

No. 39424-3-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL VICK

Appellant.

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE.....1

ARGUMENT.....1

**A. SUFFICIENT EVIDENCE SUPPORTS VICK'S
CONVICTION FOR FAILURE TO REGISTER AS A SEX
OFFENDER.....1**

**B. THE SEX OFFENDER REGISTRATION STATUTE
DOES NOT VIOLATE DUE PROCESS NOR IS IT
IMPERMISSIBLY "VAGUE".....12**

**C. THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION WHEN IT DENIED VICK'S REQUEST FOR
AN EXCEPTIONAL SENTENCE DOWNWARD.....17**

CONCLUSION.....20

TABLE OF AUTHORITIES

Cases

<u>City of Seattle v. Eze</u> , 111 Wn.2d 22, 759 P.2d 366 (1988)	13
<u>Fidalgo Holding Co. v. Skagit County</u> , 87 Wn.App. 703, 943 P.2d 341 (1997).....	14
<u>Haley v. Med. Disciplinary Bd.</u> , 117 Wn.2d 720, 818 P.2d 1062(1991).....	14
<u>In re Detention of Albrecht</u> , 129 Wn.App. 243, 118 P.3d 909(2005), <i>review denied</i> , 157 Wn.2d 1003 (2006)	13
<u>Mark v. Williams</u> , 45 Wn.App. 182, 724 P.2d 428 (1986) .	10, 11, 12
<u>State v. Garcia-Martinez</u> , 88 Wn.App. 322, 944 P.2d 1104 (1997), <i>review denied</i> , 136 Wn.2d 1002 (1998)	17
<u>State v. Gentry</u> , 125 Wash.2d 570, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995).....	1
<u>State v. McCraw</u> , 127 Wash.2d 281, 898 P.2d 838 (1995)	16
<u>State v. McGee</u> , 122 Wash.2d 783, 864 P.2d 912 (1993).....	16
<u>State v. Patterson</u> , 37 Wn.App. 275, 679 P.2d 416, <i>review denied</i> , 103 Wn.2d 1005 (1984)	3
<u>State v. Prestegard</u> , 108 Wn.App. 14, 28 P.3d 817 (2000).....	8, 13
<u>State v. Radan</u> 143 Wash.2d 323, 21 P.3d 255, 258 (2001)	16
<u>State v. Reed</u> , 84 Wn.App. 379, 928 P.2d 469 (1997)	2, 9
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	1
<u>State v. Smith</u> , 111 Wn.2d 1, 759 P.2d 372 (1988)	13
<u>State v. Thomas</u> , 150 Wash.2d 821, 83 P.3d 970 (2004).....	2
<u>State v. Vanderpool</u> , 99 Wn.App. 709, 995 P.2d 104 (2000). <i>passim</i>	

State v. Varga, 151 Wash.2d 179, 86 P.3d 139 (2004)2

State v. Watson, 160 Wn.2d 1, 154 P.3d 909(2007) 12, 13

Statutes

RCW 9A.44.1302, 3, 11

RCW 9A.44.130(7)(a)..... 3

FEDERAL CASES

Chapman v. United States, 500 U.S. 453, 111 S.Ct. 1919, 114
L.Ed.2d 524 (1991) 16

STATEMENT OF THE CASE

Without waiving the right to contest facts at a later time and except as cited below, Vick's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

A. SUFFICIENT EVIDENCE SUPPORTS VICK'S CONVICTION FOR FAILURE TO REGISTER AS A SEX OFFENDER.

The test for reviewing a defendant's challenge to the sufficiency of evidence in a criminal case is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." State v. Gentry, 125 Wn.2d 570, 596-97, 888 P.2d 1105(1995). When the sufficiency of the evidence is challenged in a criminal case, 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 claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. Salinas, 119 Wn.2d at 201. State v. Gentry, 125 Wash.2d 570, 597, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995).

Circumstantial and direct evidence have equal weight. State v. Varga, 151 Wash.2d 179, 201, 86 P.3d 139 (2004). Credibility determinations are for the trier of fact and are not subject to review. State v. Thomas, 150 Wash.2d 821, 874, 83 P.3d 970 (2004) (citing State v. Camarillo, 115 Wash.2d 60, 71, 794 P.2d 850 (1990)). In other words, the reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Thomas, 150 Wash.2d at 874-75, 83 P.3d 970 (citing State v. Cord, 103 Wash.2d 361, 367, 693 P.2d 81 (1985)).

