

NO. 46902-2-II

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

STATE OF WASHINGTON,

Respondent,

vs.

FRANKLIN H. WILCOX,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred when it ruled that the defendant's conviction for Failure to Register under RCW 9A.44.132(1) constituted a new registerable offense for which the court could impose 36 months community custody because the defendant did not have any prior convictions for failure to register under RCW 9A.44.132(1).

Issues Pertaining to Assignment of Error

Is violation of RCW 9A.44.132(1) a sex offense triggering a new registration requirement and the imposition of 36 months of community custody if the defendant has two prior convictions for violating RCW 9A.44.130 but no prior convictions for violating RCW 9A.44.132(1)?

STATEMENT OF THE CASE

By amended information filed October 24, 2014, the Grays Harbor County Prosecutor charged the defendant Frank H. Wilcox with one count of failure to register as a sex offender “contrary to RCW 9A.44.132(b),” alleging that this offense occurred between November 5, 2012, and August 21, 2013. CP 19-20. On that same day the defendant waived his right to a jury trial and entered into a Stipulation to Facts sufficient to convict. CP 21-48. That stipulation listed the defendant’s prior convictions, which included the following two convictions for failure to register:

1. Failure to Register under RCW 9A.44.130 committed on 7/5/99; and
2. Failure to Register under RCW 9A.44.130 committed on 7/3/00.

CP 39-43, 44-48.

After considering the Stipulation to Facts the trial court found the defendant guilty beyond a reasonable doubt of Failure to Register under RCW 9A.44.132(1). CP 69-70. At a subsequent sentencing hearing the trial court imposed a sentence within the standard range. *Id.* The court, over defense objection, also imposed 36 months of community custody upon its finding that the defendant’s crime itself constituted a sex offense as that term is defined in RCW 9.94A.030(46) for which the defendant would have to

register as a sex offender. RP 11/14/14 2-10.¹

In so holding the court rejected the defendant's arguments that under RCW 9.94A.030(46)(a)(v) the crime of failure to register is not a "sex offense" that triggers a new registration requirement and requires imposition of 36 months of community custody unless the defendant has a prior conviction for failure to register under RCW 9A.44.132(1) as opposed to a prior conviction for failure to register under RCW 9A.44.130. RP 11/14/14 2-10; CP 49-52. The defendant filed timely notice of appeal from this portion of the judgment and sentence. *See* Notice of Appeal.

¹The record on appeal includes three individually numbered verbatim reports of the hearings held on 8/6/14, 10/24/14 and 11/14/14. They are referred to herein as "RP [date] [page #]."

ARGUMENT

THE TRIAL COURT ERRED WHEN IT RULED THAT THE DEFENDANT'S CONVICTION FOR FAILURE TO REGISTER UNDER RCW 9A.44.132(1) CONSTITUTED A NEW REGISTERABLE OFFENSE FOR WHICH THE COURT COULD IMPOSE 36 MONTHS COMMUNITY CUSTODY BECAUSE THE DEFENDANT DID NOT HAVE ANY PRIOR CONVICTIONS FOR FAILURE TO REGISTER UNDER RCW 9A.44.132(1).

Under RCW 9A.44.130(1), any "adult or juvenile residing . . . in this state who has been found to have committed or has been convicted of any sex offense . . . shall register with the county sheriff for the county of the person's residence . . ." Prior to June 10, 2010, failure to register as a sex offender constituted a crime under RCW 9A.44.130(12), which stated as follows:

(11)(a) A person who knowingly fails to comply with any of the requirements of this section is guilty of a class B felony if the crime for which the individual was convicted was a felony sex offense as defined in subsection (10)(a) of this section or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony sex offense as defined in subsection (10)(a) of this section.

(b) If the crime for which the individual was convicted was other than a felony or a federal or out-of-state conviction for an offense that under the laws of this state would be other than a felony, violation of this section is a gross misdemeanor.

RCW 9A.44.130(12) (prior to June 10, 2010).

In Laws of 2010 c 267 § 3, effective June 10, 2010, later amended under Laws of 2011 c 337 § 5, effective July 22, 2011, the Washington Legislature created a new statute entitled RCW 9A.44.132. This new title

replaced former RCW 9A.44.130(11). Section 1 of this new statute now reads:

(1) A person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offense as defined in that section and knowingly fails to comply with any of the requirements of RCW 9A.44.130.

(a) Except as provided in (b) of this subsection, The failure to register as a sex offender pursuant to this subsection is a class C felony if:

(i) It is the person's first conviction for a felony failure to register; or

(ii) The person has previously been convicted of a felony failure to register as a sex offender in this state or pursuant to the laws of another state.

RCW 9A.44.132(1).

