

No. 45777-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Andrew Smith,

Appellant.

Cowlitz County Superior Court Cause No. 13-1-00997-5

The Honorable Judge Michael Evans

Appellant's Reply Brief

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ARGUMENT

I. THE UNJUSTIFIED IMPOSITION OF RESTRAINTS REQUIRES REVERSAL OF MR. SMITH’S CONVICTION.

Only extraordinary circumstances can justify restraining the accused during a criminal trial. *State v. Damon*, 144 Wn.2d 686, 691, 25 P.3d 418 (2001); *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). Improper shackling implicates concerns beyond the potential effect on the fact-finder. In addition, restraints restrict an accused person’s ability to assist in his own defense, interfere with his right to testify, and offend the dignity of the judicial process. *Finch*, 137 Wn.2d at 845; *State v. Hartzog*, 96 Wn.2d 383, 399, 635 P.2d 694 (1981).

Absent an individualized assessment of the need for restraints during trial, shackling is “constitutional error and therefore presumptively prejudicial.”¹ *State v. Clark*, 143 Wn.2d 731, 774, 24 P.3d 1006 (2001).

The state’s burden is to show either that “the error was harmless beyond a reasonable doubt” or that the evidence is “so overwhelming that no rational conclusion other than guilt can be reached.” *Id.*, at 774-776. Respondent erroneously contends that Mr. Smith must show ““a substantial or injurious effect or influence”” on the verdict. Brief of

¹ Appellant incorrectly referred to a leg brace in one heading in the Opening Brief. This was in error; Mr. Smith was shackled with cuffs. RP 5.

Respondent, p. 3 (quoting *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998)).

This is misleading. The defense burden to which Respondent refers does not apply in this case. Mr. Smith does not contend that jurors were influenced by seeing him in restraints; thus he need not overcome the hurdle set forth in *Hutchinson*.² See *Hutchinson*, 135 Wn.2d at 888 (“Because the jury never saw the Defendant in shackles, he cannot show prejudice.”)

Mr. Smith’s argument rests on the effects of restraints that are unrelated to their impact on the presumption of innocence or the factfinder’s perception of the defendant’s dangerousness.³ Cf. *Finch*, 137 Wn.2d at 844. Restraints interfere with an accused person’s ability to assist in the defense, affect the right to testify, and offend the dignity of the judicial process. *Finch*, 137 Wn.2d at 845; see Appellant’s Opening Brief, pp. 6-9.

Respondent concedes that restraints were improperly imposed in this case. Brief of Respondent, p. 5. Respondent does not attempt to

² Furthermore, it is undisputed that the trial judge was aware of the restraints. RP 5-6. That distinguishes this case from *Hutchinson*, in which the defendant could not show the jury saw the restraints. *Hutchinson*, 135 Wn.2d at 888.

³ This distinguishes Mr. Smith’s case from *State v. E.J.Y.*, 113 Wn. App. 940, 952, 55 P.3d 673 (2002). The *E.J.Y.* court noted that the likelihood of prejudice is greatly reduced in a bench trial.

justify the restraints by identifying any impelling necessity. Brief of Respondent, pp. 2-5. This requires reversal because Respondent fails to address harmless error with respect to the arguments raised by Mr. Smith. The state's failure to address these issues can be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Respondent does not attempt to show that the error had no effect on Mr. Smith's ability to assist in his own defense. *See Finch*, 137 Wn.2d at 846. The mere fact that Mr. Smith's dominant hand was free does not prove that he felt free to communicate with counsel. The improper restraint may well have inhibited him psychologically, and prevented him from fully participating in his own defense. *Id.* Respondent presents no argument or citations to the record to dispute this. Brief of Respondent, pp. 2-5.

Nor does Respondent prove that the error was harmless with respect to Mr. Smith's right to testify. Brief of Respondent, pp. 2-5. Mr. Smith's left hand was not freed when he took the witness stand. RP 85-86. His nonverbal communication was therefore impaired: he could not express himself with the full range of motion allowed to other witnesses.

Numerous studies have shown that gestures can profoundly influence the way a person's statements are received.⁴ Thus, for example, a witness who uses more gestures is more persuasive than one who does not. Stockwell and Schrader, *Factors That Persuade Jurors*, 27 U. Tol. L. Rev. 99, 108 (1995). Even if the judge in this case were able to adhere to the presumption of innocence, restrictions on Mr. Smith's ability to gesture while he testified may have negatively influenced the judge at a subconscious level.

Finally, the unjustified imposition of restraints "offends the dignity of the judicial process." *Finch*, 137 Wn.2d at 845. Unjustly requiring an accused person to appear in restraints degrades the entire criminal justice system. Respondent does not even comment on this. Brief of Respondent, pp. 2-6.

Respondent concedes that the trial court allowed Mr. Smith to be brought to trial in restraints in the absence of any impelling necessity. The error is presumed prejudicial. *Clark*, 143 Wn.2d at 774. Respondent has failed to address the arguments raised by Mr. Smith. The conviction must be reversed and the case remanded for a new trial. *Id.*

⁴ See, e.g., Perry, Berch, and Singleton, *Constructing Shared Understanding: The Role of Nonverbal Input in Learning Contexts*, 6 J. Contemp. Legal Issues 213 (1995).

II. MR. SMITH WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Smith rests on the argument set forth in the Opening Brief.

III. MR. SMITH’S CONVICTION MUST BE REVERSED BECAUSE HE WAS CONVICTED OF VIOLATING AN UNCONSTITUTIONAL STATUTE.

A. The sex offender registration statute burdens the right to travel, but is not narrowly tailored to achieve its compelling purpose.

A statute “implicates the right to travel when it actually deters such travel..., when impeding travel is its primary objective..., *or when it uses any classification which serves to penalize the exercise of that right.*”

Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898, 903, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986) (emphasis added) (internal quotation marks and citations omitted). The sex offender registration statute implicates the right to travel because it actually deters travel and because it uses a classification to penalize the exercise of the right to travel. *Soto-Lopez*, 476 U.S.at 903.

Washington’s sex offender registration statute burdens the right to travel and to freedom of movement, but is not narrowly tailored to achieve the government’s interest. *See* Appellant’s Opening Brief, pp. 10-17.

Accordingly, it violates substantive due process. *Lawrence v. Texas*, 539 U.S. 558, 593, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *State v. J.D.*, 86 Wn. App. 501, 506, 937 P.2d 630 (1997).

Respondent erroneously suggests that Mr. Smith need not re-register when he goes on vacation or travels for any other purpose, so long as he intends to return to his current residence. Brief of Respondent, pp. 11 (citing *State v. Pickett*, 95 Wn. App. 475, 975 P.2d 584 (1999)). This is incorrect. The current version of RCW 9A.44.130 has not been limited in the manner suggested by Respondent.⁵ The phrase “fixed residence” is defined without reference to a person’s intent to return. RCW 9A.44.128(5).

Furthermore, even if the registration requirement applies only to those who relocate without intending to return, the statute penalizes the right to travel based on a classification. *Soto-Lopez*, 476 U.S. at 903. Therefore, it must be examined under the strict scrutiny standard. *Macias v. Dep't of Labor & Indus. of State of Wash.*, 100 Wn.2d 263, 273, 668 P.2d 1278 (1983).

Respondent does not suggest that the law is narrowly tailored. Nor does Respondent claim that there is an evidentiary nexus between the law’s purpose and effect. Brief of Respondent, pp. 10-12. Respondent’s failure to respond to these points may be treated as a concession.

⁵ Indeed, appellate counsel has more than one case pending in which the defendant was convicted following temporary absence from the address of registration, despite intent to return.

Pullman, 167 Wn.2d at 212 n.4. Respondent cannot show that the registration requirement passes strict scrutiny.

For the reasons stated above and in the opening brief, Washington's sex-offender registration scheme is unconstitutional. *Aptheker v. Sec'y of State*, 378 U.S. 500, 505, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964). Mr. Smith's conviction must be reversed and the case dismissed with prejudice.

B. The *Enquist* decision rests on a misunderstanding of U.S. Supreme Court precedent and should be reversed.

Relying on *Enquist*, Respondent erroneously claims that a statute only implicates the right to travel if “it actually deters such travel and where impeding travel is its primary objective.” See Brief of Respondent, p. 10 (emphasis omitted) (quoting *State v. Enquist*, 163 Wn. App. 41, 256 P.3d 1277 (2011), review denied 173 Wn.2d 1008 (2012)). This is incorrect.

The *Enquist* standard directly conflicts with *Soto-Lopez*. Under *Soto-Lopez*, any classification that penalizes exercise of the right to travel implicates the right. *Soto-Lopez*, 476 U.S. at 903. This is so regardless of its primary purpose or actual effect. *Id.* *Enquist* should be overruled because it is “both incorrect and harmful.” *State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011) (outlining principles of *stare decisis*).

The *Enquist* standard stems from *dicta* in *State v. Lee*, 135 Wn.2d 369, 957 P.2d 741, 751 (1998). The *Lee* court addressed a challenge to former RCW 9A.46.110 (1992), which prohibited stalking. The court held that the statute was not vague or overbroad, and that it did not violate due process. *Id.*, at 373. In passing, the court asserted that “[a] state law implicates the right to travel when it actually deters such travel and impeding travel is its primary objective.” *Id.*, at 389-390. However, the court did not rely on this test in reaching its result. Instead, the *Lee* court found that the statute did not interfere with the right to travel in the first place.⁶ *Id.*, at 391.

The *dicta* in *Lee* misrepresents *dicta* from *Zobel v. Williams*, 457 U.S. 55, 60, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982). *Zobel* includes one oblique reference to a statute’s “objective,” and notes that a statute intended to “inhibit migration” would encounter “insurmountable constitutional difficulties.” *Id.*, at 62 n. 9. In other words, the *Zobel* court posited that a statute would be unconstitutional if its primary objective were impeding travel. It is not clear how the *Lee* court transformed this *dicta* into a prerequisite for finding a violation of the right to travel.

The *Enquist* court relied on this *dicta* from *Lee*, and applied it in a straightforward manner to uphold the sex offender registration scheme.

⁶ Rather, the statute applied only “to conduct between two or more persons...” *Id.*, at 391.

Enquist, 163 Wn. App. at 50-51 (“impeding travel has never been RCW 9A.44.130’s primary goal.”) However, the *Lee dicta* (and thus *Enquist*) directly conflicts with U.S. Supreme Court precedent. *See Soto-Lopez*, 476 U.S. at 903.

Enquist is therefore demonstrably incorrect. It is also harmful because it erroneously deprives litigants of arguments relating to the federally protected right to travel. Because it is both incorrect and harmful, *Enquist* must be overruled. *Barber*, 170 Wn.2d at 864.

Much of Respondent’s argument rests on this misunderstanding of the law. Brief of Respondent, pp. 10-12. Mr. Smith does not claim that the statute’s primary objective is to impede travel. *See* Appellant’s Opening Brief, pp. 12-19. Those portions of Respondent’s brief addressing the statute’s primary objective are wholly irrelevant to Mr. Smith’s argument.

Because the statute violates the right to travel, it is unconstitutional. *Aptheker*, 378 U.S. at 505. Mr. Smith’s conviction must be reversed and the case dismissed with prejudice. *Aptheker*, 378 U.S. at 505.

IV. MR. SMITH’S CONVICTION WAS ENTERED IN VIOLATION OF THE STATE CONSTITUTION’S REQUIREMENT THAT FACTUAL ISSUES IN FELONY CASES BE TRIED BY A JURY.

Mr. Smith rests on the argument set forth in the Opening Brief.

V. MR. SMITH’S OFFENDER SCORE SHOULD NOT HAVE INCLUDED HIS OREGON CONVICTIONS.

The trial court erred by adding three points to Mr. Smith’s offender score based on an Oregon conviction. The Oregon statute is broader than its Washington counterparts. Appellant’s Opening Brief, pp. 33-36. As a matter of law, the offenses are not comparable. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

The trial court also erred by including an Oregon conviction that should have washed out. Appellant’s Opening Brief, pp. 33-37. *In re Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d 456 (2005). As in *Cadwallader*, his “acknowledgement of his criminal history does not prevent him from challenging his sentence where the judgment and sentence shows that one of the prior convictions used to determine his sentence washed out.” *Id.*, at 874.

Respondent does not dispute the merits of Mr. Smith’s arguments. Brief of Respondent, pp. 14-16. Instead, Respondent argues that Mr. Smith has waived the legal errors presented here. Brief of Respondent, pp. 15-16.

Mr. Smith has not waived consideration of these legal issues. An offender cannot agree to a sentence in excess of the court's authority. *Cadwallader*, 155 Wn.2d at 874. Waiver "does not apply where the alleged sentencing error is a *legal error*." *In re Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002) (emphasis in original); *see also State v. Wilson*, 170 Wn.2d 682, 690, 244 P.3d 950 (2010) ("[W]hether the prior conviction is a felony or a misdemeanor for purposes of sentencing is a legal dispute.")

The comparability of an out-of-state offense is an issue of law.⁷ *State v. Jordan*, 180 Wn.2d 456, 460, 325 P.3d 181 (2014). It requires examination of the elements of the out-of-state offense, and comparison to any similar Washington offense. *Id.*, at 184.

Furthermore, even if judicial fact-finding on the issue of factual comparability were still permitted, an offender doesn't waive a factual comparability issue except by "'affirmative acknowledgment' of comparability." *State v. Lucero*, 168 Wn.2d 785, 789, 230 P.3d 165 (2010). It is not enough to acknowledge an offender score and standard range. *Lucero*, 168 Wn.2d at 787. Here, as in *Lucero*, Mr. Smith "did not

⁷ Judicial determinations of factual comparability are no longer permitted, under *Apprendi*⁷ and its progeny: it would "(at least) raise serious Sixth Amendment concerns" to attempt to discern the underlying facts that were not found by a court or jury. *Descamps v. United States*, 133 S.Ct. 2276, 2288, 186 L.Ed.2d 438 (2013) *reh'g denied*, 11-9540, 2013 WL 4606326 (2013). Those Washington cases involving waiver of factual comparability did not have the benefit of *Descamps* and other recent offspring of *Apprendi*.

‘affirmatively acknowledge’ that his” Oregon conviction was comparable to a Washington crime. *Lucero*, 168 Wn.2d at 789.

Wash-out errors of the type raised here are also not subject to waiver. *Goodwin*, 146 Wn.2d at 877. Where the court’s findings reflect criminal history that washes out, those offenses may not be included in the offender score. *Id.*

Contrary to Respondent’s assertion, there are legal errors evident within the four corners of Mr. Smith’s judgment and sentence. *See* Brief of Respondent, pp. 15-17. The court’s scoring error is an issue of law; it will not be resolved “through any factual inquiry.” *Wilson*, 170 Wn.2d at 690.

The trial court should not have included Mr. Smith’s two Oregon offenses in his offender score. Accordingly, his sentence must be vacated and the case remanded for a new sentencing hearing. *Id.*

VI. THE COURT ERRED BY ORDERING MR. SMITH TO PAY LEGAL FINANCIAL OBLIGATIONS BEYOND WHAT IS PERMITTED BY THE CONSTITUTION AND BY STATUTE.

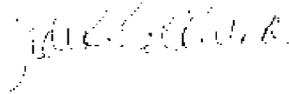
Mr. Smith rests on the argument set forth in his Opening Brief.

CONCLUSION

Mr. Smith's conviction must be reversed. The case must either be dismissed or remanded for a new trial. If reversal is not ordered, the case must be remanded for a new sentencing hearing.

Respectfully submitted on October 29, 2014,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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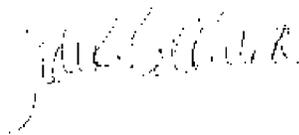
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 October 29, 2014.



Jodi R. Backlund, WSBA No. 22917
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