The policy of the sex offender registration statutes "is to allow law enforcement agencies to protect their communities, conduct investigations and quickly apprehend sex offenders. . . without *strict compliance* with the registration requirements, this policy is undermined." State v. Vanderpool, 99 Wn.App. 709, 711-714, 995 P.2d 104 (2000), citing RCW 9A.44.130 (HISTORICAL AND STATUTORY NOTES). Thus, "allowing substantial compliance as a defense would conflict with the well-established rule that 'a good faith belief that a certain activity does not violate the law is . . . not a defense in a criminal prosecution.'" Id., quoting State v. Reed, 84 Wn.App. 379, 384, 928 P.2d 469 (1997)(citing

State v. Patterson, 37 Wn.App. 275, 282, 679 P.2d 416, *review denied*, 103 Wn.2d 1005 (1984); see also, Vanderpool, supra(rejecting substantial compliance claim to sex offender registration statute, and noting that the defendant "cites no case law where the substantial compliance doctrine was applied to a criminal statute, nor could one be found).

To convict Mr. Vick of failure to register as a sex offender, the State was required to prove that Mr. Vick knowingly failed to comply with the requirement of the statute that he register in person with the sheriff. RCW 9A.44.130(7)(a). The sections of the statute pertinent to this case read as follows:

(7) All offenders who are required to register pursuant to this section. . . must report, in person, every ninety days to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. . . . Failure to report, as specified, constitutes a violation of this section and is punishable as provided in subsection (11) of this section.

RCW 9A.44.130(7)(emphasis added). Subsection (11) states, in pertinent part, "[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. . . ."

In the present case, in order to be properly considered "reported" as a sex offender, Mr. Vick had to appear in person on September 16, 2008, between the hours of 8:00 and 5:00, to the designated sheriff's office, and also had to complete certain forms. RP 14, 29. If Vick did not complete the forms, he would not be considered in compliance with the reporting requirements. RP 14, 29. Detective Borden said he has offenders report to "the training room that's immediately in --immediately to the right of the front door leading into the Criminal Justice Center ("courthouse" or "Law and Justice Center"). RP 16. Here, Mr. Vick previously reported to the sheriff's office on June 30th, 2008, and had been instructed to return on September 16, 2008. RP 13. However, Detective Borden said that on September 16th, 2008, between the hours of 8:00 and 5:00, Mr. Vick did not report to the Lewis County Sheriff's office as he was required to do. RP 16, 17. Nor did Vick leave any messages on either of Detective Borden's phones telling the detective he (Vick) would be late or otherwise could not make it on September 16, 2008. RP 16, 17. However, Vick did leave a message the following day. RP 17. In the message that Vick left the following morning, Vick said that he was sorry he "couldn't make it, provided . . . a phone number to call him back at, and said

he had a flat tire." RP 17. Borden then called Vick back, and they arranged for Vick to come to the Sheriff's Office right away. Id. & 24.

When Vick arrived the following morning, he told Detective Borden that he realized he had not shown up to the courthouse between 8:00 and 5:00 on September 16th, 2008. RP 26. Vick himself admitted that he was previously told that his next reporting date was September 16, 2008, and that he had to report between the hours of 8:00 and 5:00. RP 34. Vick himself testified that he knew it would be a crime if he failed to report on that date and time. RP 34. He told the same thing to Detective Borden. RP 27. Vick did not claim that he was confused about the dates, and said that he had even circled the date on his calendar. RP 26. Vick said that he did not make it on the proper date and time because he had a flat tire. RP 37, 18. Vick noticed the flat tire "close to 4:00" on September 16, 2008,--the date he was supposed to report by 5:00. RP 36,37. Vick noticed the flat tire, "near the intersection of Melon and South Bold Street, which is near the Fuller's Market area." RP 18, 36,37. Upon seeing the flat tire, Vick then walked a couple of blocks to to Fuller's Market "for one phone call." RP 37. However, rather than calling the detective to explain why he would be late or

