

NO. 38893-6-II

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

STATE OF WASHINGTON,

Appellant

v.

JAMES L. GREEN,

Respondent

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

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

The Honorable Michael J. Sullivan, Judge

APPELLANT'S OPENING BRIEF

DAVID BUSTAMANTE, WSBA #30668
Attorney for Appellant

DAVID J. BURKE
PACIFIC COUNTY PROSECUTING ATTORNEY
P.O. Box 45
South Bend, WA 98586
(360) 875-9361

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I. ASSIGNMENTS OF ERROR

1. The court erred by dismissing the charges against Mr. Green, either on the ground that the charges violated the state and federal constitutional prohibitions against double jeopardy, or on the ground that the charges violated the mandatory joinder rule.

2. The court erred by issuing an order that unlawfully infringed on the prosecutor's discretion to decide when to charge and not to charge offenses.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Where a level 2 or level 3 sex offender is required under RCW 9A.44.130 to register with the county sheriff at least once every ninety days, and when the State is aware, at the initial time of charging, that the sex offender has failed to register for more than one consecutive ninety-day period but has initially elected to charge the offender with only one violation, and the defendant is acquitted of this initial charge, is the State thereby prohibited, on double

jeopardy grounds, from subsequently charging the same defendant, under a separate cause of action, with failure to comply with RCW 9A.44.130 during a different ninety-day period?

2. Where an offender is required under RCW 9A.44.130 to register at least once every ninety days, and the offender fails to register for more than one consecutive ninety-day period, does the offender commit the "same offense" or a different offense for purposes of double jeopardy?

3. What is the unit of prosecution for the crime of failure to comply with the sex offender registration statute, RCW 9A.44.130, where the statute mandates for certain offenders, that they periodically re-report to the sheriff?

4. Is the second prosecution barred by the mandatory joinder rule?

5. Are the two crimes charged "related offenses" within the meaning of Court Rule 4.3.1(3)?

6. If this matter is subject to the mandatory joinder rule, should the "ends of justice" exception apply to a second prosecution

for a related offense where the prior acquittal was based on a material misstatement of the law?

7. As a general rule, when the State is aware, at the initial time of charging, that there is probable cause to charge a defendant with more than one crime not amounting to "same criminal conduct," and the State elects to charge only one of the said crimes, does the court have the power to prevent the prosecution from proceeding, on the ground that the timing of the separate prosecutions may unfairly result in a higher offender score, and consequently more incarceration time under the sentencing guidelines, than if the defendant had been simultaneously charged with all of the known crimes at the time of the initial charging decision?

III. STATEMENT OF THE CASE

On May 2, 2008, the defendant was charged in Pacific County Superior Court, under Cause No. 08-1-00054-9, with one count of failing to register as a sex offender, with the date of the alleged offense being "on or about July 9, 2007." *Information, Cause No.*

08-1-00054-9, dated May 2, 2008, attached herewith as Appendix A.¹ In the charging document, the State alleged that Mr. Green "did knowingly fail to comply with the requirements of RCW 9A.44.130, to wit: the requirement that the defendant, having a fixed residence and having designated [*sic*] as a risk level II or III, report every ninety days to the sheriff of the county where the defendant is registered, in violation of RCW 9A.44.130(7)." *Id.*

The matter came before the Pacific County Superior Court on September 18, 2008, for bench trial. *Court's Memorandum Verdict After Bench Trial, Cause No. 08-1-00054-9, filed on September 18, 2008, attached herewith as Appendix B.*² At trial, the court found that the State had failed to prove an "essential element" of the offense, namely, that the defendant had a "fixed residence" on or about July 9, 2007, and returned a verdict of not guilty. *Id.* The court entered a Judgment of Acquittal on September 18, 2008. *See Judgment of Acquittal in Cause No. 08-1-00054-9, dated September*

¹¹ This document was transmitted to the Court of Appeals pursuant to the State's Designation of Record, but was not assigned a Clerk's Papers reference number.

² This document was also transmitted pursuant to the State's Designation of Record, but was not assigned a Clerk's Papers reference number.

18, 2009, attached herewith as Appendix C.³ At the time of this trial, neither the court nor the parties were aware of a recent case, *State v. Peterson*, 145 Wash. App. 672 (2008), that speaks directly to the issue of whether the defendant's having a "fixed residence" is one of the essential elements of the crime of failing of register as a sex offender. CP 42-46.

