

FILED  
August 3, 2015  
Court of Appeals  
Division III  
State of Washington

No. 32958-5-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

BRANDON CASEY PRIES,  
Defendant/Appellant.

APPEAL FROM THE SPOKANE SUPERIOR COURT  
Honorable John O. Cooney, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The court erred in making Finding of Fact 22: “On [October 8, 2013] [] the defendant and Ms. Blair moved to Chewelah to reside with the defendant’s uncle.” CP 269.

2. The court erred in making Finding of Fact 26: “Both the defendant and Ms. Blair would have resided at the defendant’s uncle’s house longer but for being asked to leave.” CP 270.

3. The court erred in making Finding of Fact 36: “Ms. Blair and the defendant intended on spending the night of October 19, 2013, at Freeway Park.” CP 271.

4. The court erred in making Finding of Fact 37: “...[A]ny visits [the defendant] made to the New Washington Apartments in the month of October 2013 were nothing more than transient visits.” CP 271.

5. The court erred in making Finding of Fact 38: “The Court does not find that the defendant temporarily stayed in the New Washington Apartments during the month of October 2013.” CP 271.

6. The court erred in making Finding of Fact 40: “In [having the goal to avoid the Department of Corrections], the defendant abandoned his residence at the New Washington Apartments, took temporary residence in Chewelah, and then became transient.” CP 271.

7. The court erred in making Finding of Fact 41: “By abandoning his residence and becoming transient, both the Department of Corrections, as well as law enforcement in general, lacked the ability to contact the defendant.” CP 271.

8. The court erred in making Conclusion of Law 5: “Based upon the evidence, including the defendant’s concession, the defendant did not notify [appropriate authorities] of a change in residence or in becoming transient subsequent to his initial registration o[n] August 13, 2013.” CP 272.

9. The court erred in making Conclusion of Law 8: “The New Washington Apartments was not the defendant’s residence between the dates of October 3, 2013, and October 15, 2013, as he had abandoned the apartment.” CP 272.

10. The court erred in making Conclusion of Law 10: “... From mid-September 2013 through October 19, 2013, the defendant did not use the New Washington Apartment as either a temporary or permanent dwelling.” CP 272.

11. The court erred in finding beyond a reasonable doubt that “[s]ubsequent to abandoning his apartment and becoming transient on or before the date of October 3, 2013, and through his arrest o[n] October 19,

2013, the defendant knowingly failed to register as a sex offender with the Spokane County Sheriff's Office." CP 272–73.

12. The sentencing court erred when it ordered appellant to submit to another DNA collection under RCW 43.43.754.

*Issues Pertaining to Assignments of Error*

1. Was there insufficient evidence Mr. Pries abandoned his residence in the New Washington Apartments to support a conviction for a knowing failure to register as a sex offender?

2. If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, does the trial court abuse its discretion when it orders a defendant to submit to yet another DNA collection?

**B. STATEMENT OF THE CASE**

Brandon Casey Pries' 1997 convictions of first degree child molestation and second degree incest required him to register as a sex offender. CP 268, Findings of Fact 1, 3. On August 13, 2013, Mr. Pries moved into the New Washington Apartments in Spokane, Washington. The Department of Corrections (DOC) approved Mr. Pries' living arrangements at the New Washington Apartments for three months, with

his rent to be paid by the DOC. The DOC paid Mr. Pries' first full month's rent through September 30. *Id.*, Findings of Fact 6, 9, 13.

On August 13, Mr. Pries registered his New Washington Apartment address with the Spokane County Sheriff's Office. *Id.*, Finding of Fact 5. On that same day, Mr. Pries met with his community corrections officer (CCO), Natasha Ruddell. The DOC placed him on GPS monitoring and imposed a number of restrictions including a curfew. *Id.*, Findings of Fact 7, 8; RP 103–05.

When Mr. Pries failed to attend required classes, a DOC warrant was issued on September 12 for his arrest. At about the same time, the DOC lost track of Mr. Pries as he quit charging the monitoring device and removed it from his body. CP 269, Findings of Fact 14, 15, 16; RP 106–07, 174. Mr. Pries testified he subsequently avoided the DOC and his apartment manager by leaving his apartment in the morning before the manager came on duty and returning at night after the manager's shift ended. RP 168, 170–72, 204–05.

On October 8, Spokane Police Detective David Grenon went to the New Washington Apartments but was unable to contact Mr. Pries. He spoke to the apartment manager. CP 269, Finding of Fact 21; RP 126. On September 30 Mr. Pries' belongings were packed up because the rent was

up and the manager thought he had “absconded.” RP 88–89, 118–119. The manager testified Mr. Pries still had his two keys. Others told him they saw Mr. Pries come and go from his apartment after September 30 but the manager was always unable to catch him. RP 95, 98–100. The detective did not follow up by calling Mr. Pries’ contact telephone number or leaving a business card on the apartment door or returning to the apartment after hours. RP 134–35, 139–40, 142, 146. The evidence was unclear whether the October rent had been paid but there was no evidence the apartment locks had been changed or that Mr. Pries had been given an eviction notice. CP 270, Findings of Fact 27, 28, 29; RP 93, 96, 98, 101–02, 117–18.