unable to report that day, Vick inexplicably used his "one phone call" to call someone to help him with the flat tire. RP 37. Vick says he only "had enough money for one phone call." Vick said he called his "landlord" (Mr. Burgess) *from the pay phone*, but Burgess testified that Vick was *at home* when he called Burgess. RP 37; RP 51,54. That aside, it is difficult to believe that Vick could not have asked to use a non-pay phone at either Fuller's Market or some other nearby business on an emergency basis to call the sheriff's office. Respondent thinks Mr. Vick has his priorities mixed up, considering the fact he was well aware he was facing a felony if he failed to report on time. RP 33,34.

Indeed, Vick also told Detective Borden that there was no reason he (Vick) could not have left earlier to get to his appointment the previous day. RP 19. And Vick also changed the time he supposedly arrived late to the courthouse--first saying it was 5:15 then later saying it was 5:20. RP 18. So who knows what time Vick really got there. Despite all of these facts, Vick still claims that the State did not prove that he "knowingly" failed to comply with the reporting requirements. This is not a persuasive claim and is not supported by the record.

Detective Borden said that Vick *agreed* that he *knew* that he was supposed to have reported to the Sheriff's Office on September 16, 2008, between the hours of 8:00 and 5:00. RP 18. Vick himself testified that he knew he was supposed to report during that time and date. RP 34. Detective Borden said that when Vick came in the following day, the detective showed Vick his original paperwork-- which indicated when and where Vick was supposed to report. Detective Borden said, "I went through the form with him. I showed him the original that I had in my file. He acknowledged that he had been notified of the--the reporting requirements and was where [sic] he had to show up between 8:00 and 5:00 on the 16th of September." RP 18,19, 25,26.

Furthermore, Vick told the detective that he *knew it was a crime* if he failed to report on the pre-assigned date and time frame. RP 26,27. Vick admitted at trial that he knew it was a crime if he failed to show up to report on September 16, 2008. RP 34. Obviously, then, Vick knew he was supposed to report to Detective Borden between the hours of eight and five on September 16th, 2008. RP 34/ 46. He did not do so. Accordingly, the State proved that Vick "knowingly failed to report" on that date. Vick's claim now

that the State did not prove that he "knowingly" failed to comply with the reporting requirements is disingenuous at best.

Again, Vick admitted to Detective Borden that he knew he was supposed to have reported between eight and five on September 16th, 2008. RP 33,34. Vick knew it would be a crime if he did not so report. RP 34. But Vick never made it before 5:00. RP 39. And Vick didn't even remember telling Detective Borden that he had gotten to the courthouse on the correct day, but was 20 minutes late. RP 43. In short, Vick's phoning in the following day just doesn't cut it. The State presented sufficient evidence to prove that Vick knowingly failed to comply with the reporting requirements.

Nonetheless, Vick apparently thinks that because he showed up at the courthouse at 5:20 rather than before the building closed at 5:00, Vick thinks that is good enough. In other words, Vick is making a "substantial compliance" argument. However, substantial compliance is not a defense. Vanderpool, supra; State v. Prestegard, 102 Wn.App. 14, 21-22, 28 P.3d 817 (2001). Nor is the State aware of any case law stating that the doctrine of "substantial compliance" applies to sex offender registration requirements. Indeed, "allowing substantial compliance as a defense would

conflict with the well-established rule that 'a good faith belief that a certain activity does not violate the law is . . . not a defense in a criminal prosecution.'" Vanderpool, at 712, *quoting*, State v. Reed, 84 Wn.App. 379,384,928 P.2d 459 (1997)(other citations omitted). And the fact of the matter is that Vick told the detective *he knew* full well when and where and at what time he was supposed to report. RP 33,34. Plus, Vick had previously properly reported on a prior date in June. RP 33. Vick claims that his failure to show up on the correct date was based "upon a simple failure of machinery." But the point is not whether Vick "really" had a flat tire. The point is that Vick *failed to timely call* the detective to say he would either be late, or could not make it at all--due to that "failure of machinery." But Vick did not make that call until the following morning. RP 40.

