

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 40887-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

vs.

**Homer Taylor, III**

Appellant.

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Grays Harbor County Superior Court Cause No. 09-1-00336-2

The Honorable Judge Gordon Godfrey

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. Mr. Taylor's Failure to Register conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
2. The prosecution failed to prove that Mr. Taylor had been convicted of "any sex offense" for purpose of RCW 9A.44.130.

### **ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

A conviction for Failure to Register as a Sex Offender requires proof that the accused person had been convicted of "any sex offense." Here, the prosecution relied on proof that Mr. Taylor had been convicted of Statutory Rape in the Third Degree under former RCW 9A.44.090, an offense that does not qualify as a "sex offense" within the meaning of the registration statute. Did Mr. Taylor's conviction violate his Fourteenth Amendment right to due process because the prosecution failed to prove the essential elements of the charged crime?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Homer Taylor III was homeless in Hoquiam during the summer of 2010. He slept under a bridge 100 feet away from the police station. RP (2/11/10) 31, 35. One night he was cold and went to the jail to ask for a blanket, and the staff there realized that he needed to update his sex offender registration and told him to come back in the morning. He was arrested the next day. RP(2/11/10) 12, 13, 31.

Mr. Taylor was charged with Failure To Register as a Sex Offender under RCW 9A.44.130. CP 1. Mr. Taylor waived his right to a jury trial, and the case was tried before Judge Gordon Godfrey. RP (2/11/10).

In order to prove that Mr. Taylor had a qualifying prior conviction, the prosecution introduced two exhibits relating to Grays Harbor County Cause No. 82-1-00210-3. Exhibit 1 was an Information charging Mr. Taylor with Statutory Rape in the Third Degree, in violation of former RCW 9A.44.090. Supp. CP. Exhibit 2 was a Judgment and Sentence finding Mr. Taylor guilty of Statutory Rape in the Third Degree. Supp. CP. The Judgment and Sentence was dated February 5, 1988. Supp. CP.

Following trial, Mr. Taylor was convicted as charged, and sentenced to 43 months in prison. CP 9. He timely appealed. CP 20.

## ARGUMENT

**MR. TAYLOR’S FAILURE TO REGISTER CONVICTION VIOLATED HIS  
FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE  
EVIDENCE WAS INSUFFICIENT TO PROVE THE ESSENTIAL ELEMENTS OF  
THE CHARGED CRIME BEYOND A REASONABLE DOUBT.**

A. Standard of Review

Constitutional questions are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009).

B. The prosecution failed to prove beyond a reasonable doubt that Mr. Taylor had previously been convicted of “any sex offense,” because his 1988 conviction did not qualify as a sex offense under the terms of RCW 9A.44.130.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

To obtain a conviction for Failure to Register, the prosecution is required to prove beyond a reasonable doubt that the accused person has been convicted of “any sex offense.” RCW 9A.44.130(1). The phrase “sex offense” is defined in RCW 9A.44.128(6), which reads (in relevant part):

- (a) Any offense defined as a sex offense by RCW 9.94A.030;
- (b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree);
- (c) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes);
- (d) Any federal or out-of-state conviction for: An offense for which the person would be required to register as a sex offender while residing in the state of conviction; or, if not required to register in the state of conviction, an offense that under the laws of this state would be classified as a sex offense under this subsection, unless a court in the person's state of conviction has made an individualized determination that the person should not be required to register; and
- (e) Any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030 or this subsection.

RCW 9A.44.128(6). The only definition that is potentially applicable to Mr. Taylor is that which refers to RCW 9.94A.030. Under that statute, the phrase “sex offense” means:

(a)(i) A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.132; (ii) A violation of RCW 9A.64.020; (iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080; (iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes; or (v) A felony violation of RCW 9A.44.132(1) (failure to register) if the person has been convicted of violating RCW 9A.44.132(1) (failure to register) on at least one prior occasion;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection;

(c) A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135; or

(d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

RCW 9.94A.030(45). Of all these definitions, the only one potentially applicable to Mr. Taylor is that contained in RCW 9.94A.030(45)(a)(i).