On October 13, 2008, the State again charged James Green with one count of failing to register as a sex offender, under Pacific County Superior Court Cause No. 08-1-000162-6, with the date of offense being on or about October 8, 2007. CP 1-2. This Information was subsequently amended, on December 12, 2008, to correct the charging language; but the date of the offense was not altered. CP 12-13. The general nature of the allegation was that James Green was required to register every ninety days as a level two sex offender. CP 3-5. He had registered with the Pacific County Sheriff on April 7, 2007, and then did not report again until April 29, 2008. CP 3-5. As per the State's Bill of Particulars, filed

³ This document was also transmitted to the Court of Appeals, and no Clerk's Papers reference number was assigned.

on December 8, 2008, the State took the position that a separate crime is committed each and every time that a person is required to register as a sex offender and fails to do so. CP 6, 7-10, 11. Under this logic, Mr. Green would have committed at least three separate offenses between April 7, 2007, and April 29, 2008.⁴

The defendant filed a motion to dismiss the new charges on January 5, 2009, alleging that the filing of another case against Mr. Green for the same offense violated the mandatory joinder rule, and alternatively, violated the constitutional prohibition against double jeopardy. CP 14-18. The defendant cited *State v. Lee*, 132 Wn.2d 498, 501, 939 P.2d 1233 (1997), for the proposition that offenses are "related" under the mandatory joinder rule "if they are within the jurisdiction and venue of the same court and are based on the same conduct." CP 14-18. The defendant also argued that, in determining whether the filing of the new charge violated the prohibition against double jeopardy, the court should determine what "unit of

⁴ The Bill of Particulars incorrectly states that Green did not re-register until July 24, 2008, but this discrepancy does not alter the essential theory of the state's case, i.e., that within the period of 12 months or more, Mr. Green would have been required to re-register at least three additional times.

prosecution" the legislature intended as punishable under the specific criminal statute. *Id.* The defendant argued that, since the statute in this case is ambiguous as to the unit of prosecution, the rule of lenity should apply pursuant to *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1071 (1998). *Id.* The defendant likened the facts of his case to those of *State v. Westling*, 145 Wn.2d 607, 40 P.3d 669 (2002), in which a defendant was unlawfully charged with three separate counts of second degree arson when a single fire, set by him, resulted in damage to three different automobiles. *Id.*

The State responded to the defendant's motion to dismiss, arguing that the filing of the second case against Mr. Green violated neither double jeopardy nor the mandatory joinder rule. CP 19-41. The State also argued, pursuant to *State v. Peterson*, 145 Wash.App. 672 (2008), that the non-jury trial in the first case, Cause No. 08-1-00054-9, had been decided incorrectly as a matter of law, since the State should not have been required to prove that Mr. Green had a fixed address, but only that he failed to comply with the requirements of RCW 9A.44.130. *Id.* For this reason, the State

argued that the case should fall under the "ends of justice" exception to the mandatory joinder rule. *Id.* The State also argued that *Westling* did not present an appropriate analogy to the facts of Mr. Green's case. *Id.*

The court entered an order dismissing the case on January 23, 2009. *CP 47.* In its Memorandum on Defendant's Motion to Dismiss, dated January 21, 2009, the court agreed with the State's argument that in the first trial, under the holding of *Peterson*, the State was not required to prove that Mr. Green had a fixed address. *CP 42-46.* Then the court went on to pose, and to answer in the affirmative, an entirely different question: "Should the State be forced to charge all crimes in one information if the State is in possession of all the facts which could result in the State charging all possible charges (in this case, each 'failing to register')." *Id.* The court pointed out that *Peterson* had been decided before Mr. Green's first trial, and suggested that, for that reason, the "ends of justice" exception should not apply to this case. *Id.* In its Memorandum Opinion, the court made the following holding:

Put simply, if the State has information in its possession and that information is the same or almost the same information that the State would rely upon to prove the Defendant's guilt on both counts of failing to register, then the State must charge all counts up front in the same information. To allow otherwise, would be patently unfair and allow the State to "stack offenses and also stack punishments." CP-45.

The Memorandum Opinion also declared, "[T]he Court finds that double jeopardy has attached when the State failed to charge every crime in the same information as noted above." CP 46. The court's Memorandum Opinion did not address the issue of the "unit of prosecution" for the offense of failure to register as a sex offender. CP 42-46. The court also did not specifically rule on the question of whether the two alleged offenses were "related" within the meaning of CrR 4.3.1 (3). *Id.*

The State timely filed this appeal.