While the flat tire may have been a "circumstance beyond his control," Vick's failure to call Detective Borden first to explain why he would be late--was not "a circumstance beyond his control." Brief of Appellant 12. Vick's late telephone call the following day was just too little, too late. As the trial court noted, "it wasn't just a flat tire. It was the fact that you waited until it was so late in the day that with the flat tire, you couldn't . . . meet with Detective Boardman [sic] and perform the registration requirement in a timely

fashion." 6/10/09 RP 6 (sentencing). In short, there is no "tardiness-is-okay," or "substantial compliance is okay" exception to the registration requirements. Vanderpool, supra. Vicks arguments to the contrary have no basis in the law, and are not persuasive.

Vick cites a case involving the serving of an administrative search warrant, where the warrant was served on a pharmacy twenty minutes after the pharmacy closed. Brief of Appellant 9 (citing Mark v. Williams, 45 Wn.App. 182, 188, 724 P.2d 428 (1986)). But Williams is distinguishable. For one thing, Williams is a *civil* case (involving a civil lawsuit). For another, in Williams the Court noted that it found that serving the warrant twenty minutes after closing was permissible because the business owner did not keep his posted hours, and at times permitted customers to enter the pharmacy after 6:00 p.m. Williams, 45 Wn.App. at 188. Importantly, that these hours fluctuated could be seen from *outside* the pharmacy. Id.

This is in contrast to the present case, which involves a government building and a sheriff's office with a public access window that closes at 5:00. RP 21 (sheriff's public access window closes at 5:00). Likewise, the door to the training room--where Detective Borden met with offenders for purposes of registering as

sex offenders--also closed at 5:00. RP 30. Furthermore, even though Detective Borden said that he was in his office inside the sheriff's office until 6:00 on September 16, 2008--unlike in Williams--here there is no way that anyone observing from outside the walls of the otherwise-closed sheriff's office could have known that Detective Borden was actually in his office after 5:00 that day. RP 30.

Furthermore, unlike the civil matter in Williams, here, the "normal business hours" language is found in a criminal statute which necessarily requires strict compliance in order to carry out the policies underlying the statute, one of which is to protect the public. Without requiring strict compliance, the policies of protecting the community and quick apprehension of sex offenders are undermined. State v. Vanderpool, 99 Wn.App. 709, 711-714, 995 P.2d 104 (2000)(citing RCW 9A.44.130) (HISTORICAL AND STATUTORY NOTES). The facts in Williams just do not raise the same concerns as does a situation involving application of a criminal statute, and its reasoning is not relevant here.

Moreover, who decides just how many minutes past normal business hours is "permissibly late," and how many minutes late is "too late"? This is obviously a slippery slope--one that law

enforcement should not be forced to ponder when deciding whether to pursue criminal charges against sex offenders for failing to comply with the registration requirements of a criminal statute. In sum, the situation in the present case is just too different from that of Williams, and Vick's reliance on that case is misplaced.

The bottom line is that the State presented sufficient evidence to show that Vick *knowingly* failed to report to the Sheriff's Office on the required date and time. There is no authority to apply the doctrine of "substantial compliance" to the sex offender registration requirements. Vick's conviction should be affirmed.

B. THE SEX OFFENDER REGISTRATION STATUTE DOES NOT VIOLATE DUE PROCESS NOR IS IT IMPERMISSIBLY "VAGUE."

Vick further claims that the sex offender registration statute is unconstitutional because it does not expressly define "normal business hours" and it is thus impermissibly vague. This argument is without merit.

A statute's constitutionality is reviewed *de novo*. State v. Watson, 160 Wn.2d 1, 5-6, 154 P.3d 909(2007). "The due process clause of the fourteenth amendment to the United States Constitution requires statutes to provide fair notice of the conduct they proscribe." Watson, 160 Wn.2d at 6. Statutes are presumed

constitutional, so Vick has the burden of proving the statute is unconstitutional beyond a reasonable doubt. State v. Smith, 111 Wn.2d 1,5,759 P.2d 372 (1988). Vagueness claims that do not involve first amendment rights are evaluated under the facts of each case. In re Detention of Albrecht, 129 Wn.App. 243, 254, 118 P.3d 909(2005), *review denied*, 157 Wn.2d 1003 (2006). Thus, to succeed on his claim that the statute is vague, Vick must prove beyond a reasonable doubt that, as applied in his circumstances, the statute was so vague that it did not define a criminal offense with sufficient definiteness to allow a person of ordinary understanding to know what conduct it prohibited. See State v. Prestegard, 108 Wn.App. 14,21,28 P.3d 817 (2000).

