

COURT OF APPEALS
DIVISION II

07 MAY 17 PM 12:17

NO. 35189-7-II

STATE
BY

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

STATE OF WASHINGTON,

Respondent,

v.

CARL W. VANCE,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 03-1-00783-1

HONORABLE DANIEL J. BERSCHAUER, Judge

RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUES

1. Whether all the essential elements of violation of sex offender registration appear in any form, or by fair construction can be found, in the First Amended Information.

2. Whether the jury instructions in this case allowed the jury to consider an uncharged means of committing the alleged offense.

3. Whether the defendant's trial counsel rendered ineffective assistance by not objecting to Jury Instruction Nos. 5 and 8.

4. Whether the court erred in running the sentence in this case consecutive to the sentence imposed in Thurston County Cause No. 06-1-00609-1.

B. STATEMENT OF THE CASE

In 1991, the defendant Carl Vance was convicted of a sex offense, specifically child molestation in the first degree. Trial RP 11-12, 54-55. On April 24, 2000, the defendant registered as a sex offender with the Thurston County Sheriff's Office due to his having moved to Thurston County from Eastern Washington. Trial RP 44, 46, 50. At that time, he listed his residence address as 8103 Martin Way E., Space 22, Lacey, Washington 98516. Trial RP 46. This location was the Martin Way Mobile Home and RV Park. Trial RP

30.

The next contact the defendant had with the Thurston County Sheriff's Office for purposes of sex offender registration was on November 26, 2001. At that time, the defendant provided notice that he had moved to Space 25 at the same address. Trial RP 48. Thereafter, the defendant never contacted the Thurston County Sheriff's Office to report a further change of residence. Trial RP 50.

The defendant continued to live at Space 25 of the mobile home park until September, 2002. At that time, the defendant moved out of the mobile home park all together. Trial RP 37-38.

On February 19, 2003, the Lacey Police Department sent the defendant a form to complete and return in order to confirm that he was still in compliance with his sex offender registration requirements. The notice was sent to the last address provided by the defendant, which was 8103 Martin Way E., Space 25, Lacey, Washington 98516. Trial RP 27-29. However, the form was returned to

the Lacey Police Department as undeliverable.
Trial RP 27.

On April 28, 2003, an Information was filed in Thurston County Superior Court Cause No. 03-1-00783-1 charging the defendant with one count of violation of sex offender registration, RCW 9A.44.130. The offense was alleged to have occurred during the period of November 1, 2002 through April 21, 2003. CP 3. On April 30, 2003, a First Amended Information was filed which simply corrected the notation of the defendant's date of birth. CP 6. A jury trial was held in this matter on July 24, 2006. The defendant was convicted as charged. CP 42-52.

A sentencing hearing in this case took place on August 3, 2006, upon the completion of another trial on charges against this same defendant in Thurston County Superior Court Cause No. 06-1-00609-1. Thus, the defendant was sentenced on his convictions in both cases at the same time. 8-3-06 Hearing RP 479-482.

The court sentenced the defendant to 365 days

in custody in this case. That sentence was ordered to run consecutive to the defendant's sentences in Thurston County Cause No. 06-1-00609-1 and Grant County Cause No. 05-1-00270-3. CP 42-52.

C. ARGUMENT

1. All of the essential elements of violation of sex offender registration can be found by fair construction in the First Amended Information in this case.

The defendant contends that the First Amended Information in this case failed to set forth all of the essential elements of the charge. This claim has been raised for the first time on appeal.

Under the Sixth Amendment to the United States Constitution and Article 1, section 22 of the Washington State Constitution, a charging document must set forth all of the essential elements of the alleged crime so that a criminal defendant can be apprised of the nature of the charge and can prepare an adequate defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When the sufficiency of the charging document is

raised for the first time on appeal, the court will engage in a liberal construction of the document in order to determine its validity. Under that liberal analysis, the appellate court examines: (1) whether the essential elements of the alleged crime appear in any form in the charging document, or whether they can be found by fair construction; and if so, (2) whether the defendant can show that he was nonetheless actually prejudiced by any inartful language used in the document. Kjorsvik, 117 Wn.2d at 105-106.

