

No. 40877-5-II

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

V.

TERRY PETERSON

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BRIEF OF APPELLANT

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ORIGINAL

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## A. Assignments of Error

### Assignments of Error

1. The second amended information fails to include all the essential elements of the crime of failure to register.
2. The tampering with a witness charge should be dismissed for insufficient evidence.
3. The community custody prohibition on pornography is unlawful.
4. The community custody condition that Mr. Peterson obtains a substance abuse evaluation is unlawful.

### Issues Pertaining to Assignments of Error

1. Should the second amended information be dismissed when it fails to include the essential elements that: (1) Mr. Peterson failed to notify the sheriff's office after moving; and (2) he was required to notify the sheriff's office within 72 hours after moving?
2. Should the tampering with a witness charge be dismissed for insufficient evidence when the evidence fails to show that Mr. Peterson tried to induce a witness to testify falsely?
3. Should the community custody prohibition on pornography be stricken as unlawful?

4. Should the community custody condition that he obtains a substance abuse evaluation be stricken as unlawful?

## B. Statement of Facts

### Procedural History

Terry Peterson was charged by second amended information with failure to register and tampering with a witness. CP, 9. Count 1 of the second amended information reads: “On or between December 6, 2009 and March 5, 2010 in the County of Kitsap, State of Washington, the above-named Defendant, having been convicted of a felony sex offense or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony sex offense, (1) did knowingly fail to register or notify the county sheriff; or (2) did knowingly change his or her name without notifying the county sheriff and the state patrol as required by RCW 9A.44.130, contrary to [RCW] 9A.44.130(11).” Mr. Peterson was convicted by a jury of both counts. CP, 58.

Mr. Peterson stipulated that he was convicted on November 29, 1990 of a Class C felony sex offense and that between December 6, 2009 and March 5, 2010 he was required to register as a sex offender. CP, 17.

The Court instructed the jury that a person commits the crime of failure to register if he “failed to provide written notice to the county

sheriff's office with 72 hours after moving." CP, 25, RP, 134. Curiously, the jury instructions list the date range as on or between December 6, 2009 and March 3, 2010. Supplemental CP, \_\_\_.

The jury sent out a question to the court asking, "What is the legal definition of moving as stated in #11 definition 3." CP, 56. The court answered, "The jury has received all instructions in this case." CP, 56.

At sentencing, the trial court calculated Mr. Peterson's offender score on count 1 as "9" and sentenced him to a standard range sentence of 50 months. On count 2, the court calculated his offender score as "7" and sentenced him to a standard range sentence of 43 months, with both sentences to run concurrently. CP, 61. At sentencing, although the court made no mention of community custody conditions, the judgment and sentence includes several conditions. RP, 202, CP, 64. These include a substance abuse evaluation, drug related prohibitions, and pornography. CP, 64.

### Substantive Facts

On November 2, 2009, Mr. Peterson registered his address at 19630 Ashcrest Loop in Poulsbo with Elsie Clotfelter. RP, 96, 88. Prior to that date, he had been living with his mother, Margaret Crist, at 17965 Knoll Road in Poulsbo. RP, 98, 103. Ms. Clotfelter is an elderly woman,

old enough to be Mr. Peterson's grandmother, and a close friend of Ms. Crist. RP, 98, 106. Ms. Crist recalled Mr. Peterson moving out of his mother's house and moving in with Ms. Clotfelter in late 2009. RP, 98. Although he had moved out, Mr. Peterson was always welcome in the home of his mother, including eating, showering, staying, and getting warm. RP, 98. When Mr. Peterson moved in with Ms. Clotfelter, he did not bring any furniture with him. RP, 113. He had just his clothes, alarm clock, backpack, and his textbooks. RP, 113.

In response to the change of address, in early November of 2009 Community Corrections Officer David Payne did a home visit of the Ashcrest residence. RP, 88. Mr. Payne observed that Mr. Peterson had his personal possessions at the residence. RP, 89. Mr. Payne also spoke to Ms. Clotfelter, who confirmed that Mr. Peterson was living with her. RP, 89. Mr. Payne was satisfied that Mr. Peterson was living with Ms. Clotfelter. RP, 89.

Ms. Clotfelter described the living arrangement with Mr. Peterson as "wonderful." RP, 106. He was working hard and going to school, studying hard enough to make the Dean's List. RP, 106. In January, Mr. Peterson would "come and go." He was spending a lot of time with his peers, but he would always call and tell her where he was. RP, 106. He still had personal belongings at her house, including his clothes, alarm

clock, backpack and books. RP, 107. Mr. Peterson never told Ms. Clotfelter he was moving out and never returned his house key. RP, 114.