However, "the fact that some terms in a statute are not defined does not necessarily mean the statute is void for vagueness." Watson, 130 Wn.App. at 378. "Impossible standards of specificity are not required, and 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.'" Id., *quoting*, City of Seattle v. Eze, 111 Wn.2d 22,27,759 P.2d 366 (1988). Furthermore, it has been noted that "[s]ome measure of vagueness is inherent in the use of language."

Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 740, 818 P.2d 1062(1991). "[B]ecause of this inherent vagueness of language, citizens may need to utilize other statutes and court rulings to clarify the meaning of a statute. . . . Such sources are considered "[p]resumptively available to all citizens." Watson, 160 Wn.2d at 6-10(citations omitted).

In the present case, Vick is apparently claiming that the registration statutes are vague because they do not contain a definition of the phrase "normal business hours." This is not fatal however, because when a phrase is not defined in the statute, the term is to be given its plain and ordinary meaning. SanJuan Fidalgo Holding Co. v. Skagit County, 87 Wn.App. 703, 709, 943 P.2d 341 (1997). "Normal business hours" (or "normal office hours") are defined to be, the "portion of the day during which offices are usually open for the transaction of business" by Black's Law Dictionary 1083 (6th ed. 1990). Other dictionary definitions give similar definitions. SanJuanFidalgo at 709, n. 2(citing Webster's Third New International Dictionary at 1567).

Vick claims that because the term "normal business hours" is not expressly defined in the statute, he did not have "fair warning" of what was expected of him under the registration statutes. Vick

apparently now claims that there was no way to know from the statutes that he was expected to report for registration between the hours of 8:00 and 5:00. This is nonsense. First of all, any person of ordinary intelligence would know that the "normal business hours" of a public court house will likely be 8:00 to 5:00. And someone like Mr. Vick, who no doubt has more than a passing familiarity with a court house and its "normal hours" given his criminal history and previous reporting, surely would have no trouble figuring out what "normal business hours" meant in terms of the sheriff's office. Indeed, in the instant case, there is absolutely no doubt that Mr. Vick knew very well that he was supposed to report to Detective Borden on September 16, 2008, between the hours of 8:00 and 5:00. RP 13,18,19,25,26,27,33,34,39,46. There simply is not one iota of evidence in this record to support a claim that Mr. Vick did not report on time because he didn't understand the meaning of the term "normal business hours" as stated in the registration statutes.

Similarly, Vick's argument that the rule of lenity applies here so that we must construe the statute in his favor and against the State is also misplaced. However, because the statute at issue here is not ambiguous, the rule of lenity does not apply. "If a

statute is unambiguous this Court is required to apply the statute as written and “ ‘assume that the legislature mean[t] exactly what it says.’ ” State v. Radan 143 Wash.2d 323, 330, 21 P.3d 255, 258 (2001)(emphasis added); *quoting* In re Custody of Smith, 137 Wash.2d 1, 9, 969 P.2d 21 (1998) (quoting State v. McCraw, 127 Wash.2d 281, 288, 898 P.2d 838 (1995)); State v. McGee, 122 Wash.2d 783, 787, 864 P.2d 912 (1993); Chapman v. United States, 500 U.S. 453, 463-64, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991)(If a statute is unambiguous, the rule of lenity is inapplicable).

In the present case, Vick does not convincingly show that the sex offender registration statute is "ambiguous." As previously discussed above, the failure of the statute to expressly set out the exact hours comprising "normal business hours" does not render the statute "vague," nor does it render it ambiguous. Therefore, the rule of lenity is inapplicable to this case. What this record undeniably shows is that Mr. Vick knew precisely the date and the hours within which he was to report to Detective Borden at the Lewis County court house. RP 13,18,19,25,26,27,33,34,39,46. Vick's arguments to the contrary are not persuasive and his conviction should be affirmed.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED VICK'S REQUEST FOR AN EXCEPTIONAL SENTENCE DOWNWARD.

