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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

DARREN RONELL SMITH, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable K.A. van Doorninck

No. 08-1-00793-8

BRIEF OF RESPONDENT

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

1. Whether there was sufficient evidence presented to prove defendant violated RCW 9A.44.130(4)(a)(i), when the evidence showed that defendant failed to re-register after his incarceration stemming from violations of his conditions of sentence on a prior sex offense.

2. Whether RCW 9A.44.130(4)(a)(i) is not unconstitutionally vague when it is clear that a defendant incarcerated for violating conditions of his release for convictions of failure to register as a sex offender must re-register upon release from custody.

B. STATEMENT OF THE CASE.

1. Procedure

On February 12, 2008, the Pierce County Prosecutor's Office charged DARREN RONELL SMITH, JR., hereinafter "defendant," with one count of failure to register as a sex offender, one count of unlawful possession of a controlled substance, one count of unlawful possession of a firearm in the first degree, and one count of unlawful possession of a controlled substance – forty grams or less of marijuana . CP 1-2. The case was brought before the Honorable Kitty-Ann Van Doorninck on January 12, 2009. RP 3.

Defendant filed a *Knapstad* motion to dismiss the count of failure to register as a sex offender. RP 4; CP 3-7. Based on *State v. Watson*, 160 Wn.2d 1, 154 P.3d 909 (2007), defendant asked the court to find that the statute requiring defendant to register after release on administrative probation violation was ambiguous and to apply the rule of lenity. RP 4; CP 3-7. Applying the analysis and majority holding in *State v. Watson*, the court denied defendant's *Knapstad* motion to dismiss, and found that the statute was not ambiguous or unconstitutional. RP 10.

An amended information was filed on January 13, 2009, to correct a scrivener's error regarding the date the events occurred. CP 145-46. The charges against defendant were severed and defendant submitted to a stipulated facts bench trial only on the failure to register as a sex offender charge. RP 12-13. The court found defendant guilty of failing to register as a sex offender. RP 27-28. The court entered findings of fact and conclusions of law following the stipulated bench trial. CP 183-186. Following a jury trial on the other charges, defendant was found guilty of unlawful possession of a controlled substance. CP 147.

On January 23, 2009, the court held a sentencing hearing. RP 336. The court entered a judgment and sentence for all convictions. CP 190-204. For the failure to register as a sex offender conviction, the court sentenced defendant to a total of 43 months in confinement to be followed by 36 to 48 months of community custody. CP 190-204; RP 345-46. Defendant filed a timely notice of appeal. CP 179.

2. Facts relating to the failure to register charge

Defendant had a prior 2002 juvenile conviction for Indecent Liberties by Forcible Compulsion. CP 174-78, 183-86 (Findings of Fact 1). As a result, defendant is a registered sex offender with a continuing duty to register. CP 174-78, 183-86 (Findings of Fact 1). Defendant has been registering since June 21, 2002, and has signed forms several times expressly indicating he understood the requirements of the registrations law. CP 174-78, 183-86 (Findings of Fact 2).

Defendant has five previous adult felony convictions on both sex offenses and non-sex offenses. He is on supervision by DOC on all of these convictions. Specifically, defendant's two sex offenses are convictions for failure to register as a sex offender: one from May 19, 2005, and another from July 16, 2007. CP 38-141, 183-86 (Findings of Fact 3).

Defendant was incarcerated on the second conviction for failure to register as a sex offender from July 16, 2007. CP 38-141. On November 20, 2007, he was released from Pierce County Jail and registered his address as 2002 Martin Luther King Way, Tacoma. CP 38-141, 174-78, 183-86 (Findings of Fact 2). The next day he failed a drug test ordered by his supervisor. CP 38-141. On November 26, 2007, defendant failed to

report to his Community Corrections Officer. CP 38-141. On November 29, 2007, defendant was terminated from the “Breaking the Cycle” (BTC) program and returned to the Pierce County Jail. CP 38-141.

