations on Tuesdays and Thursdays. CP 3 (Finding of Fact 20).

Snohomish County's Sheriff's Office had in fact restricted the hours when a person could register. RP 29. The Sheriff's Office created an internal policy which allowed registration only on Tuesday and Thursday. RP 29. This was initiated in August, 2014. RP 29. The policy ended sometime in September, after the restrictions on registration were discovered by a bureau chief. RP 33. While Det. Berg, who testified for the State, could not be sure of the exact date when the Sheriff's Office had returned to a policy of allowing registration every business day, he stated the policy ended

Say, later in September, yes, mid to late September is when -- or mid-September is when -- that Chief

Richardson removed the signage and said we're no longer doing this.

RP 105.

Det. Berg's memory of the policy still being in effect until mid to late September was consistent with the testimony of CCO Fenton. He testified he spoke with Mr. Hoff on Friday, September 18, 2014. RP 67. Mr. Hoff told CCO Fenton he had been turned away by the Sheriff's office because it only allowed registration on Tuesday and Thursday. RP 67. CCO Fenton verified Mr. Hoff's statement "was consistent with our information because [the Sheriff's Office] had recently changed the available times to register." RP 67. CCO Fenton confirmed the only days a person could register with the Sheriff's Office during this time period were Tuesday and Thursday. RP 67.

Mr. Hoff attempted to and intended to comply with his registration requirements. CP 3 (Finding of Fact 20), RP 67. Because Mr. Hoff lost his residency on Wednesday, September 17, 2014, he needed to register as homeless within three business days of that date. *See*, RCW 9A.44.130. When he properly attempted to register on Friday, September 19, 2014, the Sheriff's policy prevented him from doing so. Mr. Hoff notified his CCO of his inability to comply with his registration requirements. CP 3 (Finding of Fact 20); RP 67. He was

ultimately arrested before the next date the Sheriff allowed for change of residency, ultimately making it impossible for him to comply with RCW 9A.44.130. CP 3 (Finding of Fact 23).

c. The violation of Mr. Hoff's due process rights in attempting to comply with his registration requirements entitles him to dismissal.

Procedural due process violations require the court to first address the private interest that will be affected by the official action. *Mathews*, 424 U.S. at 335. Liberty is a fundamental right. *Foucha*, 504 U.S. at 80. Due process prohibits the State from depriving an individual of protected liberty interests without appropriate procedural safeguards. *In re Pers. Restraint of Bush*, 164 Wn.2d 697, 704, 193 P.3d 103 (2008). While the right to be classified as a certain level of offender may not rise to a liberty interest, the ability to comply with the registration law does. Unlike classification, the failure to register will result in prosecution for new felony charges. RCW 9A.44.132. The arbitrary governmental action which prevented Mr. Hoff from registering within three “business” days of his becoming homeless on Wednesday, September 17, 2014 because he did not attempt to do so until Friday, September 19, 2014 impacts his liberty. It is a significant and fundamental right.

The second question the court must address is the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. *Mathews*, 424 U.S. at 335. Mr. Hoff does not argue the procedural safeguards in place within RCW 9A.44.130 are not sufficient to ensure sufficient procedural due process. The issue here is that the Sheriff's office policy thwarted Mr. Hoff's access to these procedural protections. The Sheriff's decision to restrict registration to only two days a week deprived Mr. Hoff of his procedural due process.

The only way Mr. Hoff could have complied with the Sheriff's policy was to notify the Sheriff of his residential status immediately, something not required by the statute and a policy he was never made aware of. He could not have known of the Sheriff's policy until he attempted to register on Friday, September 19, 2014. By then it was impossible for him to register until the following Tuesday. If this Court finds days in which the Sheriff is not open for business should be included within the definition of RCW 9A.44.128, it becomes impossible for a person to notify the Sheriff they have lost their fixed address within the time period allowed by RCW 9A.44.130 unless they notify the Sheriff immediately of the change.

Instead, this Court should find that such a restriction denied Mr. Hoff his due process rights. Indeed, providing for registration during normal business hours as contemplated by the statute would have provided the additional safeguards necessary for sufficient due process here. This is obviously why the Sheriff reversed the restrictive policy after discovering it had gone into effect without proper review. Other than the process contemplated in the statute, no additional safeguards would have been necessary in order for Mr. Hoff to be provided with sufficient due process. The Sheriff's policy of restricting address changes to only two days a week, however, resulted in a high risk of erroneous deprivation of liberty.

