

NO. 38635-6-11

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID BROSIUS,

Appellant.

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FILED
COURT OF APPEALS
STATE OF WASHINGTON

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

The Honorable Nelson E. Hunt, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. STATE V. RAMOS¹ COMPELS REVERSAL.

Citing Ramos, appellant David Brosius asserts his conviction for failing to report under RCW 9A.44.130(7)² must be reversed because his risk-level classification (the statutory element which triggers criminal liability) was determined solely by the local sheriff via a statutory structure which failed to provide adequate guidelines, resulting in an unconstitutional delegation of Legislative authority. Brief of Appellant (BOA) at 5-8. In response, the State argues Ramos does not apply, because in Ramos, the record showed the Sheriff alone determined Ramos' risk level, whereas here, not only did the local Sheriff classify Brosius as a level III offender, but the Department of Health and Human Services (DSHS) also assessed him as a level III offender. Brief of Respondent (BOR) at 12-21. The State's argument is fundamentally flawed because it is premised on an irrelevant factual distinction.

This case is factually indistinguishable from Ramos, where the local sheriff was solely responsible for determining Ramos' risk

¹ State v. Ramos, 249 Wn. App. 266, 202 P.3d 383 (2009).

level without the guidance of sufficient Legislative criteria. The crux of the State's argument is that Lewis County Sheriff Brad Borden did not exercise sole, unguided discretion because DSHS also assessed Brosius as a level III offender using sufficiently defined criteria. BOR at 20-21. However, the trial evidence and trial court's findings established Borden alone determined Brosius' risk level.

The only testimony offered by the State with regard to Sheriff Borden's risk classification method was as follows:

Q. With regard to Brosius, is he a level two or a level three sex offender?

A. He has been identified as a level three sex offender.

Q. Who made that determination?

A. I did.

Q. On what basis did you make that identification?

A. After review –

[Defense Counsel]: Objection. Relevance.

The Court: What is the relevance?

[Prosecutor]: I did not hear your ruling, Your Honor.

The Court: What is the relevance?

[Prosecutor]: Ultimately the issue here is going to be whether there is a knowing violation of the statute, so I'll withdraw that question, Your Honor.

RP (6-8-07) at 7-8.

Based on this, the trial court entered the following finding of fact: "Prior to June 30, 2006, Detective Borden had designated the defendant, David L. Brosius, as a level three sex offender." CP ___ (sub. no. 86).³ Thus the evidence shows Borden alone classified Brosius' risk level.

The State attempts to establish a different factual record by pointing to evidence produced at the post-trial hearing on a motion for new trial.⁴ During that hearing, the State for the first time produced evidence establishing, two years after Borden classified Brosius' risk level, DSHS assessed Brosius to be a level III sex offender and reported this to Borden. RP (9-22-08) at 101-05. This fact, while interesting, is irrelevant to the constitutional question presented here: does the statutory scheme permit local

³ The state designated this document, but as of the writing of this brief, it has yet to be indexed.

⁴ The constitutionality of the statutory scheme was not at issue in the motion for new trial. The issue was government misconduct.

sheriffs to classify an offender's risk level without providing sufficient criteria and guidance.

The DSHS assessment is legally and factually irrelevant to that constitutional question. First, the Legislature -- while contemplating the existence of these types of assessment -- did not direct the local sheriff to do anything more than "review" them. RCW 4.24.550(6). Second, the evidence does not establish the assessment impacted Borden's classification methodology or his determination in any way. Indeed, Borden testified the DSHS assessment changed nothing since he already classified Brosius as a level III offender several years prior.⁵ RP (9-22-08) at 105. Since the DSHS assessment had no impact on Borden's classification decision in fact or in law, its existence does not establish a relevant fact upon which Ramos can be distinguished. Ramos controls.

Next, the State suggests that since Borden chose to use the Washington State Sex Offender Risk Level Classification to assess Brosius' risk level and since this assessment tool was developed by

⁵ Although the post-trial findings suggest Borden might have relied on the DSHS assessment, Borden's testimony is contrary. Compare CP 21, with RP (9-22-08) at 105. Thus, it is not surprising the Court's oral findings, while recognizing the existence of the DSHS assessment, do not go so far as to suggest Borden somehow used this assessment when determining Brosius' classification. RP (9-22-08) at 218.

