

COURT OF APPEALS
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STATE OF WASHINGTON
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No. 41196-2-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WILLIAM AARON BARGE,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Was there sufficient evidence presented to convict Barge of Failure to Register as a Sex Offender?
- B. Can Barge raise, for the first time on appeal, a claim that his due process rights were violated due to an alleged failure to allow Barge to contest his sex offender classification?
- C. Does RCW 4.24.550(6)(b) violate Barge's right to equal protection of the law?

II. STATEMENT OF THE CASE

The State filed an information, on August 12, 2009, charging William Aaron Barge with one count of Failure to Register as a Sex Offender. CP 1-3. The State alleged that on June 16, 2009 Barge was a risk level two sex offender and failed to report to the Lewis County Sheriff's Office, on the required day during normal business hours, for the scheduled 90 day reporting. CP 1. On March 2, 2010 the State filed a motion to amend the information to add the language that Barge knowingly failed to register. CP 20-26. On March 11, 2010 an amended information was filed adding the knowingly language. CP 31-33.

On April 22, 2010, on the eve of trial, a motion for substitution of counsel was heard before the trial court. 1RP 1-10¹.

¹ There are two volumes of verbatim report of proceedings. The State will refer to the April 22, 2010 volume as 1RP and the second volume containing the bench trial, post-conviction motion and sentencing as 2RP.

Barge had retained counsel, Don McConnell, that day to replace his court appointed counsel whom he was apparently dissatisfied with. 1RP 4-6. The trial court denied Mr. McConnell's motion to substitute in because Mr. McConnell stated he could not say he could be effective at the trial scheduled for the next day and the trial court refused to allow a continuance of the trial date. 1RP 6-10. The trial had been continued several times, the last continuance to accommodate Barge's attempts to hire counsel. 1RP 6.

A bench trial was held on April 23, 2010. 2RP 1. The morning of trial, Mr. McConnell renewed his motion to substitute in and replace Barge's court appointed counsel. 2RP 4-5. After some discussion on the record and an assurance that Mr. McConnell was now prepared for trial and could be effective in his assistance to Barge, the trial court allowed Mr. McConnell's motion for substitution of counsel. 2RP 4-7. Barge stipulated that he was previously convicted of a felony sex offense. Ex. 4. Barge waived a CrR 3.5 hearing. 2RP 12. The State called one witness, Lewis County Sheriff's Office Detective Bradford Borden. 2RP 16. Detective Borden is the sex offender coordinator for the Lewis County Sheriff's Office. 2RP 16. Detective Borden is responsible for the maintenance of the sex offender registration files and for the

registration of the sex offenders in Lewis County. 2RP 17.

Detective Borden testified that Barge was a risk level two sex offender, as determined by the End of Sentence Review Committee (ESRC) and adopted by the Lewis County Sheriff's Office. 2RP 18.

Barge was registered in Lewis County with a fixed address. 2RP 18-19. Barge registered with the Lewis County Sheriff's Office on April 22, 2009 after being released back to Lewis County. 2RP 18-

19; Ex. 1. On April 22, 2009 Barge was given notification of the next scheduled report date for level two and level three sex offenders. 2RP 19-20; Ex. 2. Barge signed the original form and was given a copy. 2RP 20-21; Ex. 2. The form states: Per the

requirements of the law you must physically report to the Lewis County Sheriff's Office located at 345 West Main Street, Chehalis, WA **on 06/16/09, between 8:00 a.m. and 5:00 p.m.** Ex. 2

(emphasis original). Detective Borden testified that the quarterly reporting dates that are set by the Lewis County Sheriff's Office are always the third Tuesday of March, June, September and December. 2RP 21-22.

Barge did not report to the Lewis County Sheriff's Office on June 16, 2009. 2RP 22. Detective Borden was at his office until around 7:00 p.m. the evening of the 16th. 2RP 24. Barge did come

into the Lewis County Sheriff's Office on June 17, 2009. 2RP 22. Barge was cooperative and explained that the first time he realized the reporting date was June 16th was around 6:00 p.m. when he returned to his house. 2RP 23. Barge admitted to Detective Borden that he remembered receiving the notice of the date and Barge had marked his calendar. 2RP 23-24. Barge acknowledged he had signed the original form that stated when Barge had to report. 2RP 30-31; Ex. 2. Barge told Detective Borden that he had a lot going on and was working at Labor Ready and that he simply forgot about the report date. 2RP 26-27.

