

NO. 38189-3

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN D. FURTWANGLER, APPELLANT

FILED
COURT OF APPEALS
DIVISION II
09 JUN -1 PM 1:58
STATE OF WASHINGTON
BY _____
DEPUTY _____

Appeal from the Superior Court of Pierce County
The Honorable Sergio Armijo, Judge

No. 08-1-00960-4

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should the court treat the trial court's findings of fact as verities on appeal where defendant did not provide argument or law supporting his assignments of error?
2. Did the State produce sufficient evidence to prove to a rational fact-finder that defendant was guilty of failure to register as a sex offender?
3. Did the court impose a determinate sentence?
4. Has defendant failed to prove that the statutory sentencing scheme as enacted by the legislature violates the separation of powers doctrine?

B. STATEMENT OF THE CASE.

1. Procedure

On February 22, 2008, the State charged STEVEN FURTWANGLER, hereinafter "defendant," with one count of failure to register as a sex offender (FTRSO). CP 1-2. The case proceeded to bench trial before the Honorable Sergio Armijo on July 21, 2008. RP 1-3. After hearing the evidence, the court found defendant guilty as charged. RP 62. The court entered findings of fact and conclusions of law in support of its ruling. CP 18-22; Appendix A.

On August 15, 2008, the court sentenced defendant to a low-end, standard-range sentence of 33 months in the Department of Corrections (DOC), and a community custody range of 36-48 months. CP 30-44; RPS 4, 8.

Defendant filed a timely notice of appeal. CP 14.

2. Facts

Defendant has two prior convictions for rape of a child in the first degree child rape. CP 23-25. He is a “sex offender” required to register with the Pierce County Sheriff’s Department (PCSD) under RCW 9A.44.130. CP 9-11.

Defendant registered in Pierce County on July 7, 2004, having been previously registered as a transient in Thurston County. Ex. 1; RP 25. Defendant listed 6210 South Alder Street in Tacoma, Washington as his registered address. Ex. 1. Defendant registered again on May 29, 2007, with the same address, after being released from the Thurston County Jail. Ex. 3; RP 27.

Lonnie Lawrence lived at the Alder Street address with her husband and daughter, Tina. RP 6-7. Defendant was Tina’s boyfriend¹. RP 7. Ms. Lawrence allowed defendant to live at the house until October, 2006, when defendant and Mr. Lawrence got into a fight. RP 8. Ms.

¹ It is unclear from the record whether defendant and Tina were still dating at the time of trial.

Lawrence obtained a restraining order, prohibiting defendant from coming onto the property². RP 8. Ms. Lawrence entered the restraining order while defendant was in jail in Thurston County. RP 8.

After defendant's release from custody, Ms. Lawrence told defendant he had to find his own place to live. RP 9, 19. In order to facilitate his search for another place to live, she allowed defendant to continue receiving mail at the Alder Street address. RP 9. She also allowed defendant to store his personal belongings at the house, including food. RP 9. Defendant could come to the enclosed porch to get clean clothes and food, but he was not allowed anywhere else inside the house, nor was he allowed to sleep there. RP 10, 19. If he did enter or sleep at the house, it was without Ms. Lawrence's knowledge or permission. RP 10, 18. Most of defendant's personal items at the residence were purchased for him by Ms. Lawrence's daughter. RP 14-15, 18.

Defendant continued to receive mail at the Alder Street address, which Ms. Lawrence gave to her daughter for delivery to defendant. RP 11. Defendant would also give out Ms. Lawrence's cell phone number as a message phone, without Ms. Lawrence's permission. RP 12, 14. In October, 2007, defendant told Ms. Lawrence that he would move back into the house once the restraining order expired. RP 9-10. She told him

² A copy of the restraining order was not part of the record below. It was undisputed at trial that defendant was, in fact, restrained from coming onto the property. *See* CP 18-22; RP 49-50.

“no more,” and that he was not allowed back. RP 10. According to Ms. Lawrence, defendant did not live at the house after October 2006. RP 8, 19.