In February, Ms. Clotfelter recalled at least two occasions when Mr. Peterson stayed at her house. The first was the first weekend of February at Ms. Clotfelter's house and, at her request on February 2, he took her car to get an oil change. RP, 107. The second was around February 25 when she wrote him a check. RP, 109. She believed Mr. Peterson was living with her "off and on." RP, 108. The State impeached Ms. Clotfelter with a prior statement that she had not seen Mr. Peterson for about a month, a statement she did not recall making. RP, 107. Officer Gesell testified that on January 25, 2010 he had a conversation with Ms. Clotfelter and she told him that Mr. Peterson had not lived at her house for at least a month. RP, 125.

Mr. Peterson did not file a change of address form after November 2, 2009. RP, 96. On December 11, 2009, the Department of Corrections issued a warrant for Mr. Peterson's arrest for an unrelated reason. RP, 73.

Poulsbo Police Officer John Halsted attempted to locate Mr. Peterson in early March of 2010. RP, 67-68. Officer Halsted, who was working the graveyard shift, would drive by a couple of addresses in Poulsbo once per night looking for Mr. Peterson's vehicle. RP, 67. The two residences he was checking were the residence of Elsie Clotfelter on

Ashcrest Loop and the residence of Ms. Crist on Noll Road. RP, 68. Officer Halsted started checking these two residences three or four days before March 5, 2010. RP, 67. On March 5, 2010, as Officer Halsted drove past the Noll Street address, he saw Mr. Peterson's vehicle parked out front. RP, 68. Officer Halsted and a back up officer knocked on the door. RP, 68. Mr. Peterson came to the window and Officer Halsted identified himself as a police officer and ordered him to come outside, but Mr. Peterson did not. RP, 69. Eventually, officers entered the house through an unlocked door and arrested Mr. Peterson. RP, 69.

Mr. Peterson regularly did his laundry at his mother's residence because Ms. Clotfelter did not have a washer and dryer. RP, 101. At some point after Mr. Peterson's arrest, Ms. Crist removed some dirty laundry from Mr. Peterson's van and washed it for him. RP, 100.

Ms. Crist testified that at the time of Mr. Peterson's arrest, he was still living with Ms. Clotfelter. RP, 99. The State impeached her with a statement she allegedly made to a police officer that she knew he was not really living there, but Ms. Crist did not recall making that statement. RP, 99-100. Officer Moore testified that he had a conversation with Ms. Crist on March 12, 2010 and at that time, Ms. Crist said she knew her son had violated the failure to register statute because, for the month prior to his

arrest, he was staying at various friend's houses and living in his van and every once in a while sleeping at her house. RP, 145.

The State introduced telephone calls recorded by the Kitsap County Corrections Center between Mr. Peterson and Ms. Crist and Ms. Clotfelter. RP, 45. The voices were identified by Mr. Peterson's Community Correction Officer. RP, 77. In the phone calls, which were difficult to understand, Mr. Peterson references his pending case. RP, 46. In one phone call, Mr. Peterson asked his mother to ask Ms. Clotfelter to say he was living with her. RP, 9. Ms. Crist did not believe it was necessary to convey the message because she knew that Mr. Peterson was living with Ms. Clotfelter. RP, 99, 102. Mr. Peterson said, "Technically speaking, I was living there. I just wasn't staying there." RP, 148. In another call he said he stopped going there in February. RP, 148.

At some point after Mr. Peterson's arrest, he sent Ms. Clotfelter a statement to be notarized. RP, 111. The statement pertained to his living arrangements. RP, 111. Ms. Clotfelter never notarized it and the statement was never introduced into evidence. RP, 111, 172. It is unknown what the statement said.

### C. Argument

#### **1. The second amended information fails to include all the essential elements of the crime of failure to register.**

All essential elements of a crime, statutory or non-statutory, must be included in the charging document in order to give the accused notice of the nature of the allegations so that a defense can be properly prepared. State v. Kjorsvik, 117 Wn.2d 93, 97-102, 812 P.2d 86 (1991). The essential elements rule is of constitutional origin and is also embodied in court rule. A criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense." State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987).

At trial, the State's theory was that Mr. Peterson knowingly failed to provide written notice within 72 hours after moving. The second amended information alleges that he "knowingly fail[ed] to register or notify the county sheriff." This sentence contains two verbs: register and notify. As to the first verb, the State failed to present any evidence that Mr. Peterson had failed to register. In fact, the undisputed evidence was that he was registered at Ms. Clotfelter's residence. The issue was not that he had failed to register; the issue was whether he had failed to provide written notice that he had moved.

The second verb in the information is notify. This verb requires a direct object in order to make a complete thought. Read in context, the sentence reads: He knowingly failed to notify the county sheriff. Of what? This sentence is not a sentence at all, but a fragment. It is worth juxtaposing this first sentence with the next sentence of the information, which reads: He knowingly changed his name without notifying the county sheriff. The second sentence sets forth the element of what Mr. Peterson was required to notify the sheriff of: to wit, that he had changed his name. In order to be a complete thought, the first sentence should read: He knowingly failed to notify the county sheriff of moving.