Trial counsel brought a motion at the close of the State's case to dismiss the case due to the State not meeting its burden to show that Barge had knowingly failed to report. 2RP 32. The trial court denied Barge's motion to dismiss. 2RP 34. Three witnesses testified on behalf of Barge, Tina Smith, Barge's girlfriend, Duane Neyland, Barge's stepfather, and Barge. 2RP 35-36, 38, 41. Ms. Smith testified she believed she picked up Barge from a construction site in Ground Mound on June 16, 2009 around 5:00 p.m. 2RP 36-37. Ms. Smith then drove Barge to Toledo. 2RP 37. Mr. Neyland testified that Barge lived with him in Winlock. 2RP 38-39. Mr. Neyland stated Barge began calling the Lewis County

Sheriff's Office on June 17, 2009 around 8:00 a.m. and he dropped Barge off at the bus station that morning. 2RP 39. Barge testified on June 16, 2009 he had been working at a construction site in Ground Mound and he was picked up from work by Ms. Smith. 2RP 42-43. Barge stated he arrived home around 6:00 p.m. and when he looked at his calendar he realized he had missed his "appointment." 2RP 43-44. Barge said he attempted to call Detective Borden that evening but no one answered. 2RP 44. Barge testified he had a lot of things on his calendar per his requirements of getting out of prison, such as AA and NA meetings. 2RP 46.

The trial court found Barge guilty of Failure to Register as a Sex Offender. 2RP 53-54. Barge brought a motion to for arrest of judgment or a new trial. CP 44-56. The trial court denied Barge's motion. 2RP 60. After a sentencing hearing, Barge was sentenced to 57 months in prison. 2RP 69; CP 89. The sentence was stayed pending this appeal. CP 99-100.

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ARGUMENT

A. THERE IS SUFFICIENT EVIDENCE PRESENTED TO SUSTAIN A CONVICTION AGAINST BARGE FOR FAILURE TO REGISTER AS A SEX OFFENDER.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const., amend. XIV; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, "the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d at 638.

Barge argues that the record does not contain substantial evidence to support a conviction because the evidence presented was that Barge registered with the Lewis County Sheriff's Office on April 22, 2009 and was required to report on June 16, 2009, 55 days later. Brief of Appellant 9-10. Barge argues because he was convicted of failure to register as a sex offender under subsection seven of RCW 9A.44.130², the State must prove Barge failed to report every 90 days, and the sheriff's office cannot require Barge to report on any interval shorter than 90 days. Brief of Appellant 9. In order to prevail on this claim, Barge must show that the Lewis

² The requirement to report every 90 days has been eliminated. All references to RCW 9A.44.130(7) are as it existed on June 16, 2009.

County Sheriff's Office acted in an arbitrary and capricious manner. *State v. Mackenzie*, 114 Wn. App. 687, 695-696; 60 P.3d 607 (2002), citing *State v. Ford*, 110 Wn.2d 827, 828-30, 755 P.2d 806 (1988).

The legislature delegated the task of determining what day a level two or level three sex offender should report for the 90 day reporting requirement to the local sheriff's office. RCW

9A.44.130(7). Specifically the statute states:

All offenders who are required to register pursuant to this section who have a fixed residence and who are designated a risk level II or III 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...**

RCW 9A.44.130(7)(emphasis added). When an agency's exercise of its delegated authority is challenged it is reviewed to determine whether the agency acted in an arbitrary and capricious manner. *State v. Ford*, 110 Wn.2d at 829. For an action to be arbitrary and capricious it needs to be a "willful and unreasoning action in disregard of the facts and circumstances." *Id.* at 830 (citations omitted). An error in judgment by the agency is not considered arbitrary and capricious. *Id.* The action is not arbitrary and

capricious when the agency bases its decision on a rational factual analysis. *Id.*

In Barge's case, the Lewis County Sheriff's Office did not act in an arbitrary and capricious manner when it decided to standardize the 90 day reporting dates to the third Tuesday of the last month of the quarter (March, June, September and December). It is reasonable for the sheriff's office to set the reporting dates in this way for a number of reasons. First, it makes the reporting date predictable for the sex offender, thereby increasing the probability that the offender will remember to report. Second, every ninety days will necessarily eventually fall on a weekend or holiday, and that would not be considered during normal business hours. Thirdly, it is impractical for a sheriff's office to have various report days based on when an offender moves into the county.