On December 6, 2007¹, the Department of Corrections (DOC) filed a report detailing defendant’s current status. CP 38-141. The report referenced all five cause numbers for which defendant was on under supervision. CP 38-141. The report alleged three violations of supervision conditions by defendant. CP 38-141. They were: (1) Failing to report to his Community Corrections Officer on November 26, 2007; (2) Consuming cocaine on November 26, 2007; and (3) Failing to comply with the BTC treatment by being terminated on November 29, 2007. CP 38-141, 183-86 (Findings of Fact 4). The first violations pertained to all five cause numbers. CP 38-141. The second violations pertained to defendant’s 2005 conviction for failing to register as a sex offender. CP 38-141. The third alleged violation did not pertain to either conviction for failing to register. CP 38-141. On December 19, 2007, DOC held a hearing and defendant stipulated that he was guilty to all three violations. CP 38-141, 183-86 (Findings of Fact 4). As punishment for these

¹ The date on the document is listed as 2008. This appears to be a clerical error as the document signatures are dated 2007.

violations, defendant served 60 days in the Pierce County Jail. CP 38-141, 183-86 (Findings of Fact 4).

Defendant was released from custody on these violations on January 25, 2008. CP 174-78, 183-86 (Findings of Fact 4). Defendant did not re-register his address within 24 hours of his release from custody. CP 174-78, 183-86 (Findings of Fact 4). On February 2, 2008, defendant was arrested for Failure to Register as a Sex Offender, amongst other charges. CP 174-78, 183-86 (Findings of Fact 5).

C. ARGUMENT.

1. THERE WAS AMPLE EVIDENCE TO PROVE DEFENDANT VIOLATED RCW 9A.44.130(4)(a)(i), AS HIS INCARCERATION WAS DUE TO VIOLATIONS OF THE CONDITIONS OF HIS RELEASE FOR HIS CONVICTIONS 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 that the State met

the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging 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).

A trial court's conclusions of law are reviewed de novo and generally will be upheld if they are supported by the findings of fact. *In re Poole*, 164 Wn.2d 710, 723, 193 P.3d 1064 (2008). Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Challenged findings of fact should be upheld by this Court and treated as verities on appeal when the findings are supported by substantial evidence. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). 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. Credibility determinations are necessary because witness testimony can conflict; these determinations 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:

[G]reat 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, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

A bench trial was held on defendant's charge of failure to register as a sex offender. RP 27-28. To prove a defendant guilty of failure to register as a sex offender, the State had to convince the court that defendant violated RCW 9A.44.130. The relevant portions of RCW 9A.44.130 are as follows:

(4)(a) Offenders shall register with the county sheriff within the following deadlines...:

(i) OFFENDERS IN CUSTODY. (A) Sex offenders who committed a sex offense... and who... **are in custody, as a result of that offense**, of the state department of corrections, ... or a local jail... must register at the time of

release from custody with an official designated by the agency that has jurisdiction over the offender.... The offender must also register within twenty-four hours from the time of release with the county sheriff for the county of the person's residence....

RCW 9A.44.130. (emphasis added).

In the present case, the only findings of fact challenged by defendant are in Assignment of Error 1, 2 and 3. Brief of Appellant 1. The rest are therefore verities on appeal. The three challenged findings relate to the following findings entered by the trial court:

Findings of Fact

4. Following the Defendant's plea of guilty to three allegations: (1) Failing to report to his community Corrections Officer on 11-26-07; (2) Consuming cocaine on 11-26-07; and (3) Failing to comply with the BTC treatment on 11-29-07. The DOC order imposed 60 days in the Pierce County Jail with credit for time served, beginning on 12-5-07. The Defendant was released from custody on 1-25-08. **The Defendant knew that he had a duty to re-register his address within twenty-four hours of his release from custody but failed to do so.**

Conclusions of Law

3. The Court concludes that based on the totality of the circumstances, and beyond a reasonable doubt, that in the State of Washington, Pierce County, the Defendant, having been previously convicted of Indecent Liberties by Forcible Compulsion (cause number 01-8-01139-9), and twice convicted of Failure to Register as a Sex Offender (respectively cause numbers 05-1-05025-1 and 07-1-02341), all "sex offenses" as defined in RCW 9.94A.030 triggering a duty to register under RCW 9A.44.130, **did knowingly** fail to comply his registration requirements

when, **after being in custody for his felony sex offenses,** the Defendant did fail to register his address within twenty-four hours after being released from custody, **as a result of those sex offenses.**

CP 183-86 (Findings of Fact 4, Conclusions of Law 3).