In the present case, the defendant has not alleged any actual prejudice, and so only the first prong of the above-stated test is pertinent here. Under that first prong, if an element which is claimed to be missing from the charging document can be fairly implied by the language used in the document, the charging document will be upheld on appeal. Kjorsvik, 117 Wn.2d at 104. The question is whether there is some language in the charge which provides at least some indication of the missing element. Auburn v. Brooks, 119

Wn.2d 623, 636, 836 P.2d 212 (1992).

In charging the respondent with one count of Violation of Sex Offender Registration, the First Amended Information included the following language:

VIOLATION OF SEX OFFENDER REGISTRATION, RCW 9A.44.130:

In that the defendant, CARL W. VANCE, in the State of Washington, during the period of November 1, 2002 through April 21, 2003, having been previously convicted of a sex offense, to wit: Child Molestation in the First Degree, did knowingly fail to comply with sex offender registration requirements, to wit: moved from his residence in Thurston County and failed to notify the Thurston County Sheriff's Office as required by law.

CP 6.

During the time period of the offense in this case, the elements of the offense were set forth in subsection 10 of RCW 9A.44.130. That subsection stated as follows, in pertinent part:

A person who knowingly fails to register with the county sheriff or notify the county sheriff, or who changes his or her name without notifying the county sheriff and the state patrol, as required by this section is guilty of a class C felony if the crime for which the individual was convicted was a felony sex offense as defined in subsection 9(a) of this section or a federal or out-of-state conviction for an offense that under

the laws of this state would be a felony sex offense as defined in subsection 9(a) of this section. . . .

RCW 9A.44.130(10). Thus, this provision identified two essential elements of the crime of Violation of Sex Offender Registration. Taken in reverse order, those elements were: (1) that the respondent was previously convicted of a felony sex offense in Washington or had an equivalent federal or out-of-state conviction, and (2) knowingly failed to comply with any of the registration or notification requirements of RCW 9A.44.130. Applying a liberal construction to the First Amended Information in this case, as is required, it is apparent that both essential elements of Violation of Sex Offender Registration can be found there by fair construction.

The charging document stated that the respondent had previously been convicted of the sex offense of child molestation in the first degree. As of the time of the offense in the present case, Subsection 9(a) of RCW 9A.44.130 defined a felony sex offense as follows, in

pertinent part:

- . . . (a) "Sex offense" means:
- (i) Any offense defined as a sex offense by RCW 9.94A.030; . . .

The term "sex offense" was defined in RCW 9.94A.030 as follows, in pertinent part:

- . . . "Sex offense" means:
- (a)(i) a felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(11); . . .

RCW 9.94A.030(38)(a)(i). The crime of first-degree child molestation is a Class A felony violation of RCW 9A.44.083. Thus, by referring to a prior conviction for the sex offense of first-degree child molestation, the First Amended Information alleged that the respondent had been convicted of a felony sex offense prior to the time period set forth in the charge.

This charging document also alleged that the defendant had knowingly failed to comply with sex offender registration requirements by failing to give the legally required notice to the Thurston County Sheriff's Office upon moving from his residence in Thurston County. Therefore, by fair construction, this recitation set forth the

elements of the offense identified in RCW 9A.44.130(10).

However, the defendant contends that the time period within which he was required to provide notice to the county sheriff upon moving is also an essential element of the offense. Under RCW 9A.44.130(5)(a), as in effect during the charged period, a registered sex offender was required to provide notice of his change of address to the county sheriff within 72 hours of moving to a new location within the same county as was the prior residence. If, on the other hand, he moved to a residence in another county, he was required to provide notice of his change of address to the sheriff of the county in which he previously lived within 10 days of the move. Thus, the defendant argues that the State was required to allege in the charging document that the defendant failed to provide notice within 72 hours of moving within the county or within 10 days of moving out-of-county, or both in the alternative.

The State disagrees. A determination of what

constitutes the essential elements of a criminal offense is fundamentally a determination of legislative intent. State v. Williams, 158 Wn.2d 904, 908, 148 P.3d 993 (2006). In determining such intent, the court looks first to the plain language of the statute, and considers other sources of legislative intent only if the statute is ambiguous. State v. McGary, 122 Wn. App. 308, 313, 93 P.3d 941 (2004).