The second amended information also fails to include any allegation of time. Mr. Peterson had 72 hours from the time he moved in which to re-register. Although the State was not required to prove the exact moment he moved, it was required to prove that the move occurred more than 72 hours prior.

The Court of Appeals has rejected similar arguments to Mr. Peterson's essential element argument in the past. State v. Michael Peterson, 145 Wn. App. 672, 186 P.3d 1179 (2008), review granted, 165 Wn.2d 1027 (2009); State v. Bennett, 154 Wn. App. 202, 224 P.3d 849 (2010). In Michael Peterson, the Court concluded that there is only one way to commit failure to register and that is by violating RCW

9A.44.130(1)(a). The various timelines set out in the statute are not alternative means that need be specifically pled. According to the Michael Peterson case, the information is sufficient if it alleges that the defendant “knowingly fail[ed] to register as required by RCW 9A.44.130(1)(a).” Michael Peterson at 678.

This Court should not follow Michael Peterson for three reasons. First, given that the Washington Supreme Court has granted review of the case, it is of limited persuasive authority.

Second, the holding of Michael Peterson violates the basic principles of the essential elements rule. It is a well established rule that a recitation of no more than a numerical code section and the title of an offense does not satisfy the essential elements rule. Auburn v. Brooke, 119 Wn.2d 623, 836 P.2d 212 (1992) (holding the citation deficient that alleged "9.40.010(A)(2) Disorderly Conduct.") The Court of Appeals in Michael Peterson held that the information must allege that the defendant “knowingly fail[ed] to register as required by RCW 9A.44.130(1)(a).” This, without more, is no better than alleging "9.40.010(A)(2) Disorderly Conduct."

Third, Michael Peterson is distinguishable. The Court in Michael Peterson held that the essential elements that must be pleaded in the information are that the defendant “knowingly fail[ed] to register as

required by RCW 9A.44.130(1)(a).” Although Mr. Peterson’s second amended information references RCW 9A.44.130, it does not reference RCW 9A.44.130(1)(a). Additionally, the second amended information alleges an alternative means of committing the offense, alleging that he either: “(1) did knowingly fail to register or notify the county sheriff; or (2) did knowingly change his or her name without notifying the county sheriff and the state patrol as required by RCW 9A.44.130.” Under the analysis of Michael Peterson, subsection (1) of the second amended information should read “did knowingly fail to register or notify the county sheriff as required by RCW 9A.44.130(1)(a).” Therefore, even if Michael Peterson was correctly decided, Mr. Peterson’s information is still defective.

The remedy for failure of an Information to state all the necessary elements of a crime is dismissal without prejudice. State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995). The Information against Mr. Peterson must be dismissed without prejudice.

**2. The tampering with a witness charge should be dismissed for insufficient evidence.**

RCW 9A.72.120 (1) defines the offense of tampering with a witness.

A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

(a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or

(b) Absent himself or herself from such proceedings; or

(c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

The jury in Mr. Peterson's case was instructed only on subsection (1)(a), having to do with inducing a witness to testify falsely or to withhold testimony.

In reviewing the sufficiency of the evidence to sustain a tampering with a witness charge, the reviewing court must look to the literal words, including the inferential meaning of the words and the context in which they were used, to determine that the words were in fact an inducement to testify falsely or to withhold testimony. State v. Rempel, 114 Wn.2d 77, 785 P.2d 1134 (1990). In Rempel, the defendant called his long time girlfriend from jail after being arrested for attempted rape against her. He told her he was sorry, that he did not "mean it," and asked her to drop the charges. The Supreme Court unanimously held that the statements of the defendant did not constitute an attempt to testify falsely, to withhold

testimony, or to absent herself from the trial. Defendant's actions, while a "nuisance" and a "menace," did not constitute tampering.

Whether the reviewing court finds sufficient evidence frequently turns on the exact phrasing of the comment. In one case, the Court dismissed the case where the juvenile defendant offered his mother \$150 to drop the charges or make it a lesser charge because the request to make it a lesser charge did not require her to absent herself from the proceedings. State v. Jensen, 57 Wn. App. 501, 789 P.2d 772 (1990), aff'd sub. nom. State v. Howe, 116 Wn.2d 466; 805 P.2d 806 (1991). On the other hand, courts have affirmed convictions where the defendant literally told the witness what to do. In State v. Williamson, 131 Wn.App. 1 (1994) the defendant told the witness to recant her testimony. In State v. Scherck, 9 Wn. App. 792, 514 P.2d 1393 (1973), the defendant threatened the witness if he did not "refuse to appear as a witness in the trial." Similarly, in State v. Shroh, 91 Wn.2d 580, 588 P.2d 1182 (1979), the Court upheld a conviction where the defendant asked a witness not to appear on a subpoena.