Defendant testified that he was aware of the restraining order, but had no intention of changing his residence. RP 42, 44, 50-51. Defendant said that he was agreeable with Ms. Lawrence’s wishes that he not be at the house, “to a point.” RP 48. Defendant admitted that Ms. Lawrence told him she did not want him around, but he claimed, “I also came and went as I pleased, too. It was my residence.” RP 48. Defendant claimed that he would go to the house early in the morning to spend time with Ms. Lawrence’s daughter and sleep. RP 48. He would then leave for a time and return later in the day when Ms. Lawrence’s daughter would cook his dinner and then he would leave for the night. RP 48. According to defendant, the fact that a court ordered him to stay away from the property had “no bearing on his registration.” RP 50.

C. ARGUMENT.

1. THIS COURT SHOULD TREAT THE TRIAL COURT’S FINDINGS OF FACT AS VERITIES ON APPEAL.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal.

State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to

challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. *Id.* Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Id.*

The court entered findings of facts and conclusions of law in support of its finding of guilt. CP 18-22. In applying the above law to the case now on appeal, the court should treat all the findings of fact as verities. Defendant assigned error to two of the court's findings. *See* Appellant's brief at 1. There is no argument in the brief, however, as to how these findings are unsupported by the evidence. In *Henderson Homes, Inc v. City of Bothell*, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; *see also, State v. Jacobson*, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

In this case, defendant makes no effort to properly present argument regarding the challenged findings. Defendant specifically assigns error to the court's finding of fact 26 and 27, which state:

26. The court finds that defendant used the house at 6210 S. Alder St. to change clothes, eat, and take a shower, not to live there.
27. The court finds that once Ms. Lawrence told the defendant that he was no longer welcome to live at 6210 S. Alder St., he was effectively a transient.

Appellant's brief at 1.

Instead of supporting his assignments of error with argument, defendant simply argues that the question of where defendant lived was irrelevant and that the germane question was whether the address was defendant's "fixed residence." *See* Appellant's brief at 15. Defendant makes no argument as to how the evidence in the record fails to support the court's findings that defendant no longer lived at the 6210 South Alder Street address after Ms. Lawrence evicted him. *See* Appellant's brief at 12-21. This court should treat findings of fact 26 and 27 as verities on appeal.

If the court does choose to review findings of fact 26 and 27, sufficient evidence exists in the record to support the finding that defendant did not live at 6210 South Alder Street. Ms. Lawrence testified several times that defendant did not live at the house with her family, and that he was not welcome to live there. RP 8, 9, 10, 19. While defendant

called the house his “residence” often, when asked about connection to the house, defendant responded that it was, “where I produced my food, I had my clothes, I had been at every day. I, at times - - actually, every day I had been visiting or been there and slept.” RP 36-37. Defendant said he slept at the house for “an hour or two,” but he was never there at night. RP 42, 47-49. While he called the house a residence, defendant’s own testimony, as well as that of Ms. Lawrence, indicate that he did not live there.

In addition, the record supports the trial court’s finding that defendant was a transient. The statute does not define the word “transient.” See RCW 9A.44.130. Rather, it merely differentiates between people who have a “fixed residence” and those who do not. RCW 9A.44.130(1)(a). When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary. *State v. Bahl*, 164 Wn.2d 739, 754, 193 P.3d 678 (2008). “Transient” refers to “passing through or by a place with only a brief stay or sojourn.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2428 (2002). “Transient” is also defined as “[o]ne who, or that which, is temporary.” BLACK’S LAW DICTIONARY 1343 (5th ed. 1979). As defendant himself testified that he “visited” the house on a daily basis, it is clear that defendant’s time at 6210 South Alder Street was only temporarily at the house.

There are sufficient facts in the record to support the challenged findings of fact. Those findings, as well as the unchallenged findings of fact, should be treated as verities on appeal.