IV. ARGUMENT

A. THE PROHIBITION AGAINST DOUBLE JEOPARDY DOES NOT PREVENT THE STATE FROM PROSECUTING JAMES GREEN FOR FAILURE TO REGISTER DURING A DIFFERENT NINETY-DAY TIME PERIOD.

1. The superior court erred in holding that double jeopardy barred the second prosecution.

In dismissing the second prosecution against Mr. Green, the superior court held: "double jeopardy has attached when the State failed to charge every crime in the same information as noted above." CP 42-46. But in so doing, the court did not explain how the second prosecution placed Mr. Green in jeopardy for the "same offense."

The Fifth Amendment provides that "[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb." Washington's declaration of rights provides that "[n]o person shall ... be twice put in jeopardy for the same offense." WASH. CONST. art. I, § 9. Washington's double jeopardy clause is coextensive with the federal double jeopardy clause and "is given the same interpretation the Supreme Court gives to the Fifth Amendment." *State v. Gocken*, 127 Wash.2d 95, 107, 896 P.2d 1267 (1995). Both double jeopardy clauses "bar[] trial if three elements are met: (a) jeopardy previously attached, (b) jeopardy previously

terminated, and (c) the defendant is again in jeopardy 'for the same offense.' ” *State v. Corrado*, 81 Wash.App. 640, 645, 915 P.2d 1121 (1996) (footnotes omitted).

The reason the State's second prosecution of James Green is not barred by the prohibition against double jeopardy is that the violation charged in the second prosecution is simply not "the same offense" as the one charged in the first prosecution. The fact that Green was charged for breaking the same law, in the same manner, approximately ninety days later than was alleged in the first prosecution makes it a different offence for purposes of double jeopardy.

2. Under a unit-of-prosecution analysis, when a sex offender who is required to register every ninety days fails to do so in two consecutive ninety-day periods, he or she commits two separate offenses.

a.) This is a case of first impression in the State of Washington.

A careful search of published cases revealed no prior case addressing the issue of the unit of prosecution for failing to register

as a sex offender where the State alleged that the defendant was required to register with the county sheriff every ninety days as a level 2 or 3 sex offender.

b.) In determining the unit of prosecution, the court must first look to the plain language of the statute.

The proper test for determining whether multiple charges of violating the same crime are barred by double jeopardy is the "unit of prosecution test" and not the "same evidence test." *State v. Adel*, 136 Wash.2d 629, 633-34, 965 P.2d 1072 (1998). Under the "unit of prosecution" doctrine, the court inquires into the question of whether the State may charge several counts of violating a single statute, or only a single count. *State v. Amos*, 147 Wash.App. 217, 226, 195 P.3d 564 (2008) citing *State v. Leyda*, 157 Wash.2d 335, 347 n. 9, 138 P.3d 610 (2006); *State v. Freeman*, 153 Wash.2d 765, 770, 108 P.3d 753 (2005); *State v. Adel*, 136 Wash.2d 629, 635, 965 P.2d 1072 (1998).

The first step in the inquiry is to analyze the criminal statute.

Adel at 635. Here, RCW 9A.44.130(11)(a) provides, "A person who

knowingly fails to comply with any of the requirements of this section is guilty of a class C felony if the crime for which the individual was convicted was a felony sex offense as defined in subsection (10)(a) of this section or a federal or out-of state conviction for an offense that under the laws of this state would be a felony kidnapping offense as defined in subsection (10) (b) of this section." The operative term is the word "any," which denotes that the knowing failure to comply with any one of the requirements is a violation of the statute. If a person is required to register every ninety days, and fails to do so over the course of multiple 90-day periods, then the person has committed multiple violations, and not just a single violation.

Because the plain language of the statute is unambiguous, the court need go no further in its analysis.

c.) If the plain language of the statute does not provide an answer as to the "unit of prosecution," then the court should consider legislative intent.