The record in this case is difficult to review because the State relied on recorded telephone calls that are extremely difficult to understand. There is no transcript of the recordings in the record and the parties did not agree on what they said. The State argued that in the

recorded phone calls, Mr. Peterson said, “Technically speaking, I was living there. I just wasn’t staying there.” RP, 148. This sentence does not try to influence a person to testify falsely, but instead describes his legal peril, distinguishing between “living” in a residence and “staying” in a residence. This was the ultimate question the jury had to decide on the failure to register charge.

Mr. Peterson also asked his mother to ask Ms. Clotfelter to say he was “living” with her. The message was not passed on. Mr. Peterson’s request was not a request that Ms. Clotfelter testify falsely. It was a request that she testify truthfully, i.e. that he was living with her. At the time of his arrest, his personal belongings were at Ms. Clotfelter’s house, he still had a house key, and he was spending some time there, although it was disputed how much time.

The jury was not instructed that in order to convict Mr. Peterson they had to find that he was not living with Ms. Clotfelter. The words “living” and “staying” do not appear in the jury instructions. Instead the jury was instructed that he had to notify the sheriff’s office within 72 hours after moving. The State was correct in its closing argument when it made the following comments about the word “living:” “Elsie Clotfelter, she got on the stand, and she told you that he was living there. But it’s not for Elsie Clotfelter to make that decision. It’s for you, as members of the

jury, to decide whether that was his residence or whether he had moved from that residence.”

Had Mr. Peterson given Ms. Clotfelter specific instructions on how to testify falsely, the conviction might be sustainable. For instance, had he told her, “Tell the jury I was sleeping at your house on March 4,” knowing that he had slept at his mother’s house on March 4, that would be inducing a witness to testify falsely. But asking her to say he was living there in January and February, when his clothing, backpack, books were all at her house during that period, and he spent various nights there, is not an inducement to testify falsely.

The conviction for tampering with a witness should be dismissed with prejudice. Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

**3. The community custody prohibition on pornography is unlawful.**

The Court may not impose a blanket prohibition on pornography. State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008). The prohibition should be stricken.

**4. The community custody condition that Mr. Peterson obtain a substance abuse evaluation is unlawful.**

The Court ordered Mr. Peterson to obtain a substance abuse evaluation as part of his community custody conditions. Community custody conditions must be crime related State v. O’Cain, 144 Wn.App. 772, 184 P.3d 1262 (2008). There is nothing in this case to suggest that the crime was alcohol or drug related. This condition should be stricken.

D. Conclusion

Count 1 of the second amended information should be dismissed without prejudice. Count 2 of the second amended information should be dismissed with prejudice. The community custody prohibition on pornography and the order to get a substance abuse evaluation should be stricken.

Dated this 21<sup>st</sup> day of January, 2011.

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

Thomas E. Weaver  
WSBA #22488  
Attorney for Appellant

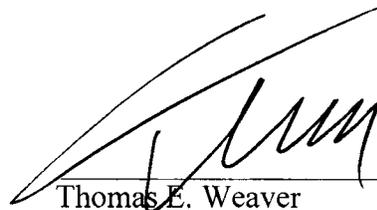


1 On January 21, 2011, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT,  
2 and the SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS, to the Kitsap County  
3 Prosecutor's Office, 614 Division St., MS 35, Port Orchard, and WA 98366-4683.

4 On January 21, 2011, I sent an original, postage prepaid, of the SUPPLEMENTAL  
5 DESIGNATION OF CLERK'S PAPERS to the Kitsap County Superior Court Clerk, 614  
6 Division St., MS 24, Port Orchard, WA 98366-4683.

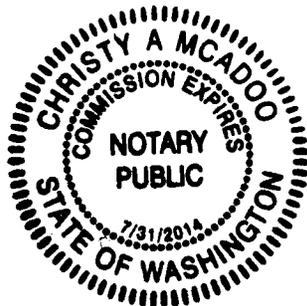
7 On January 21, 2011, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT,  
8 and the SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS, to Mr. Terry A. Peterson,  
9 LEGAL MAIL, DOC # 930854, Coyote Ridge Correction Center, PO Box 769, Connell, WA  
10 99326.

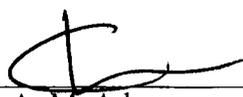
11  
12 Dated this 21<sup>st</sup> day of January, 2011.



13  
14 Thomas E. Weaver  
15 WSBA #22488  
16 Attorney for Defendant

17 SUBSCRIBED AND SWORN to before me this 21<sup>st</sup> day of January, 2011



18  
19   
20 Christy A. McAdoo  
21 NOTARY PUBLIC in and for  
22 the State of Washington.  
23 My commission expires: 7/31/2014  
24  
25