2. SUFFICIENT EVIDENCE WAS ADDUCED TO UPHOLD THE COURT'S DETERMINATION THAT DEFENDANT IS GUILTY OF FAILURE TO REGISTER AS A SEX OFFENDER.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly

against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The trial court's conclusions of law are reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

A sex offender has a statutory duty to register with the sheriff of the county of residence. RCW 9A.44.130(1)(a). The offender must keep that registration current as to his or her whereabouts. The statute establishes different timelines for changing registration if the offender has a fixed address or is homeless. If residing at a fixed address, an offender who changes addresses within the same county must register with the county sheriff within 72 hours of moving. RCW 9A.44.130(5)(a). Anyone lacking a fixed residence “shall provide signed written notice to the sheriff of the county where he or she last registered within forty-eight hours excluding weekends and holidays after ceasing to have a fixed residence.” RCW 9A.44.130(6)(a). Violation of these requirements leads to the charge of failure to register, a class C felony. RCW 9A.44.130(11)(a).

The statute does not define “fixed residence.” *See* RCW 9A.44.130. In *State v. Stratton*, the court used the dictionary definition of “residence” to find that the defendant’s presence on a property was within the statutory requirements. 130 Wn. App. 760, 124 P.3d 660 (2005). The court defined “residence” as:

the act ... of abiding or dwelling in a place for some time: an act of making one’s home in a place ...; the place where one actually lives or has his home distinguished from his technical domicile; ... a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit ...; a building used as a home.

Stratton, at 765 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1931 (1969)). In *Stratton*, the defendant was required to register as a sex offender. *Id.* at 762. He purchased a house on a real estate contract and reported that address as his residence. *Id.* The defendant later defaulted on the contract, but asked the real estate company if he could continue to use the telephone box and be there “for a little bit.” *Id.* Defendant returned the keys and began living out of his car on the property. *Id.* at 763. While he would leave the property during the day for work, he would return every evening and spend the night in his car in the driveway. *Id.* When he returned for the evenings, he would plug a telephone into the telephone box in order to check messages that had been left throughout the day. *Id.*

The court’s review in *Stratton* dealt with the ambiguity of the statute. *Id.* at 765-66. The court reviewed the purpose of the statute, which is to “assist law enforcement agencies’ efforts to protect their communities against sex offenders who re-offend.” *Id.* at 765 (citing *State v. Pray*, Wn. App. 25, 28, 980 P.2d 240 (1999)). “Specifically, registration provides law enforcement agencies with an address where they can contact a sex offender.” *Id.* (citing *Pray*, Wn. App. at 28-29). Because the defendant continued to sleep at the property, got his mail, received telephone service, and intended to return daily, the court held the

purpose of the statute was satisfied and that the State had failed to prove that defendant had no “fixed residence. *Id.* at 766-67.

In the present case, the court’s findings of fact contain sufficient evidence to find defendant guilty of the crime of FTRSO. Specifically, the court found that defendant knew he was required to register as a sex offender. CP 18-22 (finding of fact 9). Defendant registered at 6210 South Alder Street in Tacoma, WA, on July 7, 2004, and May 29, 2007. CP 18-22 (finding of fact 12). During October 2006, Ms. Lawrence, the homeowner at 6210 South Alder Street evicted defendant. CP 18-22 (findings of fact 11, 14). In October 2006, Ms. Lawrence acquired a protection order that restricted defendant from living at 6210 South Alder Street. CP 18-22 (findings of fact 14, 15). Defendant never intended to change his registration from the Alder Street address. CP 18-22 (finding of fact 24). In October 2006, defendant was a transient. CP 18-22 (findings of fact 14, 15, 27).

Not only did defendant fail to update the Sheriff with his transient status within 48 hours in October 2006, but he listed the Alder Street address in May 2007, after the protection order excluding him from the property was in place. CP 18-22 (findings of fact 12, 15). The record is clear that defendant failed to notify the Sheriff’s Office that he ceased to have a fixed residence after he was evicted from the house on Alder Street.

Defendant cites *Stratton* as standing for the proposition that a person only meets the definition of “transient” if they have been “kicked out of his former address, had all his possession removed and was sleeping on the streets and in public parks at night, not knowing where he would be at any given point in time.” See Appellant’s brief at 19-20. Yet nothing in *Stratton* so limits the court’s determination of who would qualify as transient. See *Stratton*, 130 Wn. App. at 766. Rather, the court held that because the defendant continued to sleep at his registered address, got his mail and continued to receive telephone service by an internet connection only accessible from that location, intended to return daily, and had no definite departure date, he was still at a “fixed address.”

