



No. 293211

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

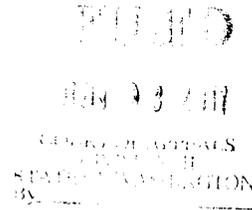
v.

ERIC PAUL ALGER, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
THE HONORABLE KATHLEEN O'CONNOR

OPENING BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
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I. ASSIGNMENTS OF ERROR

A. The trial court erred in making Conclusion of Law (CL) 3.1:

“From May 4, 2010 until his arrest on June 3, 2010, the defendant ceased being regularly and publically [sic] present at the 327 ½ W. Second address regardless of whether it was because he had physically abandoned the premises or just intended to make it impossible for persons to locate him at that residence. (CP 53).

B. The trial court erred in making CL 3.2: “The defendant abandoned the public residence where he could be located at by the SCSO and did not register a new address or as a transient”. (CP 54).

C. The trial court erred in making CL 3.3: “There is sufficient evidence to find- beyond a reasonable doubt- that the defendant is required to register as a sex offender as a resident of the State of Washington and that between May 4, 2010 and May 18, 2010 the defendant failed to register a change in residence in the State of Washington as alleged in the information. (CP 54).

D. The trial court erred in making CL 3.4: "The defendant is guilty of count I- Failure to Register as a Sex Offender." (CP 54).

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Was the evidence insufficient to support a conviction for a knowing failure to register as a sex offender?

II. STATEMENT OF FACTS

Eric Alger pled guilty to indecent liberties on August 25, 2005. On April 22, 2009, and August 12, 2009, he was found guilty of failure to register as a sex offender. Mr. Alger was released from custody on April 19, 2010, and as required, registered in Spokane County as a sex offender on April 20, 2010. (RP 64, 67)¹. He was to reside at the New Washington in room B-14 and required to log out and in on a sign in sheet. (RP 68, 77).

On April 28, 2010, he reported in at the kiosk in the Community Justice Center. (RP 69). On April 29th, Mr. Alger signed out on the sheet log. (RP 107). He returned at 1 o'clock in the morning on April 30th. When he returned, the sign-out sheet was not at the front desk and Mr. Alger just went to his room. (RP

¹ For purposes of this brief, the hearing dates of 6/4, 6/10, and 8/9/2010 will be referenced as RP page no.; hearing date 8/10/2010 as 1RP page no.; hearing date 8/19/2010 as 2RP page no.; hearing date 6/15/2010 as 3RP page no.

108,111). He stayed in his room, ill, until May 2nd. (RP 111). On May 2nd, he left without signing out. (RP 115).

On May 3rd or 4th, the manager of the New Washington conducted a welfare check on Mr. Alger. (RP 55). He noticed the keys to the room were on Mr. Alger's bed. The manager removed the keys. He thought Mr. Alger was going to return because his personal belongings remained in the room. (RP48,55).

On May 4th, Mr. Alger overslept and did not report for a meeting with his community corrections officer. (RP 115). Thereafter, Mr. Alger wanted to avoid detection by the DOC for fear he would be arrested. (RP 116). He began to sneak in and out of the New Washington by opening an outside box that contained an extra key to unlock the front door. He was easily able to open his room door with a butter knife and he regularly returned to sleep there. (RP 47). The manager testified the front desk was unmanned between midnight and 5 a.m. and it was possible to enter and exit without being seen. (RP 52, 60). On May 6th, Corrections officer Madill called the New Washington manager to locate Mr. Alger, but did not go to the New Washington herself. (RP 70).

The rent for the room was paid through May 19th. (RP 119). On May 19th, the manager packed up Mr. Alger's belongings and placed them in storage. The manager did not enter the room again until two or three weeks after that date, when it was re-rented to someone else. (RP 57). Mr. Alger testified he continued to use the room until the date of his arrest in June. (RP 121-122). There was no evidence Mr. Alger had been given an eviction notice.

Mr. Alger waived his right to a jury and the matter was tried in a bench trial. (RP 30; CP 36). The State sought to enlarge the time from May 4th- June 3rd, by amended information, but withdrew the request and limited the charging period to May 4-May 18th. (RP 19).

The State also submitted documents of a DOC administrative hearing in which Mr. Alger pleaded guilty to failure to register, but then withdrew them. (1RP 2). The prosecutor questioned Mr. Alger about his guilty plea at the hearing, as a prior inconsistent statement, and not for the truth of the matter. (RP 131). Mr. Alger explained:

"I did not indicate that I had moved out. I had pledded (sic) guilty to DOC charges because I would still have been found guilty in front of the person that was doing the hearing

because I've had him before and I knew he would have found me guilty if I had argued it.

Q: You also admitted at the same time that you did not register a change of address, correct?

A: I did not admit it. I just did everything so I could just get that over with because of the hearing officer." (RP 131).