The proper inquiry in a "unit of prosecution" analysis is what the legislature intended as the "punishable act" under the statute. *Abel* at 634. In interpreting statutes, the court's goal is to "ascertain and give effect to the intent and purpose of the legislature in creating the statute." *State v. Stratton*, 130 Wash.App 760, 764, 124 P.3d 660 (2005), citing *Am. Cont'l. Ins. Co. v. Steen*, 151 Wash.2d 512, 518, 91 P.3d 864 (2004). The court must look for statutory meaning in the wording, the context, and the entire statutory scheme. *Stratton* at 764, citing *State v. Jacobs*, 154 Wash.2d 596, 600, 115 P.3d 281 (2005). Evidence of legislative intent may be clear on the face of the legislation, it may be found in the legislative history, in the structure of the statutes, in the evil the statute is aimed at eliminating, or in any other source. *Freeman* at 773, citing *Ball v. United States*, 470 U.S. 856, 864, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); *State v. Calle*, 125 Wash.2d 269, 777-78, 888 P.2d 155.

The purpose of the sex offender registration statute is to assist law enforcement agencies in their efforts to protect communities against re-offense by sex offenders. *State v. Pray*, 96 Wash.App.

25, 980 P.2d 240 (1999), citing *Laws of 1990, ch. 3 § 401*.⁵

Registration provides law enforcement with an address where they can contact a sex offender. *Id.* Periodic re-registration every ninety days presumably affords the dual public benefits of ensuring that level two and level three offender whereabouts are kept current and of saving the sheriff the expense of having to go out periodically to verify that offenders are still living at the address they last reported. Under this reasoning, the harm caused by each failure to periodically re-register is the frustration or thwarting of the statute's intended purpose. When offenders fail to re-report as required, law enforcement agencies are not assisted in their efforts to protect communities against re-offense by sex offenders. When offenders fail to re-report as required, instead of having offenders periodically communicate to the sheriff that they are still residing at the address

⁵ "The legislature finds that sex offenders often pose a high risk of reoffense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction. Therefore, this state's policy is to assist local law enforcement agencies' efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in RCW 9A.44.130." *Laws of 1990, ch.3 §401.*

last reported, the sheriff must invest resources in seeking out offenders in an effort to verify their current whereabouts.

Logic would dictate that, after each ninety-day period, a separate harm has occurred because law enforcement is deprived of verification for that additional length of time. If the offender moves without notifying the sheriff, then each additional 90 days' delay means that the offender will likely be that much more difficult to track down should the need arise.

Under the "legislative intent" analysis, the court should conclude that, where a sex offender is required to register every ninety days, a separate crime is committed each time the offender fails to register as required.

d.) The *Blockberger* test supports an inference that the two instances of failing to register, separated by ninety-day time periods, provide the basis for separate units of prosecution.

If the legislative intent is unclear, the court may turn to the *Blockberger* test. *Freeman* at 756, citing *Calle*, 125 Wash.2d at 777-78, 888 P.2d 155; *Blockburger v. United States*, 284 U.S. 299,

304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). If each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes. *Calle*, 125 Wash.2d at 777, 888 P.2d 155; *Blockburger*, 284 U.S. at 304, 52 S.Ct. 180.

In the instant case, the element of the approximate day the offense is alleged to have been committed is sufficient to provide the basis for a separate unit of prosecution under the *Blockburger* analysis. *Blockburger* looked at, among other things, the *mens rea*, or impulse preceding each alleged criminal act.⁶ *Blockburger* at 303. Clearly Mr. Green's state of mind on or about October 8, 2007, would have been logically distinguishable from his mental state on or about July 9, 2007, the alleged date of the first violation.

Under the *Blockburger* analysis, if each crime contains an element that the other does not, the court presumes that the offenses are not the same for double jeopardy purposes. *Calle*, 777; *Blockburger* at 304. Applying this to Mr. Green's situation, the difference of ninety days is more than sufficient to establish the

⁶ "In the present case, the first transaction, resulting in a sale, has come to an end. The next sale was not the result of the original impulse, but of a fresh one—that is to say, of a new bargain." *Blockburger* at 303.

second crime as separate and distinct both as to the element of time and as to the element of mental state.

B. THE MANDATORY JOINDER RULE DOES NOT REQUIRE THE STATE TO JOIN THE TWO OFFENSES AND DOES NOT JUSTIFY DISMISSAL OF THE SECOND PROSECUTION.

1. The mandatory joinder rule does not prevent successive prosecutions because the two crimes are not "related offenses."

Pursuant to CrR 4.3.1(b), two or more offenses are related offenses if they are within the jurisdiction and venue of the same court and they are based on the same conduct. *State v. Lee*, 132 Wn.2d 498, 501, 939 P.2d 1223 (1997). "Same conduct" is conduct involving "a single criminal incident or episode." *Lee*, 132 Wn.2d at 503.

a.) "Same criminal conduct" is conduct involving "a single criminal incident or episode".