The facts in this case are distinguishable from those in *Stratton*. In *Stratton*, it is reasonable to presume that the real estate company allowed the defendant to continue living on the property, the house was vacant, and that he continued to pay for the phone service. Here, defendant was clearly not welcome by the homeowners. Ms. Lawrence had a restraining order directing defendant to stay away from the property. RP 8, 16. Defendant admitted Ms. Lawrence told him she did not want him there, but her wishes did not matter to him because he “came and went as [he] pleased, too. It was [his] residence.” RP 48. That defendant had no

intention of residing elsewhere does not elevate his wishes over that of the homeowners, nor does his reference to another person's house as his residence make that house his home.

Most importantly, when Ms. Lawrence evicted defendant, she obtained a protection order that prohibited him from entering the property. CP 18-22 (Finding of fact 15); RP 8; 49-51. The house at 6210 South Alder Street could not be defendant's residence as he was legally precluded from being there. Whether Ms. Lawrence gave defendant permission to come onto the property is irrelevant as to whether defendant was allowed to be there. Consent or permission by the protected party is not a defense to the violation of a no contact order. *State v. Dejarlais*, 136 Wn.2d 939, 942, 969 P.2d 90 (1998).

Defendant claims that, as in *Stratton*, the purpose of the statute is fulfilled as law enforcement could contact defendant at 6210 South Alder Street. *See* Appellant's brief at 21. Defendant would have this court hold that the purpose of the statute is fulfilled where the only contact law enforcement has for a registrant is a place where that registrant is legally prohibited from entering. No definition of "residence" could possibly include a place where a defendant does not reside, and has no legal authority to inhabit.

The State presented sufficient evidence to prove to a rational factfinder that defendant was transient from the time of his release from the Thurston County Jail on May 29, 2007, and that he was in violation of

RCW 9A.44.130 when he did not notify the sheriff's office within 48 hours of ceasing to have a "fixed residence."

3. THE COURT CORRECTLY ORDERED A PERIOD OF COMMUNITY CUSTODY AFTER THE PERIOD OF INCARCERATION.

FTRSO is a "sex offense." RCW 9A.44.130(10). The sentencing court is required to sentence the offender to a period of community custody in addition to the other terms of the sentence. RCW 9.94A.715(1). According to RCW 9.94A.715, the Legislature clearly intends that all sex offenders serve a period of community placement or custody in addition to incarceration. The Legislature has authorized the Sentencing Guidelines Commission (SGC) to determine the ranges of community custody for various offenders. RCW 9.94A.850(5). Sex offenders are required to be on community custody for 36-48 months. WAC 437-20-010.

A person convicted of FTRSO can get his sentence reduced by up to 1/3 for earned early release for "good behavior." RCW 9.94A.728(1)(c). The period of earned early release, if any, is set by Department of Corrections ("DOC") or the correction agency having jurisdiction, within guidelines set by the Legislature. RCW 9.94A.728(1). The offender may be transferred to community custody in lieu of earned early release. RCW 9.94A.728(2)(b). Because the amount of earned early release is driven by the offender's in-custody behavior, it is a factor that

comes into play only after sentencing. In fact, RCW 9.94A.728(1) specifically prohibits DOC from crediting the offender until the credits are earned.

Individual statutes must be read together to achieve the statutory scheme and intent. *American Legion Post 149 v. Dept. of Health*, 164 Wn.2d 570, 587-590, 192 P.3d 306 (2008); *see also, State v. Thorne*, 129 Wn.2d 736, 756-758, 921 P.3d 514 (1996).

In a Class C sex offense such as FTRSO, the combination of a prison sentence, with 36-48 months of mandated community custody, quickly approaches or exceeds the statutory maximum sentence of 60 months. Until recently, all divisions of the Court of Appeals were in agreement in how to address this issue.

Division I of the Court of Appeals first addressed this issue in 1997 with *State v. Vanoli*, 86 Wn. App. 643, 937 P.2d. 1166 (1997). Vanoli was convicted of delivering LSD to minors. *Id.* His standard range, plus his sentence enhancements, took his total to the statutory maximum of 10 years. *Id.* at 654. The court also imposed a period of community custody as required by statute. *Id.* Division I affirmed the sentence, reasoning that if the defendant earned early release credits, he could be placed on community custody, and if not, he would be released at the statutory maximum of 10 years. *Id.* at 655.