The statute makes clear that the report date is chosen by the local sheriff's office and the person is to show up on the date required, during normal business hours. RCW 9A.44.130(7). It is uncontested that Barge failed to report to the Lewis County Sheriff's Office on the designated date, June 16, 2009 between 8:00 a.m. and 5:00 p.m. 2 RP 22, 42-44. Therefore, there is sufficient

evidence to convict Barge of failure to register as a sex offender and his conviction should be affirmed.

B. BARGE IS BARRED FROM RAISING FOR THE FIRST TIME ON APPEAL ANY ARGUMENT REGARDING A DUE PROCESS VIOLATION FOR ALLEGEDLY FAILING TO GIVE BARGE THE OPPORTUNITY TO CONTEST HIS SEX OFFENDER CLASSIFICATION BECAUSE HE FAILED TO PRESERVE THE ISSUE FOR APPEAL.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *State v. O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, citing RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (citations omitted).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found

to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *State v. McFarland*, 127 Wn.2d at 333.

An error is manifest if the appellant can show actual prejudice. *State v. O'Hara*, 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*). The reviewing court may not speculate upon the existence of facts that do not appear in the record. *State v. Blight*, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *State v. McFarland*, 127 Wn.2d at 333; *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). Without prejudice the error is not manifest. *State v. McFarland*, 127 Wn.2d at 333.

Barge argues his classification as a level two sex offender subjected him to further punishment thereby giving Barge a recognized liberty interest in being free from improper classification. Brief of Appellant 17. Barge asserts he has a procedural due process right to contest his sex offender classification level and the

ESRC, sheriff's office and trial court failed to give Barge that opportunity. Brief of Appellant 12. The State is not conceding that there is a due process right to contest one's sex offender classification level. That argument need not be discussed because Barge failed to preserve the issue in any fashion in the trial court. The record is completely void of any evidence in regards to Barge wanting to contest his classification level. It was not brought up prior to trial, at trial, the post-conviction motion for a new trial and arrest of judgment or at sentencing. See 1RP 1-10, 2RP 1-73. The record necessary to make a determination in regards to Barge's alleged error is insufficient. Therefore, even if the error was of constitutional magnitude, it could not be manifest because no prejudice is shown due to the courts inability to determine the merits of the alleged error because of the insufficient record. Barge's argument is without merit and his conviction should be affirmed.

C. RCW 4.24.550(6)(b) DOES NOT VIOLATE BARGE'S RIGHT TO EQUAL PROTECTION.

The right to equal protection of laws is guaranteed by the 14th Amendment of the United States Constitution and Article I, section 12 of the Washington State Constitution. Equal protection requires persons who are similarly situated to be similarly treated

for any legitimate purpose of the law. *State v. Shawn P.*, 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993). A statute is presumed constitutional and it is the burden of party attacking the statute to prove the statute is unconstitutional beyond a reasonable doubt. *City of Bellevue v. Lee*, 166 Wn.2d 581, 585, 210 P.3d 1011 (2010), citing *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). Constitutional challenges are reviewed de novo. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 257-58, 241 P.3d 1220 (2010).

The level of scrutiny used by the courts in equal protection claims is dependent on the rights involved or the nature of the classification. *State v. Hirschfelder*, 170 Wn.2d 536,550, 242 P.3d 876 (2010)(citations omitted). The rational basis test is used when analyzing a claim that does not encompass a fundamental right or suspect class or and import right or semi-suspect class. *Id.* (citations omitted). A statute is constitutional under the rational basis test if:

(1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation.

State v. Smith, 117 Wn.2d 263, 279, 814 P.2d 652 (1991).