An essential element of an offense is one whose specification is necessary to establish the very illegality of the behavior, or which increases the potential punishment for the offense. State v. Leyda, 157 Wn.2d 335, 341, 138 P.3d 610 (2006); State v. Goodman, 150 Wn.2d 774, 785-786, 83 P.3d 410 (2004). Under the plain language of RCW 9A.44.130(10), as then in effect, the fact which created illegality was the knowing failure of a convicted sex offender to provide a notice required by RCW 9A.44.130. Whether a defendant failed to report a move within the county in 72 hours, or instead failed to report a

move to a location outside the county within 10 days, did not make the failure to comply with the statutory requirements any more or less criminal. The critical fact to be proved was that there was a failure to comply with the requirements. Whether that failure to comply was in terms of a 72-hour requirement in the statute versus a 10-day requirement also did not affect the potential penalty for a violation of the registration requirements. Therefore, such particulars did not constitute an essential element of the offense of violation of sex offender registration.

The relationship of the particular notification requirements in RCW 9A.44.130 to the crime of sex offender registration violation is similar to that of definitional sections of a criminal provision to the elements of the crime. For example, in State v. Strohm, 75 Wn. App. 301, 879 P.2d 962 (1994), Strohm was convicted of first-degree trafficking in stolen property. On appeal, he argued that nine acts included in the definition of "traffics" in RCW 9A.82.010(10)

constituted alternative elements of trafficking in stolen property. Strohm, 75 Wn. App. at 307-308. The appellate court disagreed, holding that the single act constituting the crime was "trafficking", and that the various ways in which trafficking could occur were not elements, but rather were set forth to assist in understanding what the term "trafficking" was intended to encompass. Strohm, 75 Wn. App. at 308-309.

Similarly, in State v. Marko, 107 Wn. App. 215, 27 P.3d 228 (2001), Marko was convicted for intimidating a witness. The commission of that crime included the element of the use of a threat against a current or prospective witness. Marko referred to the fact that the definition of "threat" in RCW 9A.04.110(25) included ten alternatives, and argued that therefore these were ten alternative means of committing the crime of intimidating a witness. Marko, 107 Wn. App. at 217-218.

Again, the Court of Appeals disagreed. The court found that the various ways in which a

threat could be made simply defined what was encompassed by the term "threat" and did not constitute alternative elements of the offense. Marko, 107 Wn. App. at 219-220.

In the present case, pursuant to RCW 9A.44.130(10) as then in effect, the crime of violation of sex offender registration was committed by a failure to comply with either a notification or registration requirement of RCW 9A.44.130. That statute set forth many such requirements that convicted sex offenders must comply with. Contrary to the contention of the defendant, those multiple requirements did not constitute alternative means of committing the offense of sex offender registration violation. Rather, those particulars identified and explained what acts or failures to act were encompassed in the phrase "violation of sex offender registration".

Nor is it the case that identification of the particular requirement violated affected the potential punishment for the commission of this

crime. An example to the contrary was addressed by the Washington Supreme Court in State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004). In that case, an amended information had been filed charging possession of a controlled substance with intent to deliver, and the term "meth" had been used instead of methamphetamine. The Court of Appeals had determined that the identification of the particular controlled substance possessed was not an element of the offense. Goodman, 150 Wn.2d at 784-785. The State Supreme Court ruled that in that instance the identification of the substance possessed was an essential element because the possession of methamphetamine aggravated the potential punishment a defendant could face compared to the possession of other illegal drugs. Goodman, 150 Wn.2d at 785-786.

In the present case, there is no such factor present. A failure to report a move within county in 72 hours could not be the basis for different potential penalties in comparison with a failure to report a move out of county within 10 days.

Therefore, for this reason also, such particulars do not constitute alternative elements of this offense.

At the trial of this cause, the jury was instructed as follows:

To convict the defendant of the crime of violation of sex offender registration, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the period of November 1, 2002 through April 21, 2003, the defendant had a duty to register as a sex offender in Thurston County;

(2) That the defendant moved, or had moved, from his registered address;

(3) That the defendant knowingly failed to provide written notice to the Thurston County Sheriff within 72 hours of moving to an address within Thurston County, or within 10 days of moving to an address in a new county; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Court's Instruction to the Jury No. 8 in CP 26-38. Similar language, referring to the time periods of 72 hours or 10 days, was used in the instruction defining the offense. Court's Instruction to the Jury No. 5 in CP 26-38. Neither the State nor the defendant objected to these instructions. Trial RP 60. The defendant points to these instructions as evidence that the time periods of 72 hours and 10 days constituted essential, although alternative, elements of the offense.