On October 8 Mr. Pries and his fiancée Mary Blair went to visit his uncle who lived in Chewelah. RP 169, 171, 191–92. Mr. Pries wanted to check on his uncle who was in poor health and also wanted to avoid arrest on the DOC warrant. RP 169–70, 175. Mr. Pries testified that between September 12 and October 8 he was still staying at his apartment at night. RP 171–72. For his Chewelah visit Mr. Pries took some soap, shampoo and clothes, and the book he writes songs in. RP 170. He was unaware the October rent may not have been paid, but no one told him it was unpaid or gave him any eviction notices or other legal paperwork. RP

167–68, 199–201. Mr. Pries intended to return after the family visit and left many items in his apartment including a TV that worked, Play Station with video games, radio, personal letters, family pictures, toiletry items, bedding and pots and pans. RP 74, 167, 170–71, 175, 205. He didn't put in a change of address for his mail. RP 75, 171.

On October 19 Mr. Pries' uncle asked him and Ms. Blair to leave, and the two of them returned to the New Washington Apartments. RP 75, 169, 171, 185, 191–92, 204. If they'd not been asked to leave, Mr. Pries testified he still would have returned to his apartment. RP 82, 185–86. Mr. Pries used his keys to unlock the building entrance and his apartment door. RP 75, 172. Mr. Pries and Ms. Blair said his belongings were in the apartment upon their return. RP 71–72, 75, 79, 172.

That evening Mr. Pries and Ms. Blair went to Freeway Park to smoke meth with other park-goers. RP 84, 205. Mr. Pries testified they were not planning to sleep there. RP 191. At the park Mr. Pries was arrested on the DOC warrant. RP 69, 166. Two days later Mr. Pries was charged<sup>1</sup> with failure to register as a sex offender between October 3, 2013, and October 15, 2013, and escape from community custody. CP 1–

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<sup>1</sup> A third charge, possession of a controlled substance–meth, was added by amended information. CP 6–7. The charged was dismissed following a suppression hearing. CP 164–66, 256–57.

2. After his arrest Mr. Pries attempted to have someone get the property he'd left in the apartment back. RP 172–73, 206–07.

Pre-trial, Mr. Pries pleaded guilty to the escape charge and was sentenced. CP 239–50; RP 6–11. Mr. Pries waived his right to a jury and the matter was tried to the court. He was subsequently convicted as charged of failure to register as a sex offender. CP 251, 279; RP 233–41. Mr. Pries' criminal history includes seven prior felony convictions that occurred on or after July 1, 2002. CP 281–82. The court ordered Mr. Pries to provide a biological sample for DNA identification analysis. CP 288.

This appeal followed. CP 296–97.

### **C. ARGUMENT**

1. There was insufficient evidence Mr. Pries abandoned his residence in the New Washington Apartments to support a conviction for a knowing failure to register as a sex offender.<sup>2</sup>

In a challenge to a sufficiency of the evidence, the test is whether, viewing the evidence in the 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. Gentry*, 125 Wn .2d 570, 596–97, 888 P.2d

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<sup>2</sup> Assignments of Error 6, 7, 8, 9, 10, and 11.

1105 (1995). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* at 597. Direct and circumstantial evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The sex offender registration statute requires that registered sex offenders who change addresses within the same county must provide “signed written notice of the change of address to the county sheriff within three business days of moving.” Former RCW 9A.44.130(4)(a) (2011). 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.”

Former RCW 9A.44.130(5)(a). “Lacks a fixed residence” means:

the person does not have a living situation that meets the definition of a fixed residence and includes, but is not limited to , a shelter program designed to provide temporary living accommodations for the homeless, an outdoor sleeping location, or locations where the person does not have permission to stay.

RCW 9A.44.128(9). “Fixed residence” means:

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. ...

RCW 9A.44.128(5).

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). A person must knowingly fail to comply with the registration requirements under RCW 9A.44.130 in order to be found guilty of the crime of failure to register as a sex offender. Former RCW 9A.44.130(11)(a).

The court's conclusions that Mr. Pries did not use his New Washington Apartment as either a temporary or permanent dwelling from mid-September through October 19 and that he had therefore abandoned his apartment and become a transient, as an underpinning to establish he knowingly failed to register a new address, are in error. 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). If Mr. Pries 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. *State v. Drake*, 149 Wn. App. 88, 94–95, 201 P.3d 1093 (2009).