Barge claims that RCW 4.24.550(6)(b)³ violates his right to equal protection of the laws because the legislature has not enacted any standards for the county sheriffs to use when they determine the risk assessment levels of sex offenders. Brief of Appellant 21. Barge argues because there is no standardized risk assessment authorized by the legislature, similarly situated sex offenders could be assigned different risk levels by different county sheriff's offices. Brief of Appellant 21. The United States Supreme Court has held that the equal protection clause guarantees equal treatment of individuals, not equal treatment as between geographical areas. *Salsburg v. Maryland*, 346 U.S. 545, 74 S. Ct. 280, 98 L. Ed. 281 (1954). *Salsburg* challenged a statute that barred the use of illegally seized evidence in certain counties. The Supreme Court rejected *Salsburg's* challenge of the law. *Salsburg v. Maryland*, 346 U.S. at 550-51. The Court stated,

We find little substance to appellant's claim that distinctions based on county areas are necessarily so unreasonable as to deprive him of the equal protection of the laws guaranteed by the Federal Constitution. The Equal Protection Clause relates to equality between persons as such rather than areas...[Equal Protection] means that no person or class of persons shall be denied the same protection

³ RCW 4.24.550(6)(b) states local law enforcement agencies that disseminate information pursuant to this section shall assign risk level classifications to all offenders about whom information will be disseminated.

of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

Id. (citations omitted).

The Supreme Court applied its ruling in *Salsburg* to a challenge of Sunday Closing Laws, prohibiting commercial activities on Sundays, which also carved out a number of exemptions for certain types of business at particular locations in *McGowan v. Maryland*⁴. In *McGowan* employees of a department store were prosecuted for selling items in violation of the Sunday Closing Laws. The employees challenged the laws on equal protection grounds. The Supreme Court rejected the challenge. In regards to equal protection, the Court stated several key principles including: state legislatures have wide discretion when enacting laws that affect some groups of citizens differently than others; classification cannot rest on grounds that are wholly irrelevant to the achievement of the State's objective; legislatures are presumed to have acted rationally despite a law resulting in some inequality; and a statute will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 6 L.Ed.2d 393 (1961).

⁴ *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L.Ed.2d 393 (1961).

An argument similar to Barge's was made in *State v. Ragan*⁵. Ragan argued the habitual offender statute was unconstitutional as it unlawfully delegated legislative authority because the statute lacked guidelines and allowed for the prosecuting attorney to arbitrarily apply the law. The Habitual Offender Act provided that the prosecutor shall institute a habitual offender proceeding when a defendant was convicted of an offense and was also found to have certain prior felony convictions, but the law was silent as to when to charge the habitual offender allegation. See RCW 9.92.090. The allegation was that due to the lack of guidelines, the prosecutors across the state used different standards and the statute thereby violated the equal protection clause. The Court held:

Insofar as equal protection is concerned, the only limitation on the exercise of that discretion is that it may not be arbitrary, capricious, or based upon constitutionally invidious standards. The record in this case is barren of evidence of discriminatory application and the defendant has no ground for complaint... Territorial uniformity within a state is not a constitutional requirement.

State v. Ragan, 22 Wn. App. 591, 599, 593 P.2d 815 (1979)

(citations omitted).

⁵ *State v. Ragan*, 22 Wn. App. 591, 593 P.2d 815 (1979).

The legislature's delegation of power to the county sheriff under RCW 4.24.550(6)(b) is analogous to the delegation of power to the county prosecutor in RCW 9.92.090. Sex offenders are not a suspect or semi-suspect class, therefore the rational basis test applies. The statute applies to all sex offenders and it is reasonable to distinguish between sex offenders and the general public. Further it is reasonable and there is a rational relationship between ranking different sex offenders differently in regards to the risk to the community. Equal protection is not violated by the possibility of geographical non-uniformity in the application of the law. Also, Barge does not cite any evidence to support his claim of discriminatory application of RCW 4.24.550(6)(b). Barge's equal protection claim is without merit.

CONCLUSION

For the foregoing reasons, this court should affirm Barge's conviction for failure to register as a sex offender.

RESPECTFULLY submitted this 19th day of April, 2011.

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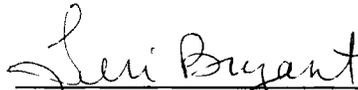
COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,) NO. 41196-2-II
Respondent,)
vs.) DECLARATION OF
MAILING
WILLIAM AARON BARGE,)
Appellant.)
_____)

Ms. Teri Bryant, paralegal for Sara I. Beigh, Deputy
Prosecuting Attorney, declares under penalty of perjury under the
laws of the State of Washington that the following is true and
correct: On April 19, 2011, the appellant was served with a copy of
the **Respondent's Brief** by depositing same in the United States
Mail, postage pre-paid, to the attorney for Appellant at the name
and address indicated below:

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DATED this 19th day of April, 2011, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office