In making its oral findings of fact, the court stated,

"From a legal standpoint, my view is that the fact that he was not longer publically [sic] residing, even if, in fact, he was clandestinely residing, means that he was not in compliance with his requirements...It seems to me that that really is the lynchpin legal issue here. The defendant has to register. He has to be publically [sic] registered." (1RP 25-26).

"So the activity that he engaged in, ...flying under the radar...[D]id in fact, abandon his public residence and created a situation where he abandoned the residence that he was registered at....He abandoned his public residence. (1RP 26,27).

Mr. Alger was found guilty and sentenced to 20 months incarceration. (CP 66). He appeals.

III. ARGUMENT

The Evidence Is Insufficient To Support A Conviction For A Knowing Failure To Register As A Sex Offender.

Because of his underlying conviction, Mr. Alger was required to comply with the registration of sex offender requirements as outlined in RCW 9A.44.130. He challenges the court's conclusion:

"From May 4, 2010 until his arrest on June 3, 2010, the defendant ceased being regularly and publically [sic] present at the 327 ½ W. Second address regardless of whether it was because he had physically abandoned the premises or just intended to make it impossible for persons to locate him at that residence. (CP 53).

Generally, a defendant can be tried and convicted only of crimes with which he or she is charged. Const. art. 1 § 22 (Amend. 10). Mr. Alger was charged with failure to register during the time period of May 4th – May 18th, not June 3rd. (CP 1).

The State is required to prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 297 U.S. 358, 364, 90 S.Ct. 1968, 25 L.Ed2d 368 (1970); U.S. Const. Amend. XIV; Const. art. 1§3. In a challenge to the sufficiency of the evidence, the test is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Sherrill*, 145 Wn. App. 473, 484, 186 P.3d 1157 (2008) quoting

State v. Gentry, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995).

All reasonable inferences from the evidence are drawn in favor of the State. *Id.*

The court's conclusion that Mr. Alger ceased to be regularly and publicly present at the New Washington, as an underpinning to establish he knowingly failed to register a new address is error. The only evidence suggesting Mr. Alger was not regularly and publicly present was the testimony of one manager who stated he did not see Mr. Alger. The manager also admitted it was possible to come and go from the residence without being seen. There was no requirement that Mr. Alger be seen regularly or publicly by another in order to establish the New Washington was still his residence.

Here, the court also concluded Mr. Alger "abandoned the public residence where he could be located at by the SCSO and did not register a new address or as a transient". (CP 54). A residence is "the place where a person lives as either a temporary or permanent dwelling, a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit." *State v. Pickett*, 95 Wn. App. 475, 478, 975 P.2d 584 (1999).

Mr. Alger kept his belongings in the residence. His rent was paid through May 19th, one day after the charging period. He testified he entered and exited the residence on a regular basis. Although he did not sign the sheet log, and admittedly made great efforts to remain unseen to prevent his arrest, he did not change his residence.

In *State v. Drake*, 149 Wn. App. 88, 201 P.3d 1093, (2009), this court considered whether Drake had *knowingly* failed to comply with registration requirements. (Emphasis added). There, Drake did not pay the rent for his registered residence. *Id.* at 91. The New Washington apartment manager removed Drake's belongings and placed them in storage. When police learned that Drake had been ousted from the residence, an arrest warrant was requested.

Without ruling on the lawfulness of Drake's eviction, the court did note the absence of evidence that Drake had notice of the eviction, the lack of evidence concerning his whereabouts during the charging period, lack of evidence he changed addresses or maintained a residence elsewhere, and no evidence from which it could be inferred he did not intend to return to his apartment. *Id.* at 94. The lack of evidence impacted the *mens rea* element of "knowingly" as there was no other evidence to support an inference

of a knowing failure to register. The court reversed the conviction, remanding for dismissal with prejudice, because the State did not prove beyond a reasonable doubt that Drake knowingly failed to register at a new address or as a homeless person. *Id.* 95.

Similarly, here, the State did not produce any evidence concerning Mr. Alger's whereabouts during the charging period that was contrary to his testimony. There was no evidence that he changed addresses or maintained a residence other than the New Washington. Like Drake, he left his belongings in the room and there was no evidence from which it could be inferred that he did not intend to return. Also, like Drake, there was no evidence Mr. Alger had notice of eviction.

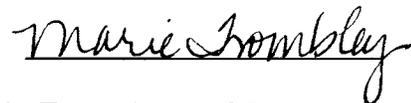
Here, the State only proved that a manager of the New Washington apartments did not recall seeing Mr. Alger after April 30th. This is not sufficient to sustain a conviction for a knowing failure to register as a sex offender.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Alger respectfully asks this court to reverse his conviction because of insufficient evidence and remand for dismissal with prejudice.

June 2, 2011

Respectfully submitted,

A handwritten signature in cursive script that reads "Marie Trombley". The signature is written in black ink and is positioned above the typed name and address.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Eric Paul Alger, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on June 2, 2011, to Eric Paul Alger, DOC 330088, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326; and emailed per agreement between the parties to Mark Erik Lindsey, Spokane County Prosecutor, at kowens@spokanecounty.org.



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