

NO. 38635-6-II

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

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

v.

DAVID BROSIUS,

Appellant.

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

09 APR 17 PM 12:33  
STATE OF WASHINGTON  
BY [Signature]  
LEWIS COUNTY

FILED  
COURT OF APPEALS  
DIVISION II

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. RCW 9A.44.130(7) and RCW 4.24.550(6)(b) are unconstitutional due to the Legislature's improper delegation of authority to the local sheriff to classify an offender's risk level, which in turn triggers the offender's duty to report.

2. The information was constitutionally insufficient, omitting essential elements of the charged crime.

3. The trial court erred when it failed to enter written findings of facts and conclusions of law after appellant's bench trial.

Issues Pertaining to Assignments of Error

1. Appellant was convicted of violating RCW 9A.44.130(7), which makes it a felony if a level II or III sex offender fails to report to the county sheriff every 90 days. The classification of a sex offender's risk level is an element of the crime. RCW 4.24.550(6)(b) gives the sheriff sole discretion in classifying a sex offender's risk level and determining whether the reporting duties under RCW 9A.44.130(7) apply. The Legislature has provided no standards or guidelines for determining an offender's risk level. Does this constitute an unlawful delegation of authority?

2. It is a felony for a sex offender, who has a fixed residence and is designated as having a risk level II or III, to fail to report to the county sheriff every 90 days. The information in this case did not allege that appellant had a fixed residence or was designated as having a risk level of II or III. Was the information constitutionally insufficient?

3. Was it error for the trial court to fail to enter findings of facts and conclusions of law following appellant's bench trial?

B. STATEMENT OF THE CASE

Lewis County Sheriff Deputy Brad Borden oversees the sex offender registration and reporting processes for Lewis County. RP 88.<sup>1</sup> He is responsible for classifying the risk level of convicted sex offenders residing there. RP 88. On April 7, 2004, Borden began monitoring appellant David Brosius, who had previously been convicted of a sex offense. RP 89. Borden completed a risk assessment questionnaire and determined Brosius to be a level III sex offender.<sup>2</sup> RP 89-93; CP 37.

Beginning in September 2006, the Washington Legislature enacted a law requiring level III sex offenders to report in person every 90 days

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<sup>1</sup> Unless otherwise stated within the brief, RP citations refer to the transcript for September 22, 2008.

<sup>2</sup> There is no evidence Brosius had been assigned a risk level by any other agency at the time Borden classified Brosius.

to the sheriff of the country where the offender is registered. CP 37; RCW 9A.44.130(7). Brosius' first report date was September 27, 2006. RP 88; CP 35. Prior to that date, Borden had sent out certified letters to all those required to report explaining the reporting process, notifying them of the reporting date, and warning that failure to do so would constitute a felony. CP 5. A second letter was also sent confirming that date. CP 5.

Brosius reported as required on September 27, 2006. CP 41. While reporting in September, Brosius was informed that the next reporting date would be December 20, 2006. CP 42-43. Brosius did not report on that day. CP 45-46.

On December 22, 2006, Borden emailed Brosius' parole officer Connie English at 11:10 in the morning. CP 45, 53. English contacted Brosius. RP 53. Brosius called Borden at noon and said he was coming right in to clear up the matter. CP 45, 53. English also emailed Borden to assure him that Brosius was coming in. CP 53-54. Brosius appeared in Borden's office at 12:30, very concerned about missing the reporting date. CP 46, 55.

Borden read Brosius his Miranda<sup>3</sup> rights and asked him to explain why he had not reported. CP 46-47. Brosius explained he was notified

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<sup>3</sup> Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966).

about the December 20 report date, but did not report because he thought the date would be confirmed via certified letter (as before). Brosius never received confirmation, however, because Bordon did not send certified letters regarding the December reporting process. CP 47. Borden, having been previously instructed to forward all potential sex-offender registration and reporting cases, referred the case to the Lewis County prosecutor. CP 59.

On March 14, 2007, the Lewis County Prosecuting Attorney charged Brosius with felony failure to report and issued a warrant, despite the de minimis nature of the violation. CP 88-92, 106-07.

On June 8, 2007, after a bench trial, the trial court regrettably found Brosius guilty. CP 82. The trial court noted that the prosecutor had proved guilt under the letter of the law, but chastised the prosecutor for not exercising its discretion to pursue cases that were more in line with the purpose of the law. CP 52, 88-91, 106-07.