In *Lee*, the State decided to prosecute the defendant for successive charges of trespass and theft in the second degree after Lee allegedly refurbished a house and then collected rent from

various persons under false pretenses, when he did not actually own the house in question and when he did not have the owner's authorization to act on his behalf. 132 Wn.2d at 500. Lee was charged with theft for collecting the monies and then failing to provide the promised housing to prospective tenants. *Lee*, 132 Wn.2d at 500. He successfully moved for a dismissal of the second charge under the mandatory joinder rule. *Lee*, 132 Wn.2d at 501. The Washington Supreme Court subsequently reversed, however, holding that "same conduct," for purposes of deciding which offenses are "related offenses," is conduct involving "a single criminal incident or episode." *Lee*, 132 Wn.2d at 503. The Court cited as examples crimes that are based upon the same physical act or omission and noting that, although temporal or geographic proximity of the offenses will often be present, a series of acts constituting the same criminal episode could span a period of time and involve more than one place, such as one continuous criminal episode involving a robbery, kidnapping, and assault on one victim occurring over many hours or even days. *Lee*, 132 Wn.2d at 503-04.

b.) "A single criminal incident or episode" must be distinguished from "a series of crimes that are part of a common scheme."

Lee held that the mere fact that a series of crimes is part of a common scheme or plan does not, in and of itself, necessarily entail mandatory joinder. Permissive joinder applies where offenses are based upon a series of acts constituting a single scheme or plan *not amounting to a single criminal incident or episode*. *Lee*, 132 Wn.2d at 504.

c.) Green's failure to register should be construed as "a series of acts constituting a single scheme or plan" and not "a single criminal incident or episode".

Turning to Mr. Green's situation, a careful examination of the alleged facts reveals striking parallels to *Lee*. The failure to register over multiple ninety-day periods is more akin to "a series of acts constituting a single scheme or plan" and less akin to "a single criminal incident or episode." Furthermore, although *Lee* held "a single criminal incident or episode" could be conduct spanning

several *days*, it certainly did not suggest that conduct spanning a period of time as long as ninety days should qualify as "a single criminal incident or episode." For this reason, permissive joinder, and not mandatory joinder, should apply to the case at bar. If permissive joinder applies, then there is no *ipso facto* violation for failure of the state to join offenses, and therefore, no grounds for dismissal of the subsequent prosecution.

2. The "ends of justice" exception to the mandatory joinder rule should prevent dismissal of the subsequent prosecution.

Court Rule 4.3.1(3) provides that in cases in which the mandatory joinder rule has been violated, a defendant may successfully move the court to dismiss a charge for a related offense unless the court determines that to do so would defeat the ends of justice. Here, Mr. Green's first trial resulted in an acquittal when the trial court mistakenly concluded that the State had failed to prove a material element of the offense. *Court's Memorandum Verdict After Bench Trial on Cause No. 08-1-00054, attached herewith as Appendix B.*

Thus the acquittal was based purely on a material misstatement of

the law, according to the holding of *Peterson*, namely, that the State was required to prove that Green had a fixed residence. The acquittal also ran contrary to legislative intent.⁷ *See Laws of 1999 sp.s, ch. 6 §1*. Although this would have no bearing if the State's second prosecution of Mr. Green constituted a violation of the prohibition against double jeopardy, it is highly relevant in determining whether the second prosecution is barred by the mandatory joinder rule. When a defendant is acquitted after a bench trial solely because of a material misstatement of the law, then the ends of justice are defeated when a subsequent prosecution is dismissed under the mandatory joinder rule. *See State v. Ramos*, 124 Wn.App. 334, 101 P.3d 872 (2004) (holding that the Supreme Court's ruling in *Andress* created a situation in which the ends of justice would be defeated if defendants could evade re-prosecution by the mere operation of a procedural rule requiring joinder of related offenses).

⁷ "The legislature intends that all sex and kidnapping offenders whose history requires them to register shall do so regardless of whether the person has a fixed residence." *Laws of 1999, sp.s. ch 6, §1*.

C. UNDER THE SEPARATION OF POWERS DOCTRINE, A TRIAL COURT MAY NOT PREVENT THE PROSECUTOR FROM EXERCISING ITS DISCRETION IN MAKING CHARGING DECISIONS, EVEN THOUGH THE TIMING OF SUCH DECISIONS MAY RESULT IN A HIGHER OFFENDER SCORE WHEN SEPARATE OFFENSES ARE CHARGED AT DIFFERENT TIMES.

