

NO. 39424-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL VICK,

Appellant.

FILED
COURT OF APPEALS
DIVISION TWO
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STATE OF WASHINGTON
BY [Signature]
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

APPELLANT'S REPLY BRIEF

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E. ARGUMENT

1. WHERE THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION, REVERSAL AND DISMISSAL ARE REQUIRED.

a. The state failed to produce sufficient evidence to support each element of failure to register as a sex offender. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Seattle v. Gellein, 112 Wn.2d 58, 62, 768 P.2d 470 (1989). Here, the State was required to prove that Mr. Vick knowingly failed to comply with the requirement that he register in person as a sex offender, according to statutory requirements. RCW 9A.44.130(7)(a); RCW 9A.44.130. The State failed to meet its burden.

b. Mr. Vick's arrival to register at 5:15 p.m. did not constitute a failure to comply with the statute, nor did it frustrate its goals. In its brief, the State takes great pains to distinguish Mark v. Williams, the case in which the appellant challenged a search warrant which had been executed against his pharmacy. 45 Wn. App. 182, 188, 724 P.2d 428 (1986). In Williams, the Court found 6:20 p.m. to be within "normal business hours," even though the pharmacy's posted hours were only 10 a.m. to 6 p.m. 45 Wn. App.

at 188. The State goes to great lengths to emphasize that Williams was a civil case, rather than a criminal one; the State also notes that the pharmacy's business hours were posted in the window. Resp. Brief at 10. However, the State's reasoning is puzzling.

The State argues that Williams is inapposite, because strict compliance is required in order to carry out the policies underlying the sex offender statute – namely, to protect the public from reoffense by convicted sex offenders. Resp. Brief at 10; RCW 9A.44.130; Laws of 1990, ch. 3, § 401. However, the State has utterly failed to show, either at trial or on appeal, how Mr. Vick's appearance to register -- fifteen minutes late -- frustrated the goals of law enforcement or undermined the statute. It is difficult to imagine how much more available Mr. Vick could have made himself to law enforcement, than he did – once he suffered that flat tire.

c. Because Mr. Vick did not knowingly fail to comply with the statute, reversal and dismissal is the appropriate remedy.

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt that Mr. Vick knowingly failed to register as a sex offender on September 16, 2008, the judgment may not stand. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d

900 (1998). This Court should reverse Mr. Vick's conviction and dismiss the charge against him.

2. BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER AN EXCEPTIONAL SENTENCE, MR. VICK'S CASE MUST BE REMANDED FOR RESENTENCING BELOW THE STANDARD RANGE.

When a court finds mitigating circumstances are established by a preponderance of the evidence, a court may impose an exceptional sentence below the standard range. RCW 9.94A.535(1). The State failed to show, either at trial or on appeal, that the purpose of the sex offender registration statute -- which was enacted to assist law enforcement agencies' efforts to protect their communities -- was frustrated in any way by Mr. Vick's actions. RCW 9A.44.130; Laws of 1990, ch. 3, § 401.

Failure to exercise discretion is an abuse of discretion. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). This Court may reverse a sentencing court's decision if it finds a clear abuse of discretion or misapplication of the law. State

v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (citing State v. Elliott, 144 Wn.2d 6, 17, 785 P.2d 440 (1990)).¹

The trial court abused its discretion in failing to consider an exceptional sentence below the standard range. Therefore, the sentence must be remanded for resentencing.

F. CONCLUSION.

For the foregoing reasons, Mr. Vick respectfully requests this Court reverse his conviction and remand the case for further proceedings, or in the alternative reverse his sentence and remand for resentencing.

DATED this 26th day of March, 2010.

Respectfully submitted,



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Washington Appellate Project (91052)
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¹ When a trial court's exercise of its discretion is "manifestly unreasonable or exercised on untenable grounds, or for untenable reasons," an abuse of discretion exists. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).

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DECLARATION OF DOCUMENT FILING AND SERVICE

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SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF MARCH, 2010.

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