Last, the court addresses the Government's interest, including the function involved and the fiscal and administrative burdens that the substitute or additional procedural requirements would entail. *Mathews*, 424 U.S. at 335. Again, Mr. Hoff is not arguing for additional safeguards not found in RCW 9A.44.130, but that the arbitrary decision of the Sheriff to withhold those safeguards deprived him of due process. Implicit in RCW 9A.44.130 is that registration with the Sheriff's office should be possible during business hours. RCW 9A.44.130 creates specific limitations, exempting weekends and

holidays from the time period required for registration. Nothing in the statute suggests the Sheriff may restrict registration in such a way as to make it impossible or unreasonably difficult for a person to comply with their registration requirements. RCW 9A.44.130.

Instead, the State has an interest in ensuring that registrants have the ability to keep their address current. *See State v. Stratton*, 130 Wn.App 760, 765, 124 P.3d 660 (2005) (The purpose of the sex offender registration statute is to assist law enforcement agencies' efforts to protect their communities against sex offenders who re-offend). While the Sheriff made an administrative decision to reduce the hours a person may change their address to reduce the time spent by staff on ensuring persons comply with their registration requirements, there was little evidence that allowing registration during regular business hours was a substantial burden on the Sheriff. In fact, the brevity of this policy and the decision to return to allowing registration during regular hours demonstrates the minimal nature of the burden.

Mr. Hoff's right to due process was violated by the unilateral decision of the Snohomish County Sheriff's Office to restrict change of address for person obliged to register to Tuesdays and Thursdays. This policy made it impossible for Mr. Hoff to register within the statutory

time period. Due process required the State to provide the means for Mr. Hoff to comply with his registration requirements. Making it an impossibility for him to do so violated his due process.

3. MR. HOFF WAS ENTITLED TO NOTICE THE SHERIFF RESTRICTED REGISTRATION CHANGES TO ONLY TWO DAYS A WEEK.

a. Due process requires notice reasonably calculated to reach the intended person.

Due process guarantees the defendant the right to notice. Notice must be “reasonably calculated, under all the circumstances,” to reach the intended person. *City of Redmond v. Arroyo–Murillo*, 149 Wn.2d 607, 617, 70 P.3d 947 (2003) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).

The State bears the burden of proving compliance. *Arroyo-Murillo*, 149 Wn.2d at 612.

b. Mr. Hoff was not provided notice he could only register twice a week until after he could no longer meet the statutory deadlines.

When a person registers in Snohomish County, they are provided with notification of their registration requirements. CP 77, Ex.

1. This form was updated on March 10, 2014 and is signed by Mr.

Hoff. CP 77, Ex. 1. It contains the statutory requirements for

registration and notifies persons who are registering as homeless they

must register each Tuesday during business hours with the Sheriff. CP 77, Ex. 1.

Importantly, nothing in this notification informed Mr. Hoff the Sheriff otherwise restricted the time a person could change their address or initially register as homeless to Tuesday or Thursday. The only additional information procedures and practices contained in the form which are not included in the statutes is the Sheriff's policy for the homeless reporting requirement. CP 77, Ex. 1.

No evidence was introduced at trial that Mr. Hoff became aware of this policy until he informed CCO Fenton he had attempted to register on Friday but was told he could not do so until the next Tuesday. RP 67.

c. The failure of the State to provide Mr. Hoff with sufficient notice of the restriction on his ability to register denied him his due process right to notice.

Mr. Hoff contends his due process rights were violated by the arbitrary decision of the Sheriff's office to restrict the time a person can register as homeless to Tuesday or Thursday. In the alternative, Mr. Hoff argues his due process rights were violated because the State failed to provide him with notice of the additional hurdles the Sheriff had put in place with regard to registration.

The failure to provide Mr. Hoff with sufficient notice of the restrictions placed upon changes of address until after Mr. Hoff could not comply with his obligations denied him the opportunity for adequate notice and is a further violation of his due process.

4. MR. HOFF DID NOT KNOWINGLY FAIL TO REGISTER HIS CHANGE OF ADDRESS.

a. Knowledge is an essential element of the crime of failure to register as a sex offender.