Immediately after ruling, the trial court sentenced Brosius to only one day in jail and gave him credit for time served. CP 86. No financial obligations were imposed. CP 93. On December 3, 2008, the trial court

formally entered its Judgment and Sentence.<sup>4</sup> RP (12-3-08) 7; CP 10-17.

Brosius timely appeals. CP 1-9.

C. ARGUMENT

1. THE SHERIFF'S CLASSIFICATION OF APPELLANT'S RISK LEVEL UNDER RCW 4.25.550(6)(b) WAS UNCONSTITUTIONAL.

To convict Brosius of failing to report under RCW 9A.44.130(7)<sup>5</sup>, the State had to prove all necessary elements of this crime, including the fact that the Lewis County Sheriff had classified Brosius as a level III sex offender under RCW 4.24.550(6)(b).<sup>6</sup> That statute provides in part:

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<sup>4</sup> The entry of the judgment and sentence was delayed due to several post-trial motions made by the defense. CP 19-28, 95-100; RP (12-3-08) 2-6.

<sup>5</sup> RCW 9A.44.130(7) provides:

All offenders who are required to register pursuant to this section who have a fixed residence and who are designated as a risk level II or III must report, in person, every ninety days to the sheriff of the county where he or she is registered.... Failure to report, as specified, constitutes a violation of this section and is punishable as provided in subsection (11) of this section.

Subsection 11 provides that a person who has been convicted of a felony sex offense and knowingly fails to register is guilty of a class C felony. RCW 9A.44.130(11)(a).

<sup>6</sup> It was the Sheriff's classification of Brosius under RCW 4.24.550 that triggered Brosius' duty to report on December 20, 2006. RCW 9A.44.130(7), see also, State v. Ramos, \_\_ Wn.2d \_\_, 202 P.3d 383, 385 (2009).

Local law enforcement agencies that disseminate information pursuant to this section shall: (a) Review available risk level classifications made by the department of corrections, the department of social and health services, and the indeterminate sentence review board; (b) assign risk level classifications to all offenders about whom information will be disseminated.

When reviewing this language, however, this Court recently found the Legislature's unguided delegation of authority to assign risk levels was unconstitutional and reversed a conviction for failure to report. State v. Ramos, \_\_\_ Wn.2d \_\_\_, 202 P.3d 383, 387 (2009). This case calls for the same result.

It is a fundamental constitutional principle that governmental powers are divided among three separate and independent branches: legislative, executive, and judicial. State v. Osloond, 60 Wn. App. 584, 587, 805 P.2d 263 (1991); U.S. Const. arts. I, II, and III; Wash. Const. arts. II, III, and IV. Separation of powers principles are violated when "the activity of one branch threatens the independence or integrity or invades the prerogatives of another." Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). This separation ensures "the fundamental functions of each branch remain inviolate." Id.

Authority to define crimes and set punishments rests firmly with the legislature. State v. Wadsworth, 139 Wn.2d 724, 734, 991 P.2d 80 (2000).

Specifically, the legislature is responsible for defining the elements of a crime. State v. Evans, 154 Wn.2d 438, 447 n. 2, 114 P.3d 627 (2005). "[I]t is unconstitutional for the Legislature to abdicate or transfer its legislative function to others." Brower v. State, 137 Wn.2d 44, 54, 969 P.2d 42 (1998). The proper delegation of defining an element of a crime requires the legislature provide the other branches adequate direction to a reach a sufficient definition. Ramos, 202 P.3d at 387. A term that is incurably vague may not be delegated to another branch for definition. State v. Sansone, 127 Wn. App. 630, 642, 643, 111 P.3d 1251 (2005).

Reviewing RCW 4.24.550(6), this Court recently concluded the Legislature unconstitutionally delegated its legislative function to the executive branch by permitting local sheriffs unguided and ultimately sole discretion in determining the classification of sex offenders. This court explained:

Here, the sex offender classification statute does not provide any comparable guidance to a local law enforcement agency. At most, RCW 4.24.550(6) instructs a local law enforcement agency to consider offender classifications made by other agencies; however, these prior classifications are not binding on the law enforcement agency. RCW 4.24.550(10). As noted, RCW 4.24.550 itself provides neither standards nor definitions to guide law enforcement agencies in determining an offender's classification. Moreover, even if we were to assume the nonbinding determinations of other agencies provided sufficient guidance to the law enforcement agency, in Ramos's case, there were no such prior assessments for

the Thurston County Sheriff's Office to review. By failing to provide criteria or standards, the legislature has delegated full responsibility for defining offenders' risk levels, an element of a felony, to local law enforcement agencies.

