

FILED

29321-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

AUG 04 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON, RESPONDENT

v.

ERIC P. ALGER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
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INDEX

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....2

STATEMENT OF THE CASE.....2

ARGUMENT6

 A. THE TRIER OF FACT CORRECTLY
 CONCLUDED THE APPELLANT
 KNOWINGLY FAILED TO REGISTER
 AS A SEX OFFENDER8

 B. THE PURPOSE OF THE SEX OFFENDER
 REGISTRATION STATUTE WOULD
 BE DEFEATED IF THE APPELLANT
 HAD IN FACT RESIDED AT HIS
 REGISTERED ADDRESS BUT TOOK
 EVERY PRECAUTION TO AVOID
 DETECTION AND ARREST AT THAT
 RESIDENCE.....13

CONCLUSION.....14

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. CASTILLO, 144 Wn. App. 584, 183 P.3d 355 (2008).....	9
STATE V. DELMARTER, 94 Wn.2d 634, 618 P.2d 99 (1980).....	6
STATE V. DRAKE, 149 Wn. App. 88, 201 P.3d 1093 (2009).....	8, 9, 10, 12
STATE V. GREEN, 94 Wn.2d 216, 616 P.2d 628 (1980).....	6
STATE V. McKINNON, 110 Wn. App. 1, 38 P.3d 1015, 1017 (2001).....	11, 14
STATE V. MYLES, 127 Wn.2d 807, 903 P.2d 979 (1995).....	6
STATE V. PARTIN, 88 Wn.2d 899, 567 P.2d 1136 (1977).....	6
STATE V. PETERSON, 168 Wn.2d 763, 230 P.3d 588 (2010).....	8, 13
STATE V. PICKETT, 95 Wn. App. 475, 975 P.2d 584 (1999).....	7, 11
STATE V. SALINAS, 119 Wn.2d 192, 829 P.2d 1068 (1992).....	6
STATE V. SMITH, 106 Wn.2d 772, 725 P.2d 951 (1988).....	6
STATE V. THOMAS, 150 Wn.2d 821, 83 P.3d 970 (2004).....	6

STATUTES

RCW 9A.08.010(1)(b) 8, 11
RCW 9A.44.130..... 7
RCW 9A.44.130(5)(a) 7
RCW 9A.44.130(6)(a) 7

I.

APPELLANT'S ASSIGNMENTS OF ERROR

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

3.1:

From May 4, 1010 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 1 – Failure to Register as a Sex Offender.

(CP 54).

II.

ISSUES PRESENTED

- A. Did the trier of fact correctly conclude the appellant knowingly failed to register as a sex offender?
- B. Alternatively, would the purpose of the sex offender registration statute be defeated if the appellant had in fact resided at his registered address but took every precaution to avoid detection and arrest at that residence?

III.

STATEMENT OF FACTS

Eric Alger was found guilty for failure to register as a sex offender on April 22, 2009 and August 12, 2009. (RP 65). Mr. Alger was later released on probation April 19, 2010 and registered as a sex offender on April 20, 2010. (RP 64, 75). As was required by Mr. Alger's release plan, Mr. Alger was pre approved to reside at the New Washington Apartments at 327-and-a-half West Second Spokane, Washington. (RP 66). Mr.

Alger's rent at the New Washington Apartments was paid by a D.O.C. voucher for the dates April 19, 2010 through May 19, 2010. (RP 47, 53).

Pursuant to the terms of his probation, Mr. Alger was required to meet with Pamela Madill, a community corrections officer with the Department of Corrections. (RP 64). Ms. Madill discussed the terms of his probation, namely his registration and residency requirements. (RP 67). During a meeting between Ms. Madill and Mr. Alger on April 20, 2010, Ms. Madill informed Mr. Alger that he would need prior approval before changing addresses. (RP 67). Although a curfew for Mr. Alger had not been set, Mr. Alger was required to use a log-sheet to sign himself in and out of his apartment. (RP 68). The next meeting between Mr. Alger and Ms. Madill was scheduled for May 4, 2010. (RP 71, 115).

The last date that Mr. Alger signed the log sheet was April 29, 2010. (RP 54, 107). According to testimony, Mr. Alger ceased using the log-sheet as was required by the D.O.C. because he was annoyed with the process. (RP 115). On May 3, 2010, David Werstein conducted a welfare check on Mr. Alger's apartment because he had not been seen since April 29, 2010. (RP 46, 54-55). Upon entering Mr. Alger's apartment, Mr. Werstein observed Mr. Alger's belongings strewn about the room with the keys to Mr. Alger's apartment on the bed. (RP 45, 55). Mr. Werstein took Mr. Alger's keys and placed them in a drawer for safe keeping. (RP 46).

However, Mr. Alger never retrieved the keys to his own apartment. (RP 47).

Mr. Alger knew that he would be arrested if he were even a few minutes late to his next scheduled meeting with Ms. Madill. (RP 106-07). Despite this fact, On May 4, 2010, Mr. Alger failed to report for a scheduled meeting and Ms. Madill requested a D.O.C. warrant. (RP 115, 71). Partially inspired by murder mystery books, Mr. Alger testified that beginning May 4, 2010, he began a systematic campaign of deception in order to avoid arrest. (RP 120, 121).

Mr. Alger testified that he avoided arrest while staying at the New Washington Apartments. (RP 116). According to the record, Mr. Alger testified that he stayed in his apartment at the New Washington from May 4, 2010 until May 19, 2010, “when [he] could” and from May 19, 2010 until his arrest on June 3, 2010, “every now and then.” (RP 116, 120). In order to sneak in and out undetected for an entire two weeks, Mr. Alger testified that he would conduct reconnaissance by peeping into bedroom windows and patrolling up and down the street in order to calculate the manager’s movements during both day and night. (RP 117-18). When the timing was right to avoid detection, Mr. Alger testified that he stealthily cracked the combination of a lock box containing a key to the building’s entrance and then used a butter knife to break in through the door of his

apartment. (RP 119). Mr. Alger claims to have accomplished this feat despite the existence of security cameras, apartment staff at the manager's desk, and Mr. Werstein's residence on the same floor as Mr. Alger's apartment. (RP 52, 58). While the feat remains remotely possible to accomplish, Mr. Werstein testified that it was "very unlikely." (RP 58).

Since, Ms. Madill did not meet with Mr. Alger as required on May 4, 2010, she did not issue a second voucher to pay for Mr. Alger's rent at the New Washington Apartments. (RP 73). Upon May 19, 2010 Mr. Werstein reentered Mr. Alger's apartment in order to pack up Mr. Alger's belongings. (RP 57). Mr. Werstein put the contents of Mr. Alger's apartment in storage. (RP 49, 57). From the dates of May 3, 2010 until May 19, 2010, Mr. Werstein testified that it looked as if nobody had been in the room. (RP 59). The apartment was then rented again two or three weeks later. (RP 57).

Mr. Alger was arrested on June 3, 2010. (RP 121). Mr. Alger was charged with knowing failure to register as a sex offender and sentenced to 20 months incarceration. (CP 66). Mr. Alger appeals the verdict.

IV.

ARGUMENT

The defendant claims there was insufficient evidence to support the bench verdict finding him guilty of failure to register as a sex offender. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence are drawn in the State's favor and are interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136(1977).

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court will defer to the trier of fact regarding issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995).

The State must prove every element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. Amend. XIV art. 1 § 3. The sex offender registration statute requires that registered sex offenders who change addresses within the same county “must send signed written notice of the change of address to the county sheriff within three business days of moving.” RCW 9A.44.130(5)(a). If the sex offender lacks a fixed residence, he or she must “provide signed written notice to the sheriff of the county where he or she last registered within three business days after ceasing to have a fixed residence.” RCW 9A.44.130(6)(a).

For purposes of this statute, 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).

Additionally, “[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.” RCW 9A.44.130. The element of “knowingly” means “[1] he or she is aware of a fact, facts, or circumstances or result described by a statute

defining an offense; or [2] he or she has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.” RCW 9A.08.010(1)(b)). Also, while the state must prove every element of the crime of failure to register as a sex offender, the purpose of the sex offender registry is to aid law enforcement in keeping the community safe by knowing the whereabouts of sex offenders and the court should not read the statute so as to work an absurdity against this purpose. *See State v. Peterson*, 168 Wn.2d 763, 774, 230 P.3d 588 (2010).

A. THE TRIER OF FACT CORRECTLY CONCLUDED THE APPELLANT KNOWINGLY FAILED TO REGISTER AS A SEX OFFENDER.

In *State v. Drake*, the sole issue was whether there was sufficient evidence to find that Mr. Drake had knowingly failed to register as a sex offender. *State v. Drake*, 149 Wn. App. 88, 92-93, 201 P.3d 1093 (2009). There, the trial court rested on the fact that Mr. Drake had been evicted from the residence registered with the state. *Id* at 94. Drake did not have legal right to his registered residence and thus Mr. Drake had knowingly failed to register as a sex offender within the allotted time. *Id*. The Court found that such an inference impacts the *mens rea* element. *Id*. Since the State offered no additional evidence to support the charged crime, the

Court concluded that the State failed to prove that Mr. Drake had not intended to return to his residence. *Id.* The Court further concluded that, “[i]f Mr. Drake maintained his residence at the New Washington Apartments and intended to return there, he was under no duty to change his registration to another residence or declare that he had no fixed residence.” *Id.* at 94-95.

Here, the State focuses on the dates prior to Mr. Alger ending his lease with the New Washington Apartments and not the dates subsequent to Mr. Alger’s legal right to occupy the apartment. The factual timeline here is entirely opposite of the timeline in *Drake*. *See* 149 Wn. App. at 88. The central issue is not whether Mr. Alger had legal right to his apartment at the New Washington from May 4, 2010 to May 19, 2010, but whether Mr. Alger abandoned his residence and his property within the apartment despite having a legal right to occupy that apartment. *See State v. Castillo* 144 Wn. App. 584, 589, 183 P.3d 355 (2008) (Where the Court found sufficient evidence of knowing failure to register in which the absence of appellant’s personal affects in the apartment were but one factor among others contributing to the finding of sufficiency).

The trier of fact in this case correctly inferred that Mr. Alger was not residing in his apartment at the New Washington. Despite the appellant’s gross simplification of the evidence against him, the State

provided more than sufficient evidence that Mr. Alger was not residing in his apartment nor intended to return. The record indicates that apartment staff did not see Mr. Alger while they sat at the office desk or on the building security cameras. (RP 52, 58). Further, Mr. Werstein did not see Mr. Alger during May 3, 2010 through May 19, 2010, despite the fact that Mr. Werstein's apartment and Mr. Alger's apartment were located on the same floor and they shared communal bathrooms and kitchens. (RP 58).

Moreover, Mr. Werstein testified that from the time he entered Mr. Alger's apartment on May 3, 2010 until he reentered Mr. Alger's apartment to pack up his belongings, that it did not seem as if anybody had been in the apartment since May 3, 2010. (RP 59). The record further indicates that Mr. Alger, annoyed with having to use the log-sheet, ceased using the log sheet which was used to indicate his coming and going from his apartment as was required by the D.O.C. (68, 107, 115)

Lastly, Mr. Alger had not been in possession of the keys to his own apartment since May 3, 2010. (RP 46). Mr. Alger had no way to unlock the door to his apartment and thus he did not have dominion or control over the contents therein. However, in *Drake*, the appellant did not abandon his property but rather sought to retrieve his property once it was put into storage. 149 Wn. App. at 95. Here, Mr. Alger never attempted to retrieve his keys or his possessions. (RP 46).

Additionally, if one were to believe Mr. Alger's testimony despite all reasonable evidence to the contrary, the record shows Mr. Alger testified that after missing his May 4th appointment with his CCO he decided to "keep low... [and] sneak in and out when [he] could." (RP 116). As previously established, a residence is not a "place of temporary sojourn or transient visit." *Pickett*, 95 Wn. App. at 478. Here, Mr. Alger testified that he only stayed at the apartment sometimes and only when he was able to avoid arrest. (RP 116, 120). The appellant confuses Mr. Alger's intent to return to his apartment contingent on his ability to avoid arrest with unencumbered intent to return to one's place of residence. If Mr. Alger's testimony were true, he only occupied the apartment on a temporary and transient basis. It should also be noted that the trial court judge acting as the trier of fact was under no obligation to believe any of Mr. Alger's testimony. *See State v. McKinnon*, 110 Wn. App. 1, 5, 38 P.3d 1015, 1017 (2001).

Mr. Alger knowingly failed to register as a sex offender. The element of "knowingly" means "[1] he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or [2] he or she has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense." RCW 9A.08.010(1)(b)).

Here, Mr. Alger knew of his registration and residency requirements as was explained to him during his April 20, 2010 meeting with Ms. Madill. (RP 67). Mr. Alger was aware that he was to live at the New Washington Apartments and was not to cease residence at the New Washington Apartments without prior approval. (RP 66-67). Moreover, Mr. Alger knew that the log-sheet was required by the D.O.C. and was intended to verify his coming and going from his apartment. (RP 68). Despite knowledge of this specific D.O.C. requirement, Mr. Alger ceased using the log-sheet because he was annoyed. (RP 115). Mr. Alger was perfectly aware of the intricacies of his registration requirements and he was aware that failures to register a new address or as a transient within three days would be a violation of his probation.

The facts here cumulatively present a much stronger case of sufficiency than *Drake* where the trial rested merely on inference that the appellant did not have legal right to his apartment and therefore knowingly failed to register. 149 Wn. App. 88. The appellant wants the court to believe that the only evidence against him is Mr. Werstein's testimony that he did not see Mr. Alger during the dates in question. Based on the evidence set forth above, the appellant's claim is patently false. The State presented more than enough evidence to lead a rational trier of fact to infer that Mr. Alger knowingly failed to register as a sex offender.

B. THE PURPOSE OF THE SEX OFFENDER REGISTRATION STATUTE WOULD BE DEFEATED IF THE APPELLANT HAD IN FACT RESIDED AT HIS REGISTERED ADDRESS BUT TOOK EVERY PRECAUTION TO AVOID DETECTION AND ARREST AT THAT RESIDENCE.

While the state must prove every element of the crime of failure to register as a sex offender, the purpose of the sex offender registry is to aid law enforcement in keeping the community safe by knowing the whereabouts of sex offenders. *See Peterson*, 168 Wn.2d at 774. The courts should not read the statute so as to work an absurdity against this purpose. *See Id.*

Inspired in part by murder mystery books, Mr. Alger testified that beginning May 4th he began a systematic campaign of deception in order to avoid arrest. (RP 120, 121).

Mr. Alger testified that he avoided arrest while staying at the New Washington Apartments. (RP 116). In order to sneak in and out undetected for an entire two weeks, Mr. Alger testified that he would conduct reconnaissance by peeping into bedroom windows and patrolling up and down the street in order to calculate the manager's movements during both day and night. (RP 117-18). When the timing was right to avoid detection, Mr. Alger testified that he cracked the combination of a

lock box containing a key to the building's entrance and then used a butter knife to break in through the door of his apartment. (RP 119).

The trial court as a trier of fact was under no obligation to believe Mr. Alger's testimony. *See McKinnon*, 110 Wn. App. at 5. If the trial were to believe Mr. Alger's testimony, Mr. Alger was defeating the purpose of the sex offender registry which is to aid law enforcement in knowing the whereabouts of sex offenders. Mr. Alger cannot claim that he did not knowingly fail to register when he made a concerted effort to reside at a place only when it was possible to avoid arrest. Claiming such behavior as compliant with the registration requirement would work an absurdity on the sex offender registration statute.

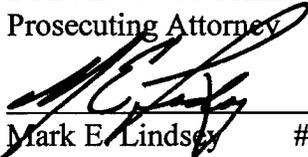
V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 3rd day of ~~July~~ ^{August}, 2011

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