One of the central concerns of the court, in granting Mr. Green's motion to dismiss, was that if the State had the ability to charge only some of those crimes initially, and then charge other crimes at a later date, it would allow the State to "stack" crimes against a defendant in such a manner that would increase the sentencing range. CP 42-46. This concern over the possibility of unfair results, under hypothetical circumstances, led the superior court to issue a general legal ruling that violates the separation of powers doctrine.

Under the separation of powers doctrine, a trial court may not infringe upon the prosecutor's prerogative to charge or not to charge offenses. *State v. Reid*, 66 Wash.2d 243, 248, 401 P.2d 988 (1965).

"A defendant's constitutional right to equal protection of the laws is not violated by the prosecutor's exercising a discretion in deciding to prosecute or not to prosecute

violation of a criminal statute. The fact that this discretion extends to two or more crimes (instead of only one) does not convert this discretion into an unconstitutional delegation of legislative authority, or constitute a denial of the equal protection of the laws, even though the facts to be proven are very similar, and arise from different parts of the same series of actions by the accused defendant." *Id.*

Under the separation of powers doctrine, the prosecutor controls the timing of a case until a charge is filed. *State v. Phillips*, 66 Wash.App. 679, 685, 833 P.2d 411 (1992), *vacated on other grounds* at 121 Wash.2d 1001 (1993).

In *State v. Cantrell*, 111 Wash.2d 385, 389, 758 P.2d 1 (1988), our Supreme Court cited the following discussion of the separation of powers doctrine from *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 244, 52 L.Ed.2d 752 (1977):

[T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining "due process," to impose on law enforcement officials our personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function." *Cantrell* at 389, citing *Lovasco*, 431 U.S. at 790, 97 S.Ct. at 2049, citing *Rochin v. California*, 342 U.S. 165, 170, 72 S.Ct. 205, 209, 96

L.Ed 183, 25 A.L.R.2d 1396 (1952).

The court should not be able to prevent a prosecutor from exercising its discretion to charge or not to charge multiple offenses merely because of a subjective belief that the power to do so might hypothetically lead to an unfair result in some situations. Although the State acknowledges that, had the first Green trial resulted in a conviction rather than an acquittal, the State could, *hypothetically*, go back and charge Mr. Green again for a different time period, this does not mean that the State actually intended to do so. The State's sole aim in these prosecutions has been to charge and to convict Mr. Green of a single count of failure to register, not multiple counts.

Even if the Court of Appeals does not reach this issue, it should resolve the question as one of "continuing and substantial public interest" where guidance would be helpful to public officers and the issue is likely to reappear in similar cases. *In re Pers. Restraint of Dalluge*, 162 Wash.2d 814, 819-20, 177 P.3d 675 (2008)(quoting *Sorenson v. City of Bellingham*, 80 Wash.2d 547, 558, 496 P.2d 512 (1972).

V. CONCLUSION

The prohibition against double jeopardy does not prevent the State from prosecuting James Green under a separate cause of action because the two violations are not the "same offense." Under a "unit of prosecution" analysis, the two crimes involved in this appeal are separate crimes. An analysis of the plain language of the statute makes clear that the legislature intended each failure to register as a separate unit of prosecution; and a consideration of the legislative intent further bolsters the conclusion that each successive failure to register, under these circumstances, is a "punishable act."

The mandatory joinder rule does not bar the successive prosecution of the two offenses because the two crimes are not "related offenses" within the meaning of CrR 4.3.1. Instead, the two crimes are properly subject to permissive joinder. Even if the court were to find that the two offenses are subject to mandatory joinder, the "ends of justice" exception to the mandatory joinder rule should prevent dismissal of the subsequent prosecution where the trial court acknowledged, in its memorandum opinion, that Mr. Green's

acquittal in the first prosecution was predicated on a misstatement of the law.

Finally, the court should not be permitted to block the State from prosecuting a case simply because the State was in possession of all of the facts necessary to prosecute more than one offense at the time the original charging decision was made and elected not to do so. The separation of powers doctrine clearly gives the prosecutor the discretion to charge or not to charge offenses under separate causes of action.

The Court of Appeals should reverse the dismissal and remand the case to the Pacific County Superior Court for reinstatement of the charge.

DATED this 3rd day of April, 2009.