The elements of a crime are “those facts ‘that the prosecution must prove to sustain a conviction.’” *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005). “An ‘essential element is one whose specification is necessary to establish the very illegality of the behavior.’” *State v. Tinker*, 155 Wn.2d 219, 221, 118 P.3d 885 (2005) (*quoting State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

Under RCW 9A.44.130(5)(a) and (b), any person who is required to register under the sex offender registration statute must notify the county sheriff of his address change within three business

days of moving. RCW 9A.44.130 (6)(a) requires a person lacking a fixed residence to provide written notice to the county sheriff within three business days after ceasing to have a fixed residence. All deadlines exclude weekends and holidays. *Peterson*, 168 Wn.2d at 768.

To violate RCW 9A.44.130 the failure to report a change of address must be knowing and unlawful. RCW 9A.44.132. It is the State's burden to establish the failure was knowing. *See State v. Clark*, 75 Wn.App. 827, 832, 880 P.2d 562, 565 (1994). Because Mr. Hoff attempted to register with the Sheriff, but was told he could not do so, except on a Tuesday or Thursday, his failure to register before his arrest fails to establish Mr. Hoff knowingly and intentionally failed to register.

b. The State failed to prove Mr. Hoff knowingly failed to register.

The trial court found Mr. Hoff had been residing at a fixed address in Lake Stevens prior to his non-compliance with his community custody supervision. CP 3 (Finding of Fact 5, 19). The Court found Mr. Hoff had knowledge he could no longer reside at his address on Wednesday, September 17, 2014. *Id.*

Mr. Hoff then attempted to comply with his registration requirements. He made daily contact with CCO Fenton between his

losing his fixed address on Wednesday, September 17, 2014 and Friday, September 19, 2014, when he attempted to register as homeless. He notified CCO Fenton of his need to change his address on Thursday, September 18, 2014. CP 2 (Finding of Fact 17). He told CCO Fenton he attempted to register on Friday, September 19, 2014, but was told registration could only occur on Tuesday or Thursday. CP 3 (Finding of Fact 20). While CCO Fenton informed Mr. Hoff a warrant had been issued for his failure to report, CCO Fenton also told Mr. Hoff “there’s nothing he [Mr. Hoff] can do until next Tuesday” about the registration requirements. RP 68. Mr. Hoff was then encouraged to surrender himself to his CCO, in order to reduce his community custody sanctions. RP 68. Mr. Hoff was arrested on Tuesday, September 23, 2014 at 12:05 a.m., prior to the Sheriff provided him with his next opportunity to register as homeless. CP 3 (Finding of Fact 23).

c. The failure of the State to establish Mr. Hoff's knowing intention to violate RCW 9A.44.130 entitles him to dismissal.

While the State established Mr. Hoff was aware of his obligation to register, the State did not establish Mr. Hoff knowingly violated RCW 9A.44.130. For nearly two months, the Snohomish County Sheriff made it virtually impossible to comply with RCW 9A.44.130, except for two days a week. For Mr. Hoff, his attempt to register within the statutory period became impossible when he attempted to register on a Friday, with the last possible day for him to register being Monday. Mr. Hoff did not knowingly violate his registration requirements. In fact, the evidence demonstrates the exact opposite—Mr. Hoff tried to register.

By thwarting his attempt to register, the Sheriff's office made it impossible for Mr. Hoff to comply with RCW 9A.44.132. Because the evidence does not establish Mr. Hoff's failure to register was knowing and intentional, the State has failed to establish Mr. Hoff knowingly and unlawfully failed to register. Mr. Hoff is entitled to dismissal of this charge. *State v. DeVries*, 149 Wn.2d 842, 854, 72 P.3d 748 (2003).

**5. THE COURT FAILED TO PROPERLY
CONSIDER A SENTENCE OUTSIDE THE
STANDARD RANGE.**

- a. It is a violation of due process for a sentencing court to fail to consider an exceptional sentence below the standard range.*

While trial judges have considerable discretion to sentence under the SRA, they are still required to act within its strictures and the principles of due process. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (citing *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)). While trial courts should generally impose a sentence within the standard range, the SRA permits departures from the standard range. The “court may impose a sentence outside the standard range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. The SRA sets forth a nonexclusive “illustrative” list of factors the court may consider in exercising its discretion to impose an exceptional sentence. *Id.*

No defendant is entitled to an exceptional sentence below the standard range but every defendant is entitled to ask the court to consider such a sentence and to have the alternative actually considered. *Id.* (citing *State v. Garcia-Martinez*, 88 Wn. App 322, 330,

944 P.2d 1104 (1997)). A trial court abuses its discretion when “it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.” *Id.*; see also *In re Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677 (2007).