But, the evidence presented to the trial court supports these findings.

Thus, they were properly entered by the court and should be upheld on appeal.

Defendant has two previous adult convictions for failure to register as a sex offender which required him to register as a sex offender, one from 2005, and the other from 2007. CP 38-141, 183-86 (Findings of Fact 1). Those two convictions also required defendant to comply with certain conditions upon release from custody. The judgment and sentence on his 2005 conviction required that defendant:

report as directed to the court and a community corrections officer;

not purchase, possess, or use any controlled substances without a prescription from a licensed physician. Provide a written prescription for controlled substances to the Community Corrections Officer within 24 hours of receipt. Submit to urinalysis as directed by the Community Corrections Officer.

CP 38-141 (Appendix "E").

The judgment and sentence on his 2007 conviction required that defendant “report as directed to the court and a community corrections officer.” CP 38-141.

On November 21, 2007, the day after defendant was released from Pierce County Jail, he submitted a urine sample for drug testing. CP 38-141. The test came back positive for cocaine. CP 38-141. This was a violation of the conditions of his release on his 2005 conviction. On November 26, 2007, defendant failed to report to his community corrections officer. CP 38-141. This was a violation of the conditions of his release on his 2005 and 2007 convictions. Additionally, defendant was terminated from the “Breaking the Cycle” program on November 29, 2007, which was a violation of the conditions on one of his non-sex offense convictions. CP 38-141.

The Department of Corrections filed a report on five of defendant’s cause numbers and included the alleged violations of: (1) Failing to report to his CCO as directed on November 26, 2007, (2) Consuming a controlled substance, cocaine, on or about November 20, 2007, and (3) Failing to comply with chemical dependency treatment at Breaking the Cycle (BTC) by being terminated from treatment on November 29, 2007. CP 38-141, 183-86 (Findings of Fact 4).

Defendant stipulated that he was guilty of such violations and the DOC hearing officer wrote in the summary of testimony section of the DOC report:

#1, 2, 3) Didn't know needed to report 2x per day to BTC.
Agrees in report #1, 2. Defendant adjustment – details adjustment not good. Defendant states making poor choices.

CP 38-141 (Hearing and Decision Summary)(emphasis added).

This is part of the record and was presented to the court to make a ruling in the stipulation to facts bench trial. Defendant agreed that he violated the first two conditions which specifically relate back to his previous sex offenses. As such, defendant cannot argue there were no facts in the record that related his sex offenses to his subsequent incarceration, specifically when he admitted and stipulated he was guilty to violating them at the DOC hearing.

As a result of defendant's stipulation to the three alleged violations, defendant was returned to Pierce County Jail and ordered by the Department of Corrections to serve 60 days on his two failure to register convictions. CP 38-141, 183-86 (Findings of Fact 4). Upon his release on January 25, 2008, defendant failed to register his address within 24 hours, in violation of RCW 9A.44.130. CP 174-78, 183-86 (Findings of Fact 4). A defendant who is required to register must re-register upon release from incarceration stemming from probation violations flowing

from his sex offense conviction, even if he is returning to the same address where he was previously registered. *State v. Watson*, 160 Wn. 2d 1, 154 P.3d 909 (2007).

Defendant contends that he was not required to re-register his address after his release because he was not “in custody, as a result of” his failure to register as a sex offender convictions as required by RCW 9A.44.130(4)(a)(i). Defendant argues that his incarceration was due solely to the third alleged violation; the termination from the Breaking the Cycle program, a condition of another cause number related only to a drug offense.