Like all of his other claims, Vick's argument that the trial court abused its discretion when it "failed to consider an exceptional sentence below the standard range" is also without merit.

Review of a trial court's denial of an exceptional sentence below the standard range is limited to circumstances where the sentencing court (1) refuses to exercise its discretion at all, or (2) relies on an impermissible basis for refusing to impose an exceptional sentence. State v. Garcia-Martinez, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998). For example, "a trial court abuses its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances." *Id.* (emphasis added). None of these factors are present here. Indeed, the record of sentencing shows that the trial court did consider Vick's request for an exceptional sentence downward, and gave well-thought-out, proper reasons for denying that request.

At sentencing in this case, the trial court heard argument from both the prosecutor and the defendant as to what sentence to

impose. 6/10/09 RP 2-6. Then, in response to Vick's request for an exceptional sentence downward because he tried to comply but only got there late because of the flat tire, the trial court stated as follows:

COURT: Well, it wasn't just a flat tire. It was the fact that you waited until it was so late in the day that with the flat tire, you couldn't get here to meet with Detective Boardman [sic] and perform the registration requirement in a timely fashion. And this prosecutor's office has taken the position that they're not going to make any exceptional or give anybody, for lack of a better way to put it, any kind of a break when the situation like what you had occurs. That's their prerogative.

The Legislature--I believe it's three years ago now--made a concerted effort when they were in session to pass not less than 12 specific bills pertaining to the issue of sex offenders and sex offender registration. One of the things that they did was to put in this new scheme of reporting on dates certain 90 days apart. And you're not the first person nor do I suspect are you going to be the last to fall afoul of the fact that you've not done so in a timely fashion. . . . I'm not allowed to ignore the statute and ignore the will of the Legislature, regardless of what I personally think about the changes that the Legislature made. . . .

The long and the short of it is that [the prosecutor] is right, notwithstanding what Mr. Underwood has filed on your behalf [the request for a downward sentence]. As a matter of law, by statute, there really aren't any of the factors that would justify me in going below standard range as far as a sentence is concerned. Given your criminal history and your offender score, the standard range is 14 to 18 months. I agree with [defense counsel]. I don't think it is necessary to impose anything other than the low end of the standard range because I don't consider this to be necessarily the most egregious violation. But it's still a violation.

And like it or not, as long as you're in the status of being a registered sex offender who has to report, it's your obligation under our law to do it and to do it as required within the time frame. That wasn't done here. That's why they prosecuted you and that's why the jury convicted you.

6/10/09 RP 6-8. This shows that the trial court gave thoughtful consideration to Vick's request to impose a sentence below the standard range. Additionally, the trial court's reasons for denying the request are supported by the record and are valid considerations-- given the strict enforcement of the registration statutes.

Vick's allegation that the trial court "failed to consider defense counsel's motion" to impose a downward sentence is absolutely false--as can be seen in the above-set-out passage from the trial court's sentencing decision. The trial court was very well aware that it could impose an exceptional sentence downward but, as the record shows, it simply did not believe Vick's lateness excuse was valid or that being merely late merited a downward sentence. Thus, the trial court clearly refused to grant a downward sentence departure because, as argued elsewhere in this brief, Vick's late arrival to register was not based solely on the flat tire. Rather, Vick's tardiness was based upon Vick's own inexcusable lack of judgment about leaving earlier, and or failing to call the

detective until the next day. Because the trial court absolutely did consider Vick's request for an exceptional sentence downward, and gave valid reasons for not granting that request, there was no abuse of discretion here. Vick's conviction and sentence should be affirmed.

CONCLUSION

For the reasons set out above, Vick's conviction and sentence should be affirmed in all respects.

RESPECTFULLY SUBMITTED THIS 20th day of February, 2010.

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by:


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DECLARATION OF SERVICE BY MAIL

The undersigned declares under penalty of perjury under the laws of the State of Washington that a copy of this response brief was served upon the Appellant by placing said document in the United States mail, postage prepaid, addressed to Appellant's attorney as follows:

JAN TRASEN
WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101

DATED THIS 22nd day of February, 2010.