Id. at 387.

This case is no different than Ramos. Deputy Borden testified he alone made the decision to classify Brosius as a level III sex offender pursuant to the authority provided in RCW 4.24.550(6)(b). In making this determination, he relied solely upon his own criteria and assessment of Brosius, having been provided no guidelines or applicable standards by the Legislature. CP 37. Even though another agency later evaluated Brosius' risk level and forwarded its assessment to Borden, Borden did not undertake the process of re-evaluating Brosius' risk level in light of that assessment. RP 105. Instead, he continued to rely on his previous determination of Brosius' risk level.<sup>7</sup> RP 105. Hence, this case is factually and legally indistinguishable for Ramos and reversal with instructions to dismiss the case is required. Ramos, 202 P.3d at 387.

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<sup>7</sup> Even if Borden did consider this subsequent assessment, it would not change the improper delegation of authority. Under RCW 4.24.550(6)(b), Borden was not required to use the later provided report as some kind of guiding factor, only "review" it. Given this, this Court has correctly concluded such reports to be statutorily nonbinding. Ramos, 202 P.3d at 387. Hence, the existence of such a report has no effect on the delegation issue being raised here.

2. THE INFORMATION WAS CONSTITUTIONALLY INSUFFICIENT.

All essential elements of a crime, statutory or otherwise, must be included in a charging document to afford notice to an accused of the nature and cause of the accusation against him. Const. art. 1, § 22 (amend. 10). Appellate courts review a charging document challenged for the first time on appeal under a liberal standard. State v. Johnson, 119 Wn.2d 143, 149-50, 829 P.2d 1078 (1992). But even under that standard, the necessary elements must appear in some form. State v. O'Neal, 126 Wn. App. 395, 414, 109 P.3d 429 (2005).

Here, the information charged:

FAILURE TO REPORT AS A SEX OFFENDER, which is a violation of RCW 9A.44.130(7), the maximum penalty for which is 5 years in prison and a \$10,000 fine, in that defendant on or about December 20, 2006, in Lewis County, Washington, then and there being a person required to report as a sex offender in Lewis County, did knowingly unlawfully fail to comply with the statutory registration requirements by failing to report on the required day for the 90 day reporting requirement as required by RCW 9A.44.130(7); against the peace and dignity of the State of Washington.

CP 103.

This language does not include the elements that Brosius had a fixed residence or that he was a risk level II or III. This is error and the charge must be dismissed. O'Neal, 126 Wn. App. at 415.

3. THE TRIAL COURT ERRED WHEN IT FAILED TO ENTER WRITTEN FINDINGS OF FACTS AND CONCLUSIONS OF LAW AFTER THE BENCH TRIAL.

The trial court must enter written findings of fact and conclusions of law after a bench trial and the court has not yet done so. CrR 6.1(d); State v. Head, 136 Wn.2d 619, 623-24, 964 P.2d 1187 (1998). Although the State submitted findings and conclusions to the trial court here, they were found to be insufficient. Supp. CP \_\_ (sub. no 32). It appears the findings and conclusions were never resubmitted or entered. This is error, requiring remand.<sup>8</sup>

D. CONCLUSION

Because RCW 4.24.550(6)(b) is unconstitutional, this Court should reverse appellant's conviction with instructions to dismiss the case. Alternatively, this court should reverse and dismiss the charge as improperly charged. Alternatively, this court should remand for entry of proper

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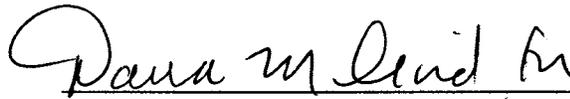
<sup>8</sup> If the findings and conclusions are later entered, appellant reserves the right to review and raise any appellate issues that may arise.

findings of facts and conclusions of law, reserving appellant's right to challenge those.

DATED this 14<sup>TH</sup> day of April, 2009.

Respectfully submitted,

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14<sup>TH</sup> DAY OF APRIL 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMES POWERS  
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BY [Signature]  
DEPUTY

**SIGNED** IN SEATTLE WASHINGTON, THIS 14<sup>TH</sup> DAY OF APRIL 2009.

x Patrick Mayovsky