Under the law of the case doctrine, given the wording of Jury Instruction No. 8 and the lack of any objection to that instruction from the State, the burden was on the State to prove a failure to notify the sheriff within 72 hours or within 10 days of moving, regardless of whether the time periods of 72 hours and 10 days were essential elements of the offense. State v. Hickman, 135 Wn.2d 97, 101-102, 954 P.2d 900 (1998). The question of what constitutes the essential elements of violation of sex offender registration is a separate, legal issue. See

State v. Williams, 158 Wn.2d 904, 908, 148 P.3d 993 (2006). Thus, the wording of the jury instructions in this case is not determinative of what elements compose the crime charged.

Even if it were true that the required time period for notification which the defendant failed to comply with in this case was an element of the offense, an allegation that the defendant failed to provide notice during the relevant time periods can be fairly implied from the charging language in this case pursuant to the liberal construction rule. The First Amended Information alleged that, upon moving, the defendant failed to provide the notification to the sheriff that was required by law. CP 6. Since notification within 72 hours, or in the alternative within 10 days, was the notification required by law, those time periods could be fairly implied from the language used.

In addition, a violation of sex offender registration requirements is an ongoing offense. RCW 9A.44.140(6). The state alleged a time period of almost six months during which the defendant

failed to provide the necessary notice. CP 6. The charging language therefore gave fair notice of a claim that the defendant did not provide notice within either 72 hours or 10 days of moving, and in fact did not provide any notice for an even longer period of time.

The defendant argues that, absent a statement in the charging document of what time requirement he was alleged to have violated upon moving, the defendant did not have full notice of all the particulars of this charge. However, that is almost always true with a criminal charge that properly sets forth the essential elements. As discussed above, a charge of trafficking in stolen property can be adequate without detailing precisely the form of trafficking the defendant is alleged to have engaged in. See Strohm, 75 Wn. App. at 309. A charge of intimidating a witness can be sufficient without identifying the precise form of threat used to accomplish the intimidation. See Marko, 107 Wn. App. at 219-220. A charge of assault can be proper without

specifying the common law form of assault alleged to have been committed. See State v. Davis, 119 Wn.2d 657, 664, 835 P.2d 1039 (1992).

In State v. Tresenriter, 101 Wn. App. 486, 4 P.3d 145 (2000), Tresenriter was charged with second-degree possession of stolen property. On appeal, he contended that the charging document was insufficient because it did not detail what the alleged property was, where the property was located when he allegedly possessed it, or if it was connected to the theft and burglary also charged. The appellate court determined that none of these matters were elements of the crime, that at best the allegation may have been too general, and that in such an instance, Tresenriter's remedy would have been to ask for a bill of particulars, and so the charging document was sufficient. Tresenriter, 101 Wn. App. at 494-495; see also State v. Leach, 113 Wn.2d 679, 687, 782 P.2d 552 (1989).

The same result should apply in the present case. The elements of a violation of sex offender

registration can be found in the First Amended Information by fair construction, and any need for greater detail concerning the nature of the alleged failure to comply could have been addressed by a request for a bill of particulars. Thus, the First Amended Information in this case was constitutionally sufficient.

2. The jury instructions in this case did not allow the jury to consider uncharged means of committing the alleged offense.

In this case it was charged that the defendant, as a convicted sex offender, failed to make the legally required notification to the county sheriff upon moving. Based on that charge, the jury at trial was instructed to determine whether the state had proved the defendant failed to provide such notification either within 72 hours of moving to an address within Thurston County or within 10 days of moving to another county. Court's Instruction to the Jury No. 8 in CP 26-38. The defendant claims on appeal that the jury was instructed to consider ways of committing this crime that were not charged. That is

incorrect.

The defendant was charged with having moved from his residence in Thurston County and having then failed to provide the notification to the Thurston County Sheriff's Office required by law. The defendant does not dispute that providing written notification within 72 hours for a move within the county or providing notice within 10 days for a move out of the county were the notifications required by law. Therefore, the jury was instructed to consider only the means of committing this crime alleged in the charging document.

The defendant refers to the time periods of 72 hours and 10 days, as set forth in the Court's "to convict" instruction, Instruction No. 8, as alternative means or elements of this offense. As discussed in the previous section, that is not correct. The pertinent element of the offense was that the defendant, as a convicted sex offender, knowingly failed to provide a legally required notification. The time periods in the instruction

simply identified which notification requirements he was alleged to have violated.