DOC pursuant to Legislative directives, then this Court may import those directives into RCW 4.24.550(6) to cure the delegation deficiency identified in Ramos. This argument should be rejected, because Borden's use of this assessment tool was not guided by the Legislature, but merely a personal choice. Had the Legislature directed local sheriff's to use the same guidelines as DOC, then there might not be a delegation problem. But it did not do so. Under the statutory scheme at issue here, the Legislature delegated to Borden unguided and sole discretion under RCW 4.24.550 when assessing Brosius' classification. Borden's personal choice of assessment tools does not cure the constitutional defect in the statutory scheme.

For these reasons, this Court should reverse Brosius' conviction under the reasoning provided in Ramos.

II. THE INFORMATION WAS CONSTITUTIONALLY DEFICIENT.

Brosius asserts the State failed to charge all essential elements of the crime by failing to plead his risk level in the information. BOA at 9-10. In response, the State essentially argues it was not required to reference a risk level in the information because failure to report as a sex offender under RCW

9A.44.130(7) is simply a subset of a general failure to register charge, which was sufficiently charged. BOR at 29-40. The State's position should be rejected because it misconstrues case law and the nature of the offense at issue.

In Ramos, this Court recognized the accused's risk-level classification is an essential element of the crime. It not only noted the trial court's opinion that this was an element,⁶ but added:

The sex offender reporting statute shows a risk level II (or III) classification is essential to constitute a violation of the reporting requirements of RCW 9A.44.130(7). This section specifies, "All offenders ... who are designated as a risk level II or III must report.... Failure to report ... constitutes a violation of this section." (Emphasis added.) Additionally, the charging instrument for Ramos's failure to report mirrors the "risk level II or III" language of the statute.

149 Wn. App. at 272, n.3.

The State acknowledges Ramos' identification of risk level as an essential element, but suggests the above-stated language was not particularly meaningful, because this Court was not directly reviewing a charging document. BOR at 38. Instead, the State

⁶ The findings in the case also suggest risk-level classification is an essential element. See, Appendix A -- finding 2 and conclusion 1.

points to Division I's opinion in State v. Peterson⁷ to support its position. (BOR at 32-35). However, Peterson is easily distinguished.

Peterson was charged and convicted of failure to register as a sex offender under RCW 9A.44.130(1). The main holding of the case was that the information was constitutionally deficient because it failed to allege Peterson "knowingly" failed to register. Peterson, 145 Wn. App. at 675. However, he also challenged the sufficiency of the evidence and the charging document on grounds the state failed to plead and prove whether he failed to register a change of fixed address in the same county, failed to register after a change of fixed residence in a different county, or failed to register after becoming homeless. In other words, he argued the statute created alternate means of committing the offense. Peterson, 145 Wn. App. at 676-77. Although technically moot, the court addressed the issue, because it was capable of repetition on remand. Peterson, 145 Wn. App. at 675-76.

⁷ 145 Wn. App. 672, 186 P.3d 1179 (2008), review granted 165 Wn.2d 1027, 203 P.3d 379 (2009).

The court disagreed the state was required to plead or prove which of the failure to register options was at issue. Significantly, under the facts of the Peterson case, the state could do neither:

Construing the subsections as alternative means of violating this statute creates the strange scenario presented in this case. The State has no evidence that Peterson moved to a fixed address, stayed in the county, moved out of the county, or was homeless during the lapse in his registration. Because the State cannot account for Peterson's whereabouts between the time he left his Everett apartment and registered as homeless, the State cannot prove any of the options. Since Peterson failed to register for more than 30 days, he clearly violated his duty to keep his registration current under all options in the statute. Yet, under Peterson's theory he could not be convicted of violating any one of them. No doubt the legislature did not intend such an absurd result. And, we will not construe statutes in a way that leads to unlikely, absurd [sic], or strained results.

Peterson, 145 Wn. App. at 677.

Accordingly, the court held that for sex offenders like Peterson, there was only one means of committing the crime – knowingly failing to register as required by RCW 9A.44.130(1)(a). The definition of registration and procedure for registration were merely definitional, not elements. Peterson, 145 Wn. App. at 678.

The significant difference here is that Peterson addressed the elements of an offense that is not at issue here. Unlike Peterson, Brosius was not charged with or convicted of failure to

register as a sex offender because he was properly registered.⁸ RCW 9A.44.130(1), (3), (5). His alleged criminal violation was the failure to report as required under RCW 9A.44.130(7). To fall within the ambit of that provision, however, one must be classified a level II or III offender. It is the offender's elevated risk classification that triggers the additional duty to report in person and subjects an offender to punishment for failure to do so, even when he is properly registered. Given this, RCW 9A.44.130(7) cannot be reasonably read as simply creating a mere subset of the general crime of failure to register. Instead, it creates a separate and distinct duty and offense.

The State's failure to recognize the distinct criminal offense created in RCW 9A.44.130(7) leads it to suggest Ramos and Peterson are incompatible. BOR at 38. However, the State is creating a conflict where none exists. Ramos is harmonized with Peterson once the distinction between a failure to register offense and a failure to report offense is acknowledged. Moreover, this Court was presumably aware of Peterson when it issued its opinion in Ramos, but it still concluded the risk-level classification II or III

⁸ Like Brosius, Ramos was properly registered at the time of the offense and was, thus, only charged with and convicted of failure to report. Ramos, 149 Wn. App. at 268.

was a necessary element of proving failure to report. Ramos, 149 Wn. App. at 272, n. 3. In so doing, this Court specifically referred to Ramos' crime as the "failure to report" not the failure to register, suggesting it considered the failure to report a distinct offense. Id. at 268. Because Peterson speaks only to the essential elements for failure to register and not for failure to report, its holding is not applicable here.

Likewise, Peterson can be distinguished based on its unusual factual scenario, which is not present here. There, the State had no idea whether Peterson had moved, had a fixed residence, or was homeless. The only fact that was clear was he had not registered under any of those options. So, the State had to charge the crime generally, otherwise Peterson was not chargeable. Given this, Division I concluded that if it interpreted the statute as Peterson suggested, he would be utterly unaccountable -- an absurd result which the Legislature could not have intended. Peterson, 145 Wn. App. at 677.

Unlike Peterson, however, Brosius was theoretically chargeable under RCW 9A.44.130(7), but the State simply failed to include all the necessary elements. Here, there are no absurd results in holding the State accountable for charging the necessary

element of risk classification given the facts known to it. As such, this case is again clearly distinguishable from Peterson. Ramos controls.

Alternatively, the State argues that a fair construction of the charging language sufficiently implies Brosius was classified as a level II or III risk. (BOR at 39-40). The record does not support this.

The Information charges:

...defendant on or about December 20, 2006, in Lewis County, Washington, then and there being a person required to register as a sex offender in Lewis County, did knowingly and unlawfully fail to comply with the statutory registration requirements by failing to report on the required days for the 90 days reporting requirement as required by RCW 9A.44.130(7)...

CP 22.

This charging language is constitutionally deficient because it does not include any facts establishing Brosius fell within the ambit of RCW 9A.44.130(7). While the charging language alleges Brosius is required to register as a sex offender, there are no facts suggesting the duty to report under RCW 9A.44.130(7) applies to him. The charging language does not specify Brosius' risk classification as level II or III. Moreover, the State failed to include

even a general allegation that Brosius is a person required to report to the sheriff of Lewis County under RCW 9A.44.130(7).

Because there is a class of sex offenders (level I) required to register but not to report, the accused's risk classification is an essential element. Thus, the State must include in the charge facts establishing an offender is not only a sex offender who is required to register, but a sex offender who is required to report in person every 90 days – i.e. that he is a level II or III risk. That was not done here. As such, there is no way to fairly construct the charging language as constitutionally sufficient.

Because the information fails to include all statutory elements, prejudice is presumed. State v. Moavenzadeh, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998) (quoting State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995)). Hence, this Court should reverse Brosius' conviction.

B. CONCLUSION

For the reasons stated herein and all those stated in appellant's opening brief, this Court should reverse appellant's conviction.

DATED this 27th day of July, 2009

Respectfully submitted,

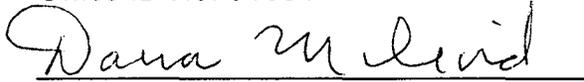
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DIVISION II**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 38635-6-II
)	
DAVID BROSIUS,)	
)	
Appellant.)	

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 27TH DAY OF JULY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF JULY 2009.

x *Patrick Mayovsky*

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