But, as described above, defendant violated three conditions related to five different cause numbers, two of which were prior failure to register as a sex offender convictions. These three alleged violations listed in the DOC report were presented in the hearing where defendant himself pleaded guilty to the three violations. The court imposed confinement time as a penalty for these violations. Because the first and second violations related back to his community custody conditions on his convictions for failure to register as a sex offender, this triggered the statutory requirement that defendant needed to re-register his address upon release from custody on a matter related to that offense. *See* RCW 9A.44.130(4)(a)(i). Therefore, defendant’s argument that he was in

custody on an unrelated matter is incorrect; he was in custody for violating the conditions of release of his convictions for failure to register as sex offender, as well as on three other convictions for which he is not required to register.

2. RCW 9A.44.130(4)(a)(i) IS NOT UNCONSTITUTIONALLY VAGUE AS IT CLEARLY REQUIRES A DEFENDANT INCARCERATED FOR VIOLATING COMMUNITY CUSTODY CONDITIONS ON A SEX OFFENSE TO RE-REGISTER UPON HIS RELEASE FROM CUSTODY.

A statute is presumed constitutional, and the burden is on the party challenging it to prove it is unconstitutionally vague beyond a reasonable doubt. *State v. Halstien*, 122 Wn.2d 109, 122, 857 P.2d 270 (1993); *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991); *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). The fundamental purpose of the vagueness doctrine is to give persons who want to comply with the law fair warning of what is prohibited so that vague laws do not "trap the innocent." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972); *see also*, *State v. Crediford*, 130 Wn.2d 747, 766, 927 P.2d 1129 (1996) (J. Sanders, concurring) (*quoting Bouie v. City of Columbia*, 378 U.S. 347, 350, 84 S. Ct. 1697, 12 L.Ed.2d 894 (1964)).

A statute is void for vagueness under the Fourteenth Amendment if it either 1) does not define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited, or 2) if it fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L.Ed.2d 903 (1983); *State v. Groom*, 133 Wn.2d 679, 691, 947 P.2d 240 (1997); *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990).

When a challenged statute does not involve First Amendment rights, the court reviews the statute in light of the facts of each case. *Douglass*, 115 Wn.2d at 182. The challenged law is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the statute and not by examining hypothetical situations at the periphery of the scope of the statute. *Douglass*, 115 Wn.2d at 182-83; *State v. Pastrana*, 94 Wn. App. 463, 473-74, 972 P.2d 557, *review denied*, 138 Wn.2d 1007 (1999). A party to whose conduct a statute clearly applies may not challenge it on the ground that it is vague as applied to the conduct of others. *City of Seattle v. Abercrombie*, 85 Wn. App. 393, 400, 945 P.2d 1132, *review denied*, 133 Wn.2d 1005 (1993).

The essential principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L.Ed.2d 432 (1997).

A statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366, 78 A.L.R. 4th 1115 (1988). Neither "impossible standards of specificity" or "mathematical certainty" are required, because some degree of vagueness is inherent in any use of language. *Halstien*, 122 Wn.2d at 117 (quoting *Eze*, 111 Wn.2d at 26-27); *Haley*, 117 Wn.2d at 740. Courts are to recognize that uncertainties lurk in most English words and phrases and that the English language is simply not as precise as a mathematical equation. *Douglass*, 115 Wn.2d at 179; *Eze*, 111 Wn.2d at 27. If a person of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement, the ordinance is sufficiently definite. *Eze*, 111 Wn.2d at 27; *State v. Motherwell*, 114 Wn.2d 353, 369, 788 P.2d 1066 (1990).

The court does not analyze portions of a statute in isolation when addressing a vagueness challenge; instead, a statute is viewed as a whole to see if it has the required degree of specificity. *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 741, 818 P.2d 1062 (1991).