The court could have told the jury in a separate instruction that a convicted sex offender was legally required to report to the county sheriff a change of address in the county within 72 hours, and to report a change of address to another county within 10 days. The "to convict" instruction could have then used the precise words in the First Amended Information and required the State to prove that the defendant, having moved from his residence in Thurston County, failed to notify the Thurston County Sheriff as required by law. However, worded in that manner and considered as a whole, the instructions would not have told the jury anything different from the instructions used in this case. That which the State would have been required to prove in that instance is identical to what the State was required to prove here.

Thus, the jury in this case was not instructed to consider ways of committing the

alleged crime different from what was alleged in the charging document.

3. The defendant's trial counsel did not render ineffective assistance by failing to object to Jury Instructions Nos. 5 and 8.

The defendant contends on appeal that his trial counsel rendered ineffective assistance by failing to object to Jury Instruction No. 5, defining the charged offense, and Jury Instruction No. 8, the "to convict" instruction. To demonstrate ineffective assistance of counsel, a defendant must show: (1) that defense counsel's performance was deficient, in that it fell below an objective standard of reasonableness based on a consideration of all the circumstances; and (2) that defense counsel's performance prejudiced the defendant because there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). When considering a claim of ineffective assistance, the court must engage in a strong presumption that counsel's

representation was effective. McFarland, 127 Wn.2d at 335. To satisfy his burden to prove ineffective assistance, the defendant must show that there is an absence of any legitimate strategic or tactical reason for the challenged conduct of trial counsel. Id. at 336.

The defendant has not shown that trial counsel's performance in this case was deficient. As discussed above, Instructions 5 and 8 did not allow the jury to consider uncharged means of committing the alleged crime. Therefore, an objection to those instructions on that basis would have been inappropriate.

Furthermore, there is no showing that there is a reasonable probability the outcome would have been different if defense counsel had objected to the wording of those instructions. Again as discussed above, had the "to convict" instruction been worded using the precise language of the First Amended Information, referring to the defendant's failure to provide the legally required notification upon moving rather than

referring to specific time requirements, a separate instruction would have been proper to inform the jury of what those legal requirements were, including the time period requirements. In that instance, considering those instructions as a whole, they would not have differed in any substantive way from the ones used in this case.

4. The State concedes that the sentence in this case is legally required to run concurrent with the defendant's sentence in Thurston County Cause No.06-1-00609-1.

On August 3, 2006, a sentence hearing was held in this case. At the same hearing, the defendant was also sentenced to life in prison as a persistent offender in Thurston County Cause No. 06-1-00609-1. Pursuant to RCW 9.94A.525(1), since the sentencing in Cause 06-1-00609-1 occurred on the same day as the sentencing in this case, the conviction in Cause 06-1-00609-1 constituted a "current offense" for purposes of the sentencing in this cause. Pursuant to RCW 9.94A.589(1), sentences imposed for current offenses must be served concurrently unless an exceptional sentence is imposed.

The court ordered that the sentence in this case run consecutive to the sentence in Cause 06-1-11609-1. Based on the above statutory provisions, that was error. The sentence in this case must be amended to require that it run concurrent with the sentence in Cause 06-1-609-1.

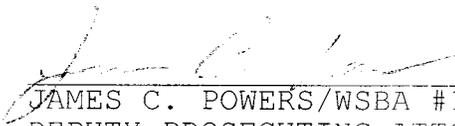
The sentence in this case was also ordered to run consecutive to the sentence in Grant County Cause No. 05-1-00270-3. That consecutive sentence was an appropriate exercise of the court's discretion pursuant to RCW 9.94A.589(3). The defendant does not dispute this.

D. CONCLUSION

Based on the above, the State respectfully requests that this court affirm the respondent's conviction, but remand for re-sentencing in order to run the sentence concurrently with Cause 06-1-00690-1.

DATED this 16th day of May, 2007.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
CARL W. VANCE,)	
Appellant)	

07 MAY 17 PM 12:10
 STATE OF WASHINGTON
 BY [Signature]
 DEPUTY ATTORNEY GENERAL

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 16th day of May, 2007, I caused to be mailed to appellant's attorney, THOMAS E. DOYLE, a copy of the Respondent's Brief, addressing said envelope as follows:

Thomas E. Doyle,
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that
the foregoing is true and correct to the best of
my knowledge.

DATED this 16th day of May, 2007 at Olympia, WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney