

No. 43032-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL GEORGE RICHEY,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-04919-5
The Honorable Frank Cuthbertson, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt that Michael Richey knowingly failed to comply with sex offender notification requirements.
2. The trial court erred when it entered Finding of Fact XXIX and Finding of Fact XXXII.
3. The trial court erred when it failed to specifically reduce Michael Richey's term of community custody in order to ensure that his combined term of incarceration and community custody does not exceed the statutory maximum.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the evidence showed that Michael Richey kept his personal belongings at his registered address, occasionally ate meals at his registered address, received mail at his registered address, and stayed overnight about four times a week at his registered address, did the State fail to prove that Richey no longer resided at his registered address and fail to prove that he was required to reregister as transient?
(Assignment of Error 1)
2. Is Finding of Fact XXIX, which states that Michael Richey did not take meals at his registered address, supported by

substantial evidence where several witnesses testified that Richey often cooked and ate meals at that registered address? (Assignment of Error 2)

3. Is Finding of Fact XXXII, which states that Michael Richey did not know where he would stay from one night to the next, supported by substantial evidence where none of the witnesses testified that Richey did not know where he would stay from one night to the next? (Assignment of Error 2)
4. Where the sentencing statute and case law require the sentencing court to specify a definite term of community custody that will not, when combined with the term of incarceration, exceed an offender's statutory maximum, did the trial court err when it imposed a 0-36 month term of community custody that, when combined with the term of confinement, could exceed the statutory maximum allowed by law? (Assignment of Error 3)

III. STATEMENT OF THE CASE

Michael George Richey was convicted in 1994 of a sex offense that imposes a lifetime registration requirement. (CP 7; RP

27-29; Exh. 1)¹ Richey was also convicted in 2006 of failing to register as a sex offender. (RP 29-30; Exh. 2) Over the subsequent years he complied with the registration requirements by filing change-of-address forms when necessary and by registering as transient when appropriate. (RP 30-46; Exh. 3-8)

On May 3, 2010, Richey submitted a change-of-address form to the Pierce County Sheriff Departments' sex offender registration unit, and listed his address as a trailer in a trailer community located at 2011 217th Street Court East in Spanaway, Washington. (CP 7, 9; RP 46; Exh. 10) The trailer was owned by a friend of Richey's mother, Hollie Moss. (RP 146)

On May 7, 2010, two deputy sheriffs went to the trailer to conduct a registration verification check. (RP 54, 57, 67, 68; CP 9) They arrived just before 5:30 PM, AND were greeted by Moss and her daughter, Christine. (RP 59, 60) The women directed the deputies to Richey's small bedroom. (RP 60, 61) The deputies observed a stripped mattress leaning against a wall and three or four boxes stacked in a corner. (RP 61, 62, 72, 73; CP 9) In the deputies' opinion, there did not appear to be signs that the bedroom

¹ The transcripts containing the trial proceedings, labeled volumes 1 and 2, will be referred to simply as "RP." The transcripts containing the pretrial hearing and sentencing hearing will be referred to by the date of the proceeding.

was currently inhabited. (RP 61, 72)

As a result, the State charged Richey with one count of failure to register as a sex offender (RCW 9A.44.130). (CP 1, 3) At Richey's bench trial, Richey, Moss and several of Richey's family and friends testified on his behalf. The trial court found that these defense witnesses were all credible. (CP 10-12)

Richey testified that he moved into Moss' trailer in the spring of 2010. (RP 172) He kept his personal property in the trailer, ate frequent meals there, and received his mail there. (RP 178, 179) During that time, Richey attended weekly and daily treatment sessions, AA meetings, and counseling appointments. (RP 175, 177, 180, 181; CP 12) Because of the up to two-and-one-half hour bus rides required to attend these activities, he sometimes slept at a friend's house or his mother's house, which were more conveniently located. (RP 176-77, 178; CP 12) But he still frequently slept at the trailer and considered it his home. (RP 178)

In early May, Moss' water heater leaked and caused water damage to the floor of Richey's bedroom.² (RP 179; CP 11, 12)

² The deputy sheriffs testified that they did not notice any water damage. (RP 65, 76-77; CP 9) But there is no indication that they were made aware of the flooding so there was no reason for them to be looking for evidence of flooding, or for them to specifically notice the existence or lack of water damage in Richey's bedroom.

Richey leaned the mattress against the wall so it would dry, and then slept in the living room. (RP 179, 191-92)

Moss also testified that Richey did indeed live with her in the spring of 2010. (RP 146) Richey kept his personal belongings in her trailer and in a nearby storage shed, and slept on a mattress on the bedroom floor. (RP 148, 157) While Richey lived with her, he would occasionally have visitors, would cook and eat some of his meals at the trailer, and slept overnight about four times a week. (RP 148, 150-51) Richey also paid a small amount of rent during the time he lived there. (RP 163) Moss confirmed that there had been water damage to the rug in Richey's bedroom, and that Richey occasionally slept at a friend's house or at his mother's house. (RP 159)

Richey's brother, Harold Lindren, and his friends, Benjamin Workman and Patrick Sorensen, testified that Richey lived in the trailer and that they either visited him or dropped him off and picked him up from that location numerous times during the spring of 2010. (RP 81, 82-83, 93-94, 97, 118, 119; CP 11) Workman testified that he helped Richey move some of his personal belongings into the shed next to the trailer after flooding damaged the floor of Richey's room. (RP 95-96; CP 10)

The trial court found Richey guilty. (RP 221-23; CP 14) The court found that the trailer was Richey's residence at some point, but during the charging period he was "only in and out of there part of the time" and was therefore transient. (RP 221, 222-23) The trial court entered the following relevant conclusions of law:

V

That on or about the period between May 7 2010 through July 29 2010 defendant ceased to have a fixed residence and became a transient sex offender

VI

That defendant failed to comply with the Washington State sex offender registration requirements by failing to register as a transient sex offender with the Pierce County Sheriff's Department Sex Offender Registration Unit[.]

(CP 14) (A complete copy of the trial court's written findings and conclusions are attached in the Appendix.)

The court sentenced Richey within his standard range to 43 months of confinement, followed by a term of community custody of 0-36 months. (RP 02/03/12 RP 8; CP 19-22, 29-30) This appeal timely follows. (CP40)

IV. ARGUMENT & AUTHORITIES

- A. THE STATE'S EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S FINDING OF GUILT OR ITS CONCLUSION THAT RICHEY WAS TRANSIENT AND THEREFORE OBLIGATED TO NOTIFY THE SHERIFF'S DEPARTMENT OF THIS CHANGE IN STATUS.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

Following a bench trial, the appellate court reviews the trial court’s decision to determine whether substantial evidence supports any challenged findings of fact and whether the findings support the conclusions of law. State v. Hovig, 149 Wn. App. 1, 8, 202 P.3d 318 (2009). Conclusions of law are reviewed de novo.

See State v. B.J.S., 140 Wn. App. 91, 97, 169 P.3d 34 (2007).

Initially, contrary to the trial court's Finding of Fact XXXII, Richey never testified that he "did not know where he would stay from one night to the next[,]" just that he occasionally slept at different places in order to avoid the water damage or the long bus rides. (RP 178, CP 12) Accordingly, this finding is not supported by substantial evidence presented at trial and should be disregarded. See State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Likewise, in its written Finding of Fact XXIX, the trial court states that "[Richey] did not take meals at the trailer." (RP 11) Because several witnesses testified that Richey did eat meals at the trailer, this finding is also not supported by substantial evidence and should be disregarded. See Broadaway, 133 Wn.2d 118 at 131.

Next, RCW 9A.44.130 governs registration for sex offenders and provides the penalties for failure to comply. If a convicted sex offender changes his residence address within the same county, he must give the county sheriff written notice of the change within 72 hours. RCW 9A.44.130(5)(a). In addition, a convicted sex offender who lacks a "fixed residence" is transient and is required to provide written notice to the sheriff of the county where he last registered

within 48 hours. RCW 9A.44.130(6)(a). In addition, a transient offender must report weekly, in person, to the sheriff of the county where he is registered. RCW 9A.44.130(6)(b).

An offender is not required to update his registration simply because he sleeps somewhere other than his registered address on occasion. That is because the notice requirement is only triggered when the offender “changes his or her residence” or when the offender lacks a “fixed residence[.]” RCW 9A.44.130(5)(a), (6)(a). Accordingly, the question in this case is whether the State proved beyond a reasonable doubt that Moss’ trailer was no longer Richey’s primary residence and that he instead lacked a fixed residence. The answer is no.

Though the registration statute does not define “residence,” in State v. Stratton this Court applied the dictionary definition of “residence” to determine whether a car parked in front of the offender’s former house could be considered a “fixed residence.” 130 Wn. App. 760, 765, 124 P.3d 660 (2005). The definition relied upon by this Court provided, in part, that a “residence” is: “a temporary or permanent dwelling place, abode, or habitation *to which one intends to return as distinguished from a place of temporary sojourn or transient visit.*” 130 Wn. App. at 765 (quoting

Webster's Third New International Dictionary, at 1931 (1969))
(emphasis added).

Accordingly, a stay at a different location is not a change of residence if the offender intends it to be a temporary visit; and the first location remains his residence as long as he intends to return there. Thus, even though Richey was away from the trailer on occasion, that does not mean that he changed his residence or lacked a fixed residence under the terms of the statute, and it does not mean he is required to notify the Sheriff's Department of his status. As long as Richey "intends to return" to the trailer, there is no violation of the registration statute.

And the testimony of the defense witnesses in this case establishes that Richey did consider the trailer to be his "residence" even though he frequently slept at his friend's or mother's homes. (RP 176-77, 178) He kept his personal belongings there, consistently slept and took meals there, and received his mail there. (RP 176-77, 178)

The other homes were just a "place of temporary sojourn or transient visit," used while he waited for his bedroom to become habitable or so that he could avoid the lengthy travel required to attend his morning appointments. (RP 178, 191-92)

The State failed to establish beyond a reasonable doubt that Richey did not reside at the trailer, or that Richey did not intend to return to the trailer. The State therefore failed to meet its burden of proving every element of the crime of failing to register as a sex offender, and Richey's conviction must be reversed.

B. THE TRIAL COURT ERRED WHEN IT FAILED TO SPECIFICALLY REDUCE RICHEY'S TERM OF COMMUNITY CUSTODY IN ORDER TO ENSURE THAT HIS COMBINED TERM OF INCARCERATION AND COMMUNITY CUSTODY DOES NOT EXCEED THE STATUTORY MAXIMUM.

A trial court may impose a sentence only as authorized by statute. See In re Pers. Res. of Tobin, 165 Wn.2d 172, 175, 196 P.3d 670 (2008). And the court cannot impose a term of confinement and community custody that, when added together, punishes an offender in excess of the statutory maximum. RCW 9.94A.505(5); State v. Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005); State v. Sloan, 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004).

Based on Richey's offender score, his standard range sentence is 43 to 57 months, to be followed by a three year (36 month) term of community custody. (CP 19-22; RP 3) See RCW 9.94A.701(1)(a); RCW 9.94A.030(46)(a)(v). Richey's conviction for failing to register as a sex offender is a class C felony, with a

statutory maximum of five years (60 months). RCW 9A.44.132(1)(a); RCW 9A.20.021(1)(c).

The trial court sentenced Rickman to 43 months of confinement and “0–36 months” of community custody. (CP 29, 30)

However, under RCW 9.94A.701(9), the community custody term specified by RCW 9.94A.701(1) “shall be reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime.” Therefore, under this statute, “the trial court, not the Department of Corrections, [is] required to reduce [an offender’s] term of community custody to avoid a sentence in excess of the statutory maximum.” State v. Boyd, -- Wn.2d --, 275 P.3d 321, 322 (2012) (citing State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011)).

Both RCW 9.94A.701(9) and Boyd clearly and unequivocally require the sentencing court to specify a definite term of confinement and a definite term of community custody, and require the sentencing court, not DOC, to ensure that the combined terms will not exceed an offender’s statutory maximum.

But the trial court here imposed a community custody range,

not a specific and definite term. (CP 30) While the minimum of the range would not result in a sentence that exceeds the statutory maximum, because Richey was sentenced to 43 months of confinement, anything more than 17 months of community custody has the potential to exceed the 60-month statutory maximum. The trial court thus left it to DOC to calculate and ensure that Richey's total term of confinement and community custody does not exceed the statutory maximum. The trial court's failure to reduce the term of community custody violates the clear terms of RCW 9.94A.701(9).

The appropriate remedy when this occurs is to remand for resentencing. See In re Sentences of Jones, 129 Wn. App. 626, 627-28, 120 P.3d 84 (2005); Boyd, 275 P.3d at 322-23. Accordingly, Richey's case should be remanded to the trial court to amend the community custody term and resentence Richey consistent with RCW 9.94A.701(9).

V. CONCLUSION

The State failed to meet its burden of proving that Richey knowingly failed to comply with the requirements of the sex offender registration statute because the evidence did not establish that he no longer resided in Moss' trailer or that he did not intend to

continue to use it as his primary residence. Richey's conviction for failing to register as a sex offender should be reversed. Alternatively, the trial court should have imposed a specific term of community custody that would not exceed Richey's statutory maximum when combined with his term of confinement. For this reason, Richey's case should be remanded for resentencing.

DATED: July 16, 2012



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CERTIFICATE OF MAILING

I certify that on 07/16/2012, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Michael G. Richey, DOC#285052, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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