To prove that Mr. Taylor had a prior conviction requiring registration, the prosecution introduced the Information and the Judgment and Sentence from Grays Harbor County Cause No. 82-1-00210-3. Exhibits 2 and 3, Supp. CP. Those documents indicate that Mr. Taylor pled guilty to Statutory Rape in the Third Degree, under (former) RCW 9A.44.090.

RCW 9A.44.090 was repealed by the legislature in 1988. Laws of 1988, Chapter 145, Section 24 (effective July 1, 1988). Accordingly, Mr. Taylor's conviction is not a "[a] felony that is a violation of chapter 9A.44 RCW." RCW 9.94A.030(45)(a)(i) (emphasis added). Because Statutory Rape in the Third Degree is no longer a violation of RCW 9A.44, it does not qualify as a "sex offense" within the meaning of RCW 9A.44.130. Thus Mr. Taylor's conviction is not one that requires registration under RCW 9A.44.130, and his failure to register is not a violation of that statute.

Had the legislature intended the registration requirement to cover repealed sections of RCW 9A.44, it would have said so. This is confirmed by the legislature's specific listing of other offenses that are no longer in effect, but for which registration is required. *See, e.g.*, RCW 9.94A.030(45)(b), which includes in the definition of "sex offense" "any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection."<sup>1</sup>

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<sup>1</sup> The legislature has taken similar steps for other definitions involving statutes that have since been repealed. *See, e.g.*, RCW 9.94A.030(31), defining the phrase "most serious offense" to include, *inter alia*, "(u) Any felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection...; (v)(i) A prior conviction for indecent liberties under RCW 9A.88.100(1) (a), (b), and (c), chapter 260, Laws of 1975 1st ex. sess. as it existed until July 1, 1979, RCW 9A.44.100(1) (a), (b), and (c) as it existed from July 1, 1979, until June 11, 1986, and RCW 9A.44.100(1) (a), (b), and (d) as it existed from June 11, 1986, until July 1, 1988; (ii) A prior conviction for

Even if the legislature inadvertently omitted repealed sections of RCW 9A.44 from the definition of “sex offense,” the omission cannot be “corrected” by the judiciary. *State v. S.M.H.*, 76 Wash.App. 550, 558-559, 887 P.2d 903 (1995) (the omission of the juvenile sexual motivation statute from the definition of “sex offense” was likely inadvertent, but could not be “corrected” by the court); *see also In re Detention of Martin*, 163 Wash.2d 501, 512, 182 P.3d 951 (2008) (a court may only correct an omission that renders the entire statute absurd or meaningless).

The legislature did not define “sex offense” to include Statutory Rape in the Third Degree under former RCW 9A.44.090. Because the prosecutor did not submit evidence that Mr. Taylor had been convicted of a qualifying sex offense, it failed to prove beyond a reasonable doubt that he was obligated to register, or that his failure to do so violated RCW 9A.44.130. Accordingly, his conviction must be reversed and the case dismissed with prejudice. *Smalis, supra*.

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indecent liberties under RCW 9A.44.100(1)(c) as it existed from June 11, 1986, until July 1, 1988, if: (A) The crime was committed against a child under the age of fourteen; or (B) the relationship between the victim and perpetrator is included in the definition of indecent liberties under RCW 9A.44.100(1)(c) as it existed from July 1, 1988, through July 27, 1997, or RCW 9A.44.100(1) (d) or (e) as it existed from July 25, 1993, through July 27, 1997.” RCW 9.94A.030(31).

**CONCLUSION**

For the foregoing reasons, Mr. Taylor's conviction must be reversed and his case dismissed with prejudice.

Respectfully submitted on December 11, 2010.

**BACKLUND AND MISTRY**

  
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STATE OF WASHINGTON

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Homer Taylor III, DOC #250420  
Monroe Corrections Center  
PO Box 777  
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and to:

Grays Harbor Prosecuting Attorney  
102 West Broadway, #102  
Montesano, WA 98563

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 11, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 11, 2010.

  
\_\_\_\_\_  
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