In 2004, Division I applied *Vanoli* to Class C sex offenses in *State v. Sloan*, 121 Wn. App. 220, 87 P.3d 1214 (2004) (*overruled by State v. Linerud*, 147 Wn. App. 944, 197 P.3d 1224 (2008)). Sloan was convicted of third degree child rape and third degree child molestation. *Id.* at 222. There, the Court adopted the *Vanoli* reasoning and held that the sentencing court could both comply with RCW 9.94A.715, and avoid imposing a sentence over the statutory maximum by including language in the judgment that the combined sentence of incarceration and community custody could not exceed the statutory maximum. *Id.* at 223-24.

Division II of the Court of Appeals recently approved the *Sloan* analysis in *State v. Vant*, 145 Wn. App. 592, 186 P.3d 1149 (July, 2008). Vant had been convicted of violation of a protection order and FTRSO. *Id.* at 595-96. The trial court sentenced him to 18 months incarceration and 36-48 months of community custody. *Id.* at 597. The statutory maximum sentence was 60 months. *Id.* This Court affirmed the sentence, with directions to the trial court to correct the judgment and sentence to include a statement that the combined total of total confinement and community custody could not exceed the maximum term, as required by *Sloan*. *Id.* at 605-606.

In two recent cases Division III of the Court of Appeals also approved the *Sloan* analysis. In *State v. Hibdon*, 140 Wn. App. 534, 166 P.3d 826 (2007), the defendant had been sentenced for delivering

marijuana. *Id.* at 536. The standard range was 51-68 months in prison, and the court imposed the statutory maximum of 60 months. *Id.* The parties mistakenly believed that community placement was not required, so the court did not order it. *Id.* The defendant later demanded that the court impose 12 months of community custody and reduce his prison sentence by 12 months to accommodate the community custody requirement. *Id.* at 537. Division III rejected the request and used the analysis from *Vanoli* and *Sloan. Hibdon*, at 538. Division III also held that the trial court erred when it did not impose community custody and remanded for sentencing. *Id.* at 538-39. The court approved of imposing a term of confinement, and “such community custody to which the offender may become eligible.” *Id.* at 539.

In *State v. Torngren*, 147 Wn. App. 556, 196 P.3d 742 (November, 2008), the defendant was sentenced to 60 months in prison, to be followed by 9-18 months of community custody for third degree assault and felony eluding. *Id.* at 560. Again, Division III used the *Sloan* analysis in affirming the sentence. *Torngren*, at 566.

Recently, Division I departed from its own holding in *Sloan*. See *State v. Linerud*, 147 Wn. App. 944, 197 P.3d 1224 (Dec. 29, 2008). In *Linerud*, Division I held that “a sentence is indeterminate when it puts the burden on the DOC rather than the sentencing court to ensure that the

inmate does not serve more than the statutory maximum.” *Id.* at 948.

Division I soon followed *Linerud* with a similar holding in *State v. Berg*, 147 Wn. App. 923, 198 P.3d 529 (2008).

In another Division I case, *State v. Davis*, 146 Wn. App. 714, 192 P.3d 29 (2008), the court affirmed the trial court which ordered an exceptional sentence down on the confinement portion of the sentence in order to include the term of community custody without exceeding the statutory maximum. *Id.* at 719-22. There, the trial court felt that the additional community custody was more important for the sentence of that offender than additional incarceration. *Id.* at 718.

At this time, neither Division II nor Division III have joined Division I in abandoning *Sloan*. It should also be noted that Division I is still divided on the issue, as shown in its recent decision upholding *Linerud* in *State v. Hagler*, ___ Wn.2d ___, ___ P.3d ___ (2009) (No. 61107-1, 2-1 decision). Justice Ellington’s dissent in *Hagler* criticized the court’s ruling in *Linerud*, and suggested that Division I should return to its holding in *Sloan*. *Id.* (slip op. dissent at 1).