Mr. Pries' rent was paid at least through September 30, if not through October 31 as testified to by the apartment manager. Mr. Pries testified he entered and exited his apartment on a regular basis from mid-September through October 7, albeit at night, and his presence was corroborated by information from other tenants.<sup>3,4</sup> While Mr. Pries candidly admitted he sought to avoid arrest on the DOC warrant by visiting his uncle in Chewelah from October 3 through 19, there was no evidence he changed his residence to Stevens County and the State did not charge Mr. Pries on this basis. CP 6–7. The fact he took minimal personal items to Chewelah is consistent with a temporary visit to see a relative. As further evidence of his intent to return from the trip to Chewelah, Mr. Pries left the majority of his belongings in the apartment, kept his keys to the building and apartment, and did not put in a change of address with the post office. Mr. Pries testified he would have returned to

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<sup>3</sup> Assignment of Error 4. See, RP 95, 98–100, 171–72. Finding of Fact 37 is not supported by the record.

<sup>4</sup> Assignment of Error 5. As set forth in the argument *infra*, there is substantial evidence Mr. Pries *continued* his residence at the New Washington Apartments in October 2013. Finding of Fact 38 states “The Court does not find that the defendant temporarily stayed [there during that time period].” Appellant is unsure what the finding is meant to convey. To the extent the finding suggests that Mr. Pries was not physically at his apartment or had abandoned or changed his residence address, the finding is in error.

his apartment even if his uncle had not asked them to leave.<sup>5</sup> He in fact *did* return to his apartment on October 19, the day he was arrested.<sup>6,7</sup>

In *State v. Drake*, this court considered whether Drake had failed to comply with registration requirements. There, Drake did not pay the rent for his registered residence. 149 Wn. App. at 91. The New Washington Apartments 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* of “knowingly” as there was no other evidence to support an inference of a

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<sup>5</sup> Assignment of Error 2. See, RP 82, 185–86. Finding of Fact 26 is not supported by the record.

<sup>6</sup> Assignment of Error 3. Mr. Pries testified they were not planning to sleep at Freeway Park. RP 191. Finding of Fact 36 is not supported by the record.

<sup>7</sup> Assignment of Error 1. Instead of moving with intent to establish a new place of residence, the portions of the record cited in this paragraph constitute substantial evidence Mr. Pries was temporarily visiting his uncle. See, *Pickett*, 95 Wn. App. at 478.

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.* at 95.

Similarly, here, the State did not produce any evidence concerning Mr. Pries' whereabouts during the charging period that was contrary to his testimony. There was no evidence that he changed addresses by visiting his uncle or maintained a residence other than the New Washington apartment. Like *Drake*, he left the majority of 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 the building or apartment locks had been changed or that Mr. Pries otherwise had notice of eviction. *Cf., State v. Breidt*, 349 P.3d 924, 928 (Wash. Ct. App. 2015) (A person of common intelligence would have understood that being evicted and moving out of a house was a change of residence address that required updating one's sex offender registration with the sheriff's office.).

The State's evidence did not establish Mr. Pries abandoned his apartment and thereby become homeless. The evidence was insufficient to sustain a conviction for a knowing failure to register as a sex offender.

2. The trial court abused its discretion when it ordered Mr. Pries to submit to another collection of his DNA.<sup>8</sup>

A trial court abuses its discretion if its decision is “manifestly unreasonable,” based on “untenable grounds,” or made for “untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). “A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

RCW 43.43.754(1) requires a biological sample to be collected when an individual is convicted of a felony offense. RCW 43.43.754(2) provides: “If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted.” Thus, the trial court has discretion as to whether to order the collection of an offender’s DNA under such circumstances.

It is manifestly unreasonable for a sentencing court to order a defendant’s DNA to be collected pursuant to RCW 43.43.754(1) where the record discloses that the defendant’s DNA has already been collected. The

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<sup>8</sup> Assignment of Error 12.

Legislature recognizes that collecting more than one DNA sample from an individual is unnecessary. It is also a waste of judicial, state, and local law enforcement resources when sentencing courts issue duplicative DNA collection orders.

Here, Mr. Pries' DNA was previously collected pursuant to the statute. He had seven prior felony convictions dated July 1, 2002, or later. These prior convictions each required collection of a biological sample for purposes of DNA identification analysis pursuant to the current statute. RCW 43.43.754(6) (a); Laws of 2008 c 97 § 2, eff. June 12, 2008; Laws of 2002 c 289 § 2, eff. July 1, 2002. There is no evidence suggesting his DNA had not been collected as required by the prior convictions and placed in the DNA database. Mr. Pries fell within the parameters of RCW 43.43.754(2) and a subsequent DNA sample was not required. Under these circumstances, it was manifestly unreasonable for the sentencing court to order him to submit to another collection of his DNA. CP 288. The collection order must be reversed.

**D. CONCLUSION**

For the reasons stated, the conviction should be reversed.

Alternatively the order to submit an additional biological sample for DNA identification analysis should be vacated.

Respectfully submitted on August 3, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on August 3, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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