RESPECTFULLY SUBMITTED,



David Bustamante, WSBA #30668
Deputy Prosecuting Attorney for Appellant
David J. Burke, Prosecuting Attorney
Pacific County, Washington

APPENDIX A

Information of 5/2/08, Cause No. 08-1-00054-9

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,)	
)	NO. 08-1-00054-9
Plaintiff,)	INFORMATION
)	RCW 9A.44.130(7)(11)
vs.)	
)	
JAMES L. GREEN,)	
DOB: 10/19/69)	
)	
Defendant.)	
_____)	

COMES NOW DAVID J. BURKE, Prosecuting Attorney for Pacific County,
Washington, and accuses the defendant of one count of Failing to Register as a Sex
Offender committed as follows:

COUNT I

On or about **July 9, 2007**, in the County of Pacific, State of Washington, the
above named Defendant having been convicted on or about December 31, 1996, of
a sex offense that would be classified as a felony under the laws of Washington, to
wit: State v. James L. Green, Clark County Superior Court Cause #96-1-001004-9
and being required to register pursuant to RCW 9A.44.130, did knowingly fail to
comply with the requirements of RCW 9A.44.130, to wit: the requirement that the

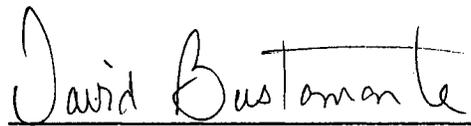
Pacific County Prosecuting Attorney
P.O. Box 45
Courthouse
South Bend, WA 98586
Phone: (360) 875-9361
Fax: (360) 875-9362

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defendant, having a fixed residence and having designated as a risk level II or III,
report every ninety days to the sheriff of the county where the defendant is
registered, in violation of RCW 9A.44.130(7).

Pursuant to RCW 9A.44.130(11)(a) the maximum sentence for this crime is
confinement in a state correctional facility for five years, a fine of \$10,000 or both
such confinement and fine.

DATED this 30th day of April, 2008.



DAVID BUSTAMANTE, WSBA#30668
Senior Deputy Prosecuting Attorney

APPENDIX B

Court's Memorandum Vedict After Bench Trial of 09/18/2008
in Cause No 08-1-00054-9

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PACIFIC

STATE OF WASHINGTON,)	
)	
Plaintiff,)	NO. 08-1-00054-9
)	
vs.)	COURT'S MEMORANDUM
)	VERDICT AFTER BENCH TRIAL
JAMES L. GREEN,)	
)	
Defendant.)	
_____)	

This matter came before the Court on September 18, 2008, for bench trial.

At the conclusion of the State's case-in-chief, the Defendant moved for dismissal. The Court denied Defendant's motion.

At the conclusion of the trial, and after argument, the Court found the Defendant not guilty of failing to register.

The Court found that the State had failed to prove beyond a reasonable doubt an essential element of the crime, (1) that on or about July 9, 2007, the Defendant "had a fixed residence". The State argued that the Court could infer that the Defendant had a fixed residence on or about July 9, 2007, because he, in fact, had a fixed residence on or about March 28, 2005. The Court found that it could not grant the State that inference. Over 27 months passed between March 28, 2005 and July 9, 2007. The State has the burden to prove each and every element of the crime

beyond a reasonable doubt. That includes the element that the Defendant “had a fixed residence on or about July 9, 2007”. The State did not ask any of its four (4) witnesses any question as to whether the Defendant had a fixed residence on or about July 9, 2007. The Defendant might have moved and not registered that change; the Defendant may have been forced to move, become homeless and failed to register. The fact that the State had not charged the Defendant with any other crime regarding failing to register any change in address, does not negate the State’s responsibility to prove that essential element of the crime that the Defendant had a fixed residence on or about July 9, 2007.

The testimony from Sergeant Ekman that he had not seen the Defendant in the Sheriff’s office after March 12, 2007, is not proof that the Defendant had a fixed residence on July 9, 2007. The State relied upon a print card completed on March 28, 2005, that listed the Defendant’s “street address” as 24918 Dell Place, Ocean Park, WA. The State did not inquire of any witness about this address and argued that the Court should find from the face of this document alone (State’s Exhibit #3) that the Defendant’s address was a “fixed residence” on or about 27 months later. Even though the blank on Exhibit #3 only states “street address” and does not list whether that address is a “fixed” address, the Court found that the Court could infer that the Ocean Park address was Defendant’s fixed residence on March 28, 2005, even though the term “fixed residence” was not present on the form, only the words “street address”.