In the present case, defendant was required to register as a sex offender and abide by the conditions set forth in RCW 9A.44.130. CP 174-78. The relevant portions of RCW 9A.44.130 are as follows:

(4)(a) Offenders shall register with the county sheriff within the following deadlines...:

(i) OFFENDERS IN CUSTODY. (A) Sex offenders who committed a sex offense... and who... **are in custody, as a result of that offense**, of the state department of corrections, ... or a local jail... must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender.... The offender must also register within twenty-four hours from the time of release with the county sheriff for the county of the person's residence....

RCW 9A.44.130. (emphasis added).

Defendant's argument the statute is unconstitutionally vague is without merit. The evidence described above shows defendant was in custody for violating the conditions of his release on his convictions for failure to register as a sex offender. This is precisely what the statute means when it reads "in custody, as a result of that offense." There is no confusion whereby a reasonable person would not be able to understand this requirement. Because defendant violated the conditions of his release on his convictions for failure to register as a sex offender, he should have known that he was required to register as a sex offender as the statute clearly requires.

The Washington State Supreme Court has also addressed this issue in *State v. Watson*, 160 Wn.2d 1, 154 P.3d 909 (2007). In that case, the defendant was convicted of child molestation in the first degree which

required him to register as a sex offender. *Watson*, 160 Wn.2d at 4. After he was released from prison, the defendant was ordered to comply with certain community custody provisions. *Watson*, 160 Wn.2d at 4. He violated three, and was sent back to serve an additional 60 days in jail. *Watson*, 160 Wn.2d at 4. Upon release, the defendant returned to his previous residence, but failed to re-register within 24 hours, violating RCW 9A.44.130. *Watson*, 160 Wn.2d at 5.

The defendant in *Watson* appealed his conviction and argued that the registration statute was unconstitutionally vague as to whether it required re-registration when a sex offender was in custody due to violating conditions of his or her community custody for the sex offense and returned to the same address. *Watson*, 160 Wn.2d at 8. The court looked to previous case law and found that “incarceration for probation violations ‘relates back to the original conviction for which probation was granted.’” *Watson*, 160 Wn.2d at 8 (quoting *State v. Eilts*, 94 Wn.2d 489, 494 n. 3, 617 P.2d 993 (1980); see also *State v. King*, 130 Wn.2d 517, 522, 925 P.2d 606 (1996); *State v. Whitaker*, 112 Wn.2d 341, 342, 771 P.2d 332 (1989)).

Thus, the court concluded that the defendant's 60 days in custody for violation of his community custody conditions were the result of his sex offense. *Watson*, 160 Wn.2d at 9. This therefore triggered the requirement that he re-register upon release and led the court to hold the statute was not unconstitutionally vague. *Watson*, 160 Wn.2d at 9. The court reasoned in their holding "ordinary people need not guess blindly at the meaning of RCW 9A.44.139(4)(a)(i); rather, they can obtain clarification from other sources." *Watson*, 160 Wn.2d at 11.

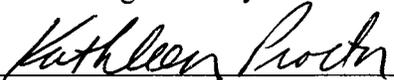
The present case is similar to *Watson* in that defendant's incarceration stemmed from violations of his conditions of release on his two sex offense convictions for failure to register as a sex offender. These conditions of release placed defendant on probationary status just like the defendant in *Watson*. Because the court has already addressed this issue and the present case is similar in facts to *Watson*, this court, bound by precedent, should find that defendant has failed to show this statute is unconstitutionally vague.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: August 24, 2009.

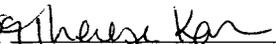
GERALD A. HORNE
Pierce County
Prosecuting Attorney

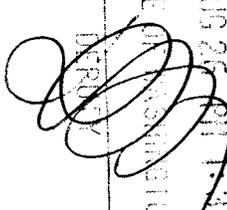

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Chelsey McLean
Rule 9 Legal Intern

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.

8/25/09 
Date Signature

09 AUG 26 01:17:27
STATE OF WASHINGTON
BY 
DEPUTY
COURT OF APPEALS
DIVISION II