The term "sex offender" as it applies in RCW 9A.44.132(1) derives from the legislature's definition for the word "sex offense" found in RCW 9.94A.030(46). Subsection (a) of section (46) of this statute states:

(46) "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;

RCW 9.94A.010(46)(a).

As is apparent from a careful reading of this statute, subparts (a)(i) and (a)(v) create a dichotomy between failure to register offenses which are themselves “sex offenses” for which one must independently register and those that are not themselves “sex offenses” and for which there is no new registration requirement. Under the latter subsection, the term “sex offense” includes any felony violation of RCW 9A.44.132(1) “if the person has been convicted of violating RCW 9A.44.132(1).”

As was just set out, a conviction for failure to register as a sex offender is itself a new sex offense creating a new registration requirement if the person who committed the offense has a prior conviction for “violating RCW 9A.44.132(1).” However, this is not the only onus imposed in these circumstances. Under RCW 9.94A.701(1)(a), a person convicted of any “sex offense” is also subject to a 36 months community custody requirement. This statute states:

(1) If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years:

(a) A sex offense not sentenced under RCW 9.94A.507;

RCW 9.94A.701(1)(a)

BRIEF OF APPELLANT - 6

In the case at bar the defense argued to the trial court that the defendant's conviction was not a "sex offense" under RCW 9.94A.030(46)(a)(v) because he had two prior convictions for failure to register which fell under RCW 9A.44.130, not RCW 9A.44.132(1). The state responded by arguing that since RCW 9A.44.132 was simply a recodification of RCW 9A.44.130(12), any conviction for failure to register under RCW 9A.44.130(12) also constituted a conviction for failure to register under RCW 9A.44.132(1). Thus, the state argued that the defendant did have a prior conviction under the latter statute, which meant that his current offense was a registerable "sex offense" and did require the imposition of 36 months community custody. The trial court agreed with the state's argument.

As the following explains the trial court erred in its ruling for two reasons. First, the trial court's ruling ignores both the plain meaning of RCW 9.94A.030(46)(a)(v) as well as the principle of *Expressio unius est exclusio alterius*. Second, to the extent there is any ambiguity in the statute, the trial court's ruling violates the rule of lenity. The following sets out both of these arguments.

(1) The Trial Court's Ruling Violates the Plain Meaning of the Statute and the Principle of Expressio Unius Est Exclusio Alterius.

Under the rules of statutory interpretation, "if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an

expression of legislative intent.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002). However, all words “must be read in the context of the statute in which they appear, not in isolation.” *State v. Lilyblad*, 163 Wn.2d 1, 177 P.3d 686 (2008). In addition, statutes are only deemed ambiguous if the language is susceptible to more than one reasonable interpretation. *State v. Jacobs*, 154 Wn.2d 596, 115 P.3d 281 (2005). Finally, under the doctrine of *expressio unius est exclusio alterius*, the expression of one thing in a statute implies the exclusion of the other and omissions must be deemed to be exclusions.” *In re Det. of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002).

In the case at bar, the statutory provision at issue is RCW 9.94A.030(46)(a)(i)&(v). These two subsections state:

(46) “Sex offense” means:

(a)(i) A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.132;

. . . .

(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;

RCW 9.94A.030(46)(a)(i)&(v).

The statutory language in subsection (v) is clear on its face. A felony violation of RCW 9A.44.132(1) is only a “sex offense” if the defendant “has

been convicted of violating RCW 9A.44.132(1) (failure to register) on at least one prior occasion.” The legislature did not use the phrase “failure to register as a sex offender in this state or pursuant to the laws of another state.” Indeed, the legislature uses the latter language in RCW 9A.44.132 to define those instances in which prior failures to register convictions increase a current conviction from a class C felony to a class B felony. Thus it is obvious that the legislature understands and intends a difference when using the language “has been convicted of violating RCW 9A.44.132(1)” as opposed to the language “failure to register as a sex offender in this state or pursuant to the laws of another state.” Thus, under both the plain language rule as well as the doctrine of *expressio unius est exclusio alterius*, a violation of RCW 9A.44.132(1) is not a sex offense if the defendant’s prior convictions were obtained under RCW 9A.44.130.

(2) The Trial Court’s Ruling violates the Rule of Lenity.

Under the rule of lenity, if an ambiguous criminal provision has two or more reasonable interpretations, the courts must strictly construe the statute in favor of the defendant. *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996). A statute is ambiguous if it has two or more reasonable interpretations. *Cerrillo v. Esparza*, 158 Wn.2d 194, 142 P.3d 155 (2006). In the case at bar, the defendant’s interpretation of RCW 9A.44.030(46)(a)(v) is reasonable, particularly because it follows the plain meaning of the

provision itself.

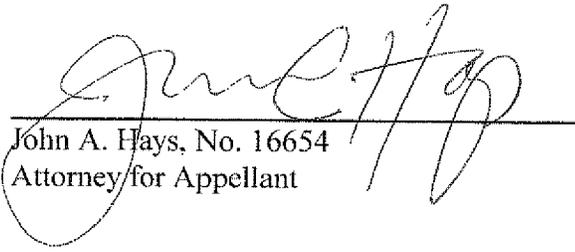
In addition, the defendant's interpretation also recognizes a distinction that the legislature intended when it specifically limited defining failure to register under RCW 9A.44.132(1) as a sex offense to those instances in which a defendant had a prior conviction for failure to register under that same statute as opposed to prior statutes. That distinction flows from the fact that prior to the adoption of RCW 9A.44.132(1), the offense of failure to register was not itself a registerable offense. The legislature's requirement that a person have a prior conviction under RCW 9A.44.132(1) before a current conviction under RCW 9A.44.132(1) becomes a sex offense indicates an intent to leave prior failure to register convictions in the category of crimes that are not defined as sex offenses. Thus, since the defendant's interpretation of this statute is reasonable, under the rule of lenity, this court should strictly interpret it to the defendant's benefit. Consequently, the trial court erred when it found that the defendant's conviction constituted a sex offense that was subject to a 36 months community custody requirement.

CONCLUSION

The trial court erred when it found that the defendant's conviction for failure to register under RCW 9A.44.132(1) constituted a sex offense that triggered a new registration requirement as well as a requirement of 36 months of community custody.

DATED this 29th day of June, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

RCW 9A.44.030(46)

(46) “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.701

(1) If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years:

(a) A sex offense not sentenced under RCW 9.94A.507; or

(b) A serious violent offense.

(2) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.

(3) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for:

(a) Any crime against persons under RCW 9.94A.411(2);

(b) An offense involving the unlawful possession of a firearm under RCW 9.41.040, where the offender is a criminal street gang member or associate;

(c) A felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000; or

(d) A felony violation of RCW 9A.44.132(1) (failure to register) that is the offender's first violation for a felony failure to register.

(4) If an offender is sentenced under the drug offender sentencing alternative, the court shall impose community custody as provided in RCW 9.94A.660.

(5) If an offender is sentenced under the special sex offender sentencing alternative, the court shall impose community custody as provided in RCW 9.94A.670.

(6) If an offender is sentenced to a work ethic camp, the court shall impose community custody as provided in RCW 9.94A.690.

(7) If an offender is sentenced under the parenting sentencing alternative, the court shall impose a term of community custody as provided in RCW 9.94A.655.

(8) If a sex offender is sentenced as a nonpersistent offender pursuant to RCW 9.94A.507, the court shall impose community custody as provided in that section.

(9) The term of community custody specified by this section 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 as provided in RCW 9A.20.021.

RCW 9A.44.132

(1) A person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130.

(a) The failure to register as a sex offender pursuant to this subsection is a class C felony if:

(i) It is the person's first conviction for a felony failure to register; or

(ii) The person has previously been convicted of a felony failure to register as a sex offender in this state or pursuant to the laws of another state.

(b) If a person has been convicted of a felony failure to register as a sex offender in this state or pursuant to the laws of another state on two or more prior occasions, the failure to register under this subsection is a class B felony.

(2) A person is guilty of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a sex offense other than a felony and knowingly fails to comply with any of the requirements of RCW 9A.44.130. The failure to register as a sex offender under this subsection is a gross misdemeanor.

(3) A person commits the crime of failure to register as a kidnapping offender if the person has a duty to register under RCW 9A.44.130 for a kidnapping offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130.

(a) If the person has a duty to register for a felony kidnapping offense, the failure to register as a kidnapping offender is a class C felony.

(b) If the person has a duty to register for a kidnapping offense other than a felony, the failure to register as a kidnapping offender is a gross misdemeanor.

(4) Unless relieved of the duty to register pursuant to RCW 9A.44.141 and 9A.44.142, a violation of this section is an ongoing offense for purposes of the statute of limitations under RCW 9A.04.080.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
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vs.

FRANKLIN H. WILCOX,
Appellant.

NO. 46902-2-II

**AFFIRMATION
OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Ms Katherine Svoboda
Grays Harbor County Prosecuting Attorney
102 West Broadway Ave., Suite 102
Monteseno, WA 98563
ksvoboda@co.grays-harbor.wa.us
2. Franklin H. Wilcox, No.903228
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

Dated this 29th day of June, 2015, at Longview, WA.


Diane C. Hays

HAYS LAW OFFICE

June 29, 2015 - 12:30 PM

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ksvoboda@co.grays-harbor.wa.us