Finally, the State argued that it is not the State’s responsibility to find where the Defendant is residing. The Court finds that the duty of the State is exactly that: to prove beyond any reasonable doubt that the Defendant had a fixed residence on or about July 9, 2007. The Defendant is under no legal obligation to prove any element of a crime, including where he was

living on or about July 9, 2007, or whether it was his fixed residence or some temporary residence or, indeed, whether the Defendant was homeless on July 9, 2007. The burden is the State's. The State cannot shift that burden to the Defendant to prove any element of a crime. The Court's notes do not reflect that the State asked any witness questions about their knowledge of the Defendant's "fixed residence". Whether this choice was intentional or the State just forgot to cover this element has no effect on this decision.

Finally, the parties agree that the "90-day obligation" only applies to a person who has a "fixed residence". The Court did find that the State proved that the Defendant knew that he should have reported to the Sheriff's office every 90 days. He had notice of his Level II Sex Offender status by CCO Foster on two separate meetings between Officer Foster and Defendant. Further, the Defendant signed two documents that stated that he had to report every 90 days to the Sheriff's office if he was classified as a Level II Sex Offender.

The Court did not admit State's Identification #2. This document, if admitted, would not have changed the verdict of the Court. The State, after asked by the Court, informed the Court that Identification #2 would be offered to prove that the Defendant was a Level II Sex Offender [The State later established that fact through their in-court witnesses]. The cover affidavit of Lori Price attached to State's Identification #2 did not state that the following, attached documents were "certified". Said affidavit stated that the attached (documents) were certified by Lorie A. Price to be "copies of the original records of Green, James". However, the Court finds upon reflection, that the Court would have probably admitted the last five (5) pages of State's Identification #2, but not the three pages comprising the "Bulletin" [The Court would have first listened to arguments by both counsel]. However, even if admitted, State's Identification #2

would have no effect on whether the State proved the “fixed residence” element of the State’s Information.

Finally, the Court reserved it’s ruling on State’s Identification #2 for further argument by both counsels. The State did not raise any further argument or discussion regarding Identification #2 until after the State had rested. It would be improper for the Court to remind either party of their opportunity to continue argument regarding the admission of a numbered identification.

In conclusion, the State failed to prove an essential element of the crime as charged by the State in their information, specifically: that the Defendant had a “fixed residence” on or about July 9, 2007. The State cannot shift this burden to the Defendant. The Court cannot assume or infer that the Defendant had a “fixed residence” on or about July 9, 2007, because he had a fixed residence 27 months earlier. The State must prove this essential element of the charged crime.

Decided this 18th day of September, 2008.


JUDGE MICHAEL J. SULLIVAN

APPENDIX C

Judgment of Acquittal of 09/18/2008 in Cause No. 08-1-00054-9

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VIRGINIA LEACH GLENN
PACIFIC CO. WA

[Signature]

SUPERIOR COURT OF WASHINGTON
COUNTY OF **Pacific**

STATE OF WASHINGTON, Plaintiff,

vs. JAMES ERSON

Defendant.

SID:

If no SID, use DOB:

No. 08-1-00054-9

JUDGMENT OF ACQUITTAL AND ORDER OF
IMMEDIATE RELEASE FROM CUSTODY

JDODA

I. BASIS

The defendant was found not guilty in this case on 9-18-2008
(Date)

[] by a jury before Judge MICHAEL SULLIVAN

II. JUDGMENT

The defendant is ACQUITTED of the charge(s) filed herein.

III. ORDER

IT IS ORDERED that the defendant be released from custody immediately on this charge and the case is dismissed with prejudice.

Dated: 9/18/08

David Bustamante

Deputy Prosecuting Attorney

WSBA # 30668

Print name:

[Signature]

JUDGE Print name:

MICHAEL SULLIVAN

[Signature]

Attorney for Defendant

WSBA # 21310

Print name: DAVID S. HATCH

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STATE OF WASHINGTON

PROOF OF SERVICE

BY *cm*
DEPUTY

On the 3rd day of April, 2009, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

James Louis Green
3037 Stackpole Rd.
Ocean Park, WA 98640

On the 3rd day of April, 2009, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

Peter Tiller
The Tiller Law Firm
P.O. Box 58
Centralia, WA 98531-0058

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct,

Signed this 3rd day of April, 2009, at South Bend, Washington.

 David Bustamante
David Bustamante