This court should continue to follow the reasoning set forth in *Sloan*. Although sex offenders may accrue earned early release credits under RCW 9.94A.728, the Legislature intends that that period be spent on community custody. The *Sloan* and *Vanoli* analysis remain the best way

for sentencing courts to follow the sentencing scheme intended and mandated by the Legislature, without risk of a defendant serving longer than the statutory maximum.

The Legislature recognized that earned early release could introduce a level of uncertainty in the sentence. RCW 9.94A.030(16) specifically addresses the effect of the application of the earned early release provisions on a defendant's sentence. Under RCW 9.94A.030(16):

The fact that an offender through earned early release can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.

Linerud acknowledges the full definition of “determinate sentence” under RCW 9.94A.030, but the court does not discuss or answer the question of the Legislature’s authority to define “determinate sentence” within a statutory sentencing scheme. See *Linerud*, at 950, n. 14. Under *Linerud*, and the defendant’s reasoning, any sentence where a defendant is eligible for earned early release is “indeterminate” because DOC decides when to release a defendant to community custody. Yet RCW 9.94A.030(16) specifically states that early release does not create an indeterminate sentence.

A sentencing court is limited to the power and options authorized by the Legislature. The Legislature authorizes the Sentencing Guidelines Commission (“SGC”) to set the ranges of community custody for various offenders. The Legislature mandated that the courts sentence sex

offenders to the community custody ranges determined by the SGC, in addition to a period of incarceration. The Legislature did not grant the courts the authority to modify or limit the period of community custody other than by the expiration of the statutory maximum. The Legislature has the power to create the SRA and to define its terms, including the term, “determinate sentence.” By definition there may be variability of a sentence caused by earned early release, but the sentence remains determinate.

The court in the present case imposed a determinate sentence, as required by law. The court sentenced defendant to 33 months incarceration, and 36 to 48 months of community custody. CP 30-44. The judgment and sentence expressly states:

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense.

CP 30-44 at paragraph 4.6. In addition, the language “Total time in custody and on [community] custody not to exceed statutory maximum of 60 months,” was added to the judgment and sentence. CP 30-44 at paragraph 4.6. Presumably, defendant could earn early release time of up to 1/3 off his incarceration per RCW 9.94A.728(1)(c). Defendant’s community custody will consist of any earned early release time awarded

by DOC, or whatever portion of the term of community custody that may be served until expiration of the statutory maximum term. The sentencing court committed no error.

4. THE STATUTORY SENTENCING SCHEME ENACTED BY THE LEGISLATURE DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

The doctrine of separation of powers comes from the constitutional distribution of the government's authority into three branches. The purpose of the doctrine is to prevent one branch of government from aggrandizing itself or encroaching upon the "fundamental functions" of another. *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). But because the three branches are not "hermetically sealed," the separation of powers doctrine allows the government a measure of "flexibility and practicality." *Id.*

The test for determining whether separation of powers is violated reflects the concern for the independence of each branch as well as the fact that some overlap is allowed:

The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

State v. Moreno, 147 Wn.2d 500, 505-506, 58 P.3d 265 (2002), (quoting *Carrick v. Locke*, 125 Wn.2d at 135).

The fixing of legal punishment is exclusively a function of the Legislature. *See State v. Ritchie*, 126 Wn.2d 388, 394, 894 P.2d 1308 (1995); *State v. Ammons*, 105 Wn.2d 175, 713 P. 2d 719 (1986). The sentencing of a defendant is the province of the judiciary, provided the court is acting within the authority granted to it by the Legislature. *See Ammons*, 105 Wn.2d at 181. Yet, the Legislature also has the authority to delegate sentencing power to State agencies. *State v. Bryan*, 93 Wn.2d 177,181, 606 P.2d 1228 (1980).

Under the SRA, the Legislature has empowered the courts to impose determinate sentences, within an appropriate standard range, and not to exceed a maximum statutory term. *See* RCW 9.94A.505(2)(a)(i), RCW 9.94A.505(5). Hence, when the court sentences a defendant to a standard-range sentence, not to exceed the statutory maximum, the court has acted within its authority. The Legislature has also directed DOC to calculate an offender's earned early release time and to schedule an offender's expected release date. *See* RCW 9.94A.728(1)(b)(iv). Hence, when DOC calculates an offender's earned early release time and schedules his release date for a term less than what the court ordered the agency is acting within its authority.