The legislature identifies seven purposes for determining standard range sentences. Sentencing courts must:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state’s and local governments’ resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010.

In *State v. Garcia*, the Court of Appeals upheld the trial court’s decision to impose an exceptional sentence below the standard range for Mr. Garcia’s conviction for failure to register as a sex offender. 162 Wn.App. 678, 681, 256 P.3d 379 (2011). Like Mr. Hoff, Mr. Garcia attempted to perform his obligated reporting duties. *Id.* at 686. He had

transportation difficulties and did not make it to the Yakima Sheriff's Office until 4:50 p.m. when he was told to instead report to the jail. *Id.* at 682. When he went to the jail, he was told he could only be admitted if an officer brought him in. *Id.* Mr. Garcia did not report to the Sheriff's Office or report to jail. He was sentenced to 364 days. *Id.* His standard range was 33 to 43 months. *Id.* In upholding his sentence, the Court of Appeals found the factors the trial court used to justify an exceptional sentence were reasonable and did not constitute an abuse of discretion. *Id.* at 687-88.

b. The courts legal error in believing it could not impose an exceptional sentence below the standard range violated Mr. Hoff's due process rights.

Mr. Hoff asked the court to impose an exceptional sentence of nine months based upon his attempt to comply with his registration requirements. CP 46; 7/10 RP 5. In denying Mr. Hoff's request, the court stated that the standard range for the offense was not "appropriate" but stated "I don't think legally there's a basis for an exceptional sentence below the standard range." 7/10 RP 5. The trial court was legally incorrect. It was obligated to consider whether Mr. Hoff was entitled to an exceptional sentence below the standard range. Moreover, if the court had done so, it would have been well within its

discretion to grant Mr. Hoff a lesser sentence. *Garcia*, 162 Wn.App. at 681.

c. Mr. Hoff is entitled to a new sentencing hearing so the trial court may consider whether a sentence below the standard range is justified.

While sentencing courts should have discretion in imposing a sentence, they must operate within the law. In fact, scenarios similar to Mr. Hoff's have been upheld as legally sufficient to justify an exceptional sentence. *See Garcia*, 162 Wn.App. at 681. Likewise, certain "failed defenses" have been found to constitute sufficient mitigation to support an exceptional sentence below the standard range. *See State v. Jeannotte*, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997); *State v. Hutsell*, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993).

The trial court concluded there was no legal basis for imposing an exceptional sentence. Because the trial court believed it had no legal basis for imposing an exceptional sentence below the standard range, this Court should remand this matter for a new sentencing hearing.

F. CONCLUSION

Had it not been for the decision of the Snohomish County Sheriff to restrict change of address registrations to only two days a

week, Mr. Hoff would have complied with his registration requirements.

The State presented insufficient evidence three business days elapsed between Mr. Hoff losing his fixed address and his arrest, which entitles him to dismissal.

The arbitrary decision of the Sheriff to restrict the dates he could register made it impossible for Mr. Hoff to comply with his obligations. This due process violation has had a clear impact upon his liberty and also entitles him to dismissal.

Procedural due process also requires notice reasonably calculated to reach the intended person. The failure of the State to establish Mr. Hoff had notice of the restricted hours for registration is a violation of Mr. Hoff's due process rights entitling him to dismissal.

The State failed to prove Mr. Hoff knowingly and intentionally violated RCW 9A.44.132. The evidence established it was impossible for Mr. Hoff to comply with his registration requirements within the statutory time period, once he received notice he could only register on two days a week.

Finally, the trial court committed legal error which violated Mr. Hoff's due process rights when it determined it lacked a legal basis to

consider an exceptional sentence below the standard range. Mr. Hoff is entitled to a new sentencing hearing.

Should Mr. Hoff not prevail in this appeal, he asks this Court to waive the costs of appeal. Mr. Hoff was found indigent by the trial court and only mandatory costs were imposed. *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015).

DATED this 11th day of January 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 73730-9-I
)	
JASON HOFF,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **OPENING 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:

<p>[X] SETH FINE, DPA [sfine@snoco.org] SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201</p>	<p>() () (X)</p>	<p>U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL</p>
<p>[X] JASON HOFF 784913 MONROE CORRECTIONAL COMPLEX PO BOX 777 MONROE, WA 98272</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

SIGNED IN SEATTLE, WASHINGTON, THIS 14TH DAY OF JANUARY, 2016.



X _____

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