

NO. 48515-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NICK NICHOLS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Suzan Clark, Judge

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

The trial court erred in entering a judgment against Mr. Nichols when the evidence of failure to register as a sex offender was legally insufficient.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the State failed to present sufficient evidence that Mr. Nichols lacked a fixed residence for purposes of the failure to register as a sex offender statute?

2. Whether Mr. Nichols should have to pay appellate costs if he does not substantially prevail on appeal and the State requests costs?

STATEMENT OF THE CASE

Nick Nichols is a long haul trucker. RP¹ 50, 86. Although he is a resident of Washington, his work takes him out of the state on average 21-24 consecutive days each month. RP 86. He drives truck in all the lower 48 states. RP 86.

Mr. Nichols must register as a sex offender because of a 1990 conviction in Clark County for attempted rape in the first degree. RP² 88; CP 32.

¹ There is a single volume of verbatim report of proceedings for this appeal.

² Mr. Nichols stipulated to certain facts for use at the non-jury trial. CP 32-33; RP 23.

Mr. Nichols used to own a house in Grays Harbor but found that because of his trucking occupation, he spent more time on the road than at home. RP 87. He consistently provided his home address to the Grays Harbor County Sheriff when abiding by his sex offender registration requirement. RP 87. Because he was rarely at his house, he decided to sell it and use the proceeds to buy his own truck. RP 87-88.

Despite the sale of his house and the long hours on the road, Mr. Nichols still called Washington home. RP 53. Wanting a home base, Mr. Nichols reached out to his life-long friend Joe Brown and asked Brown if he could share Brown's Vancouver residence. RP 53. Mr. Brown agreed to the arrangement but refused to take any money for the likes of rent or utilities. RP 88, 113.

Mr. Nichols moved his few belongings – a kayak, clothing, a cooler, his personal truck – to Brown's apartment at 2716 K Street #1, Vancouver. RP 109, 112. On December 29, 2014, Mr. Nichols dutifully fulfilled his registration requirement by personally registering his new fixed residence with Clark County Sheriff's Detective Kevin McVicker. RP 30; Supplemental Designation of Clerk's Papers, Trial Exhibit 11.

Mr. Nichols also updated his address with various entities to include his vehicle registration, taxes, post office box, and Washington driver's license. RP 92-93, 99, 103; Supp. DCP, Exhibits 4, 5, 6, 7, 8, 10,

11. Mr. Brown took in Mr. Nichols's mail while Nichols was on the road. RP 44, 53. When Mr. Nichols received a parking ticket in Illinois, the ticket information was mailed to his K Street address. RP 105; Supp. DCP Ex. 11. Mr. Nichols also maintained a Vancouver post office box. RP 53. Mr. Brown sometimes picked up that mail too. RP 53.

As a matter of routine monitoring, on March 14, 2015, Clark County Sheriff's Detective David Jensen went to Mr. Nichols's address. RP 63. Mr. Nichols was out on the road. RP 64. Detective Jensen spoke with Mr. Brown. RP 65. Mr. Brown is in his 80s. RP 89. Mr. Brown told Detective Jensen that Mr. Nichols did not live with him but stayed at the residence a few times. RP 44. When he stayed the night, Mr. Nichols slept in a lounge chair. RP 44. Mr. Brown signed a witness statement under the penalty of perjury. Supp. DCP Ex. 15.

The State charged Mr. Nichols with a first offense for failure to register as a sex offender. CP 1, 31.

Mr. Nichols was arrested on the charge at the K Street address when he was home from the road. RP 106.³

Had Mr. Nichols been home when Detective Jensen checked up on his residence status, he likely would have found Mr. Nichols and Mr.

³ Mr. Nichols filed a pre-trial *Knapstad* motion. CP 2-20. At the motion, the State argued, and the court agreed, that there were disputed factual issues and thus denied the motion. RP 2-12.

Brown sharing a takeout meal and amicably watching sports on television as was their routine when Nichols was home. RP 56, 111-12. Mr. Nichols preferred to sleep in his semi-truck as he did not like the way the apartment smelled. RP 108. Neither of the apartment's two bedrooms were routinely used for sleeping by either Mr. Brown or Mr. Nichols. RP 55.

Mr. Brown welcomed his "home base" arrangement with Mr. Nichols. RP 57-58. Mr. Nichols had standing permission to be there any time. RP 57-58. Mr. Brown realized that as a long haul trucker living in Washington, Mr. Nichols needed a place to come to from the road and he gladly provided it. RP 56-58.

Mr. Nichols signed a written waiver of his right to a jury trial and the court engaged in a brief colloquy with him about the waiver. CP 30; RP 12. After hearing testimony and examining the exhibits admitted at trial, the court found Mr. Nichols guilty as charged. RP 154-58. The court imposed two days in jail on a maximum sentence of one year. RP 172; CP 41. It also imposed 12 months of community custody. CP 42. The court entered written findings of fact and conclusions of law to support its verdict:

1. FINDINGS OF FACT

1. The person before the court who has been identified as Nick G. Nichols was convicted on May 15, 1991, of Attempted Rape in the First Degree, a class A felony sex offense, for an offense

committed on December 10, 1990 under Clark County Superior Court Cause Number 90-1-01073-2.

2. As a result of the conviction, Nick Nichols was required to register as a sex offender during the time period from December 29, 2014, to May 7, 2015.⁴

3. On December 29, 2014 the defendant, Nick Nichols, completed a sex offender change of address form in Clark County, WA indicating he would be residing at 2716 K Street #1 in Vancouver.

4. Nick Nichols stored some possessions at 2716 K Street #1 in Vancouver, WA, including, a Dodge Ram pickup truck, a kayak, some clothes, and a cooler.

5. Mr. Nichols is a long haul truck driver across the 48 states. He is typically outside the State of Washington while on his job as a truck driver for 3 weeks to 26 days per month.

6. On the registration form that the defendant filled out on December 29, 2014 he signed under the portion that said, "I have read or someone has read to me the requirements to register as a sex offender. I understand the requirements as listed under RCW 9A.44.130."

7. On the registration form that the defendant filled out on December 29, 2014, he initialed each of the specifically enumerated requirements of registration on the second page of the form.

8. The registration statute is clear that if a person lacks a fixed residence, he or she has to comply with the in person check in requirement.

9. Fixed residence is defined by RCW 9A.44.128. It states:

[A] building that a person lawfully and habitually uses as living quarters a majority of the week. Uses as living quarters means to conduct activities consistent with the common understanding of

⁴ The Amended Information under which Mr. Nichols was tried lists the date range for the offense as January 1, 2015 through May 7, 2015.

residing, such as sleeping; eating; keeping personal belongings; receiving mail, and paying utilities, rent, or mortgage.

CONCLUSIONS OF LAW:

1. All of the above facts have been proven by the State beyond a reasonable doubt.

2. The court has jurisdiction over the parties hereto and the subject matter of the action.

3. 2716 K Street #1 in Vancouver, WA was not the defendant's fixed residence during the time period from January 1, 2015 to May 7, 2015.

4. RCW 9A.08.010 defines knowingly. It states:

A person knows or acts knowingly or with knowledge when (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist when facts are described by a statute defining an offense.

5. During the time period from January 1, 2015 to May 7, 2015, Nick Nichols knowing failed to comply with a requirement of the sex offender registration under RCW 9A.44.130.

6. Judgment and Sentence should be entered accordingly.

Mr. Nichols appeals all portions of his judgment and sentence. CP

34. The trial court determined Mr. Nichols's indigency entitled him to appointed counsel on appeal. Supplemental Designation of Clerk's Paper, Order of Indigency (sub. nom. 34).

ARGUMENT

1. The State failed to present sufficient evidence to prove that Mr. Nichols knowingly failed to register as a sex offender.

a. Standards of proof and authorities

“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). Uncontested findings of fact are

verities on appeal. *State v. Alexander*, 125 Wn. 2d 717, 722–23, 888 P.2d 1169 (1995).

- b. *No rational trier of fact could have found that Mr. Nichols knowingly failed to register as a sex offender.*

A convicted sex offender has a statutory duty to register with the sheriff of the county of residence. RCW 9A.44.130(1)(a). A person who knowingly fails to comply with any of the registration requirements is guilty of failure to register, a class C felony. RCW 9A.44.132(1)(a)(i). In its Amended Information, the State failed to specify exactly what Mr. Nichols did, or did not do, to violate the registration requirement. CP 31. The State's position became clear in its presentation of evidence and argument to the court: Mr. Nichols failed to notify the court he lacked a fixed residence thus requiring him to check in weekly with the Clark County Sheriff's Office. RP 128-140; 149-154.

But a conviction requires proof that Mr. Nichols lacked a fixed residence. *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005). A person cannot be convicted of failure to register if there is insufficient evidence he lacked a fixed residence. Mr. Nichols had a fixed residence. Thus he did not knowingly fail to comply with any registration requirements.

As the court noted in its conclusions of law, a fixed residence is defined for the purpose of the statute as

[A] building that a person lawfully and habitually uses as living quarters a majority of the week. Uses as living quarters means to conduct activities consistent with the common understanding of residing, such as sleeping; eating; keeping personal belongings; receiving mail, and paying utilities, rent, or mortgage.

CP 36-37; RCW 9.94A.128(5). Mr. Nichols's fixed residence was 2716 K St., Apt 1, Vancouver. Each month he returned from his long haul trucking duties to that residence. It was his home. He has lawful access to it and habitually used it when he was home. At times he slept there in a recliner. Other times he would sleep more comfortably in the sleeper compartment of his truck which he often parked near the residence. RP 48, 113.

He took meals at his residence. RP 112. Commonly, he brought home take out and he and Mr. Brown would enjoy their meal together while watching television. RP 56, 112.

He kept his personal belongings at the residence, in his semi-truck, and in a storage unit. RP 102, 109, 112-113. The personal belongings he kept at the apartment consisted of his non-work truck, his kayak, some clothing, and a cooler. RP 112. He received mail both at the apartment and at his PO Box. RP 60, 92.

He did not pay rent or utilities because Mr. Brown refused to take his money. RP 88. He listed the apartment as his address on any

paperwork requiring documentation of his home address. See trial exhibits 4-8, 10, 11. When the police came to arrest him on the current charge, they found him at his home, a fixed residence - 2716 K St., Apt 1, Vancouver.

c. Insufficient evidence necessitates reversal of Mr. Nichols's conviction.

The state presented insufficient evidence that Mr. Nichols knowingly failed to register when he updated his registration on December 29, 2014. No rational trier of fact could have found beyond a reasonable doubt that Mr. Nichols's fixed residence was anything but 2716 K St., Apt 1, Vancouver. Mr. Nichols did not knowingly misidentify his status of having a fixed residence between January 1 and May 7, 2015. Accordingly, his conviction must be reversed and the charge dismissed with prejudice. *Stratton*, 130 Wn. App. at 767.

2. If the State substantially prevails on appeal, any request for appellate costs should be denied.

If Mr. Nichols does not prevail on appeal, he requests that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party on appeal. *State v. Sinclair*, 192 Wn. App. 380, 391, 367 P.3d 612 (2016); RCW 10.73.160(1) (the "court of appeals . . . may require an adult . . . to pay appellate costs."). Imposing costs against indigent defendants raises

problems well documented in *Blazina*: “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). *Sinclair* recognized the concerns expressed in *Blazina* applied to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. *Sinclair*, 192 Wn. App. at 391.

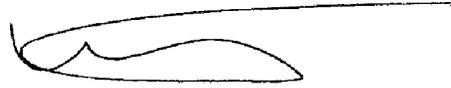
Although Mr. Nichols retained counsel on appeal, the trial court found he qualified for indigent defense on appeal. Supp. DCP, Order of Indigency (sub. nom. 34). As noted on the Motion and Order Seeking Review at Public Expense, Mr. Nichols has substantial debt. Supp DCP, Motion and Order Seeking Review at Public Expense (sub. nom 33). Mr. Nichols may have difficulty finding well-paying work given his criminal history of seven prior felony convictions and the requirement of sex offender registration. CP 49-50.

Importantly, there is a presumption of continued indigency through the review process. *Sinclair*, 192 Wn. App. at 393; RAP 15.2(f). As in *Sinclair*, there is no trial court order finding Mr. Nichols’s financial condition has improved or is likely to improve. *Sinclair*, 192 Wn. App. at 393. Given the serious concerns recognized in *Blazina* and *Sinclair*, this court should soundly exercise its discretion by denying the State’s request for appellate costs in this appeal involving an indigent appellant.

CONCLUSION

Mr. Nichols's conviction should be reversed and dismissed.

Respectfully submitted August 19, 2016.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', written over a horizontal line.

LISA E. TABBUT/WSBA 21344
Attorney for Nick Nichols

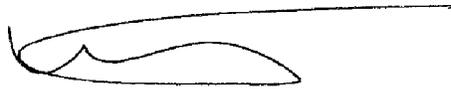
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Nick Nichols, PO Box 1822, Vancouver, WA 98668.

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

Signed August 19, 2016, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Nick Nichols, Appellant

LISA E TABBUT LAW OFFICE

August 19, 2016 - 10:22 AM

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