Defendant claims that the sentencing court improperly delegated its sentencing authority to DOC when it left defendant's actual sentence up to DOC to decide at a later date. *See* Appellant's brief at 25. Yet defendant fails to address the fact that it is the Legislature, not the court,

that directed DOC to calculate defendant's earned release time, after he has earned it, and schedule his release date. Also, the sentencing court imposed a standard-range sentence of 33 months, with a community custody term of 36 to 48 months, not to exceed the statutory maximum term of 60 months. The court, not DOC, has set the term of sentence, as required by RCW 9.94A.715. The court has not delegated its authority when DOC, acting under the direction of the legislature, will later calculate defendant's earned early release time, schedule his release date, and ensure that he serves no more time than that which was imposed by the court.

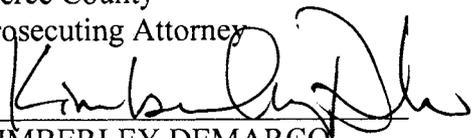
Acting under the directive of the Legislature, the court has imposed a determinate sentence as defined by RCW 9.94A.030(21). The determinations by DOC, acting within its authority also delegated by the Legislature, do not threaten the independence or integrity or invade the prerogatives of the judiciary. There is no violation of the separation of powers.

D. CONCLUSION.

The State presented sufficient evidence for a rational fact-finder to find defendant guilty of failure to register as a sex offender, and defendant was properly sentenced based on that conviction. For the reasons stated above, the State respectfully requests this court to affirm defendant's conviction and sentence.

DATED: May 29, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


KIMBERLEY DEMARCO
Deputy Prosecuting Attorney
WSB # 39218

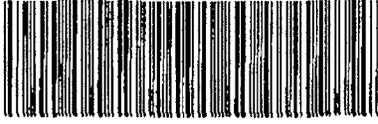
Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

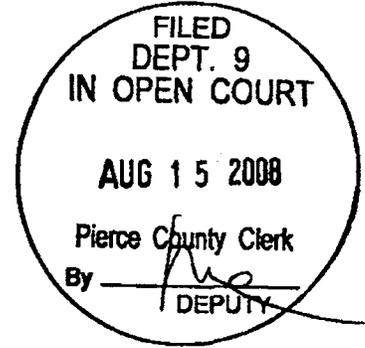
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Date Signature

APPENDIX “A”

Findings of Fact



08-1-00960-4 30346856 FNFL 08-18-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 08-1-00960-4

AUG 18 2008

vs.

STEVEN DOUGLAS FURTWANGLER,

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: BENCH TRIAL**

Defendant.

THIS MATTER having come on before the Honorable Sergio Armijo, Judge of the above entitled court, for bench trial on the 21st day of July, 2008, the defendant having been present and represented by attorney AARON TALNEY, and the State being represented by Deputy Prosecuting Attorney BRYCE NELSON, and the court having observed the demeanor and heard the testimony of the witnesses and having considered all the evidence and the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

- Office Assistant GayLynn Wilke and Community Service Officer Sandi Estep of the Pierce County Sheriff's Department and Lonnie Lawrence testified on behalf of the State.**
- The defendant testified on his own behalf.**

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2. Sandi Estep testified that she is a Community Service Officer for the Pierce County Sheriff's Department, and that most of her job responsibility deals with registering sex offenders.
 3. Ms. Estep testified about the process which sex offenders must go through when they register, including the documentation and the physical location where an offender must register.
 4. Ms. Estep testified that offenders must come to the County-City Building in Tacoma, WA, to fill out their registration paperwork.
 5. GayLynn Wilke testified that she is the records custodian for the Sex/Kidnap Offender Registration Unit of the Pierce County Sheriff's Department.
 6. Ms. Wilke testified that Exhibits #1 and #3 were true and accurate copies of the records she maintains as part of her duties.
 7. Exhibits #1 and #3 are various registration documents filled out and signed by the defendant over a course of approximately three years indicating where he lived during that time frame.
 8. Exhibits #1 and #3 were all admitted at trial after the appropriate foundation was laid.
 9. The defendant testified that he knew he was required to register as a sex offender.
 10. The defendant stipulated that he had been convicted of an offense that required him to register as a sex offender.
 11. Lonnie Lawrence lived at 6210 S. Alder St. in Tacoma, WA.
 12. On 7/7/04, and again on 5/29/07, the defendant registered with the Pierce County Sheriff's Department. On both dates the defendant listed 6210 S. Alder St. in Tacoma, WA, as his address.

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13. Ms. Lawrence testified that the defendant was dating her daughter and for a time lived with them at 6210 S. Alder St.
 14. During October of 2006, Ms. Lawrence kicked the defendant out of her home after there was an altercation.
 15. When Ms. Lawrence kicked the defendant out of her house, she obtained a protection order that restricted the defendant from living at 6210 S. Alder St.
 16. After these events, the defendant still came over to 6210 S. Alder St. to do laundry, eat meals, and hang out with his girlfriend, Ms. Lawrence's daughter.
 17. Even though the defendant continued to come over to 6210 S. Alder St., he was not permitted inside the house, and was not permitted to live at that location, ^{except} The defendant was permitted in the mud room/rear porch of the residence, where he ate his meals, visited his girlfriend, and took naps during the daytime hours.
 18. Ms. Lawrence testified that when people called her phone number looking for the defendant, she told them that her number was not the defendant's message phone.
 19. Ms. Lawrence testified that the defendant had clothing, his video game system, and food in her house after he was no longer permitted by her to live there.
 20. The defendant's food was stored in a separate cupboard, and that at times she had taken the defendant with her and her daughter when they went shopping for food.
 21. The defendant testified that he continued to keep his clothes and food at 6210 S. Alder St. after he was told by Ms. Lawrence that he was no longer welcome to live there.
 22. The defendant testified that he visited 6210 S. Alder St. every day, and slept there during the day.

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23. The defendant testified that all of his possessions were at 6210 S. Alder St., that he received mail at that location, that he gave that address to his friends and family to contact him, that he used a computer there to access the internet, and that he used the phone number at that location as a contact number.

24. The defendant testified that he had his dogs at 6210 S. Alder St., and that he never intended to change his registration.

25. The defendant testified that he typically went out at night and was not at 6210 S. Alder St. during the evening hours.

26. The court finds that that the defendant used the house at 6210 S. Alder St. to change clothes, eat, and take a shower, not to live there.

27. The court finds that once Ms. Lawrence told the defendant that he was no longer welcome to live at 6210 S. Alder St., he was effectively a transient.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

II. CONCLUSIONS OF LAW

1. That the Court has jurisdiction of the parties and subject matter.
2. That all relevant events of the crime occurred in Pierce County, in the State of Washington.
3. That STEVEN DOUGLAS FURTWANGLER is guilty beyond a reasonable doubt of the crime of FAILURE TO REGISTER AS A SEX OFFENDER, in that, on or about the 27th day of September, 2007, STEVEN DOUGLAS FURTWANGLER:

A. had previously been convicted of a felony offense that required him to register as a sex offender;

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- B. (1) knowingly failed to comply with the requirement of sex offender registration that the defendant send written notices of a change of address to the county sheriff within seventy two hours of moving to a new residence within the same county; OR
- (2) knowingly failed to comply with the requirement that the defendant who had a fixed residence, send a signed written notice of where the defendant plans to stay to the sheriff of the county where the defendant last registered within forty-eight hours, excluding weekends and holidays, of ceasing to have a fixed residence; and

C. the acts occurred in the State of Washington.

DONE IN OPEN COURT this 15th day of August, 2008.

[Signature]
 JUDGE
 SERGIO ARMIJO

[Signature]
 Pierce County Clerk
 DEPUTY

FILED
 DEPT. 9
 IN OPEN COURT
 AUG 15 2008

Presented by:

[Signature]
 BRYCE NELSON
 Deputy Prosecuting Attorney
 WSB # 33142

Approved as to Form:

[Signature]
 AARON TALNEY
 Attorney for Defendant
 WSB #