

64727-0

64727-0

NO. 64727-0-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SCOTT AVILLA,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. The prosecution did not prove all essential elements of failure to register as a sex offender beyond a reasonable doubt.

2. The court misunderstood its discretion to consider and impose a sentence below the standard range.

3. The court erred by entering the unnumbered findings of fact that Avilla had vacated his residence by December 1, 2008, and had moved by mid-December 2008. CP 18 (attached as Appendix A).

4. To the extent the court's conclusion of law that Avilla knowingly failed to register is a finding of fact, it was not proven by substantial evidence. CP 20.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Due process under the United States and Washington Constitutions requires the State prove every element of the charged offense beyond a reasonable doubt. Knowingly failing to register one's address is an element of the offense of failure to register as a sex offender. The State provided conflicting evidence that Avilla either had moved or was in the process of moving when he was arrested and accused of failing to register his new address. Did the State fail to prove beyond a reasonable doubt that Avilla

had moved and not registered his new address within the grace period allowed under the registration statute?

2. A court has discretion to impose an exceptional sentence below the standard range when the circumstances of the crime present substantial and compelling justification for a lesser sentence. The court believed Avilla should receive a lesser sentence but claimed it lacked authority to impose one. Where there are numerous possible avenues for imposing an exceptional sentence and the court misunderstood its discretionary authority to consider an exceptional sentence, is Avilla entitled to a new sentencing hearing?

C. STATEMENT OF THE CASE.

Scott Avilla registered his address with the Snohomish County Sheriff's Office as he was required to do, informing them that he was living on Jim Creek Road. 2RP 11, 48. Avilla lived at the Jim Creek Road address for about six months, when he decided to relocate to a friend's home. 2RP 49, 52. Because Avilla was living in his own trailer and would save money by living with his friend, he moved his trailer to his brother's property at some point in late November or December 2008. 2RP 52-53. Avilla was unsure of exactly when he moved his trailer off the Jim

Creek property. He continued collecting his mail at the Jim Creek address, including his unemployment check, as he had not finished relocating. RP 55.

On December 10, 2008, a sheriff's deputy went to the Jim Creek address and spoke with the property's owner and Avilla's landlord, John Klein. 2RP 33-34. Klein owned five acres of land and rented part of it to Avilla, where Avilla kept his trailer. 2RP 21-22, 29. Klein told the deputy that he had been out of town, but he thought Avilla had moved, although he was not sure when Avilla moved. 2RP 27. The deputy did not search the property to see if Avilla's trailer was still on the property. 2RP 44. On December 19, 2008, Avilla was arrested and charged with failing to register as a sex offender. 2RP 36, 38; CP 41.

The trial court found that Avilla had moved out of the Jim Creek address in mid-December and concluded he knowingly failed to register his new address. CP 18. The court expressed its interest in imposing a sentence below the standard range, because the standard range was unduly excessive, but stated that it had no discretion and was therefore unable to impose a lesser sentence upon Avilla. 2RP 81. Avilla timely appeals.

Pertinent facts are discussed in more detail in the relevant argument sections below.

D. ARGUMENT.

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT AVILLA KNOWINGLY FAILED TO REGISTER

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend. 14; Apprendi v. New Jersey, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, 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.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Green, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State's evidence and

all reasonable inferences that can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The State was required to prove beyond a reasonable doubt that Avilla (1) changed his residence on or after December 1, 2008, (2) he knowingly failed to register as a sex offender with the Snohomish County Sheriff, and (3) he had previously been convicted of a sex offense that required registration. RCW 9A.44.130(1)(a), (5)(a), (11)(a); State v. Castillo, 144 Wn.App. 584, 588, 183 P.3d 355 (2008). Under RCW 9A.44.130(5), a person who is required to register must inform the pertinent authorities when her address changes, within 72 hours of a within-county change of residence and within 10 days of a move to another county. The State failed to prove that Avilla knowingly failed to register as a sex offender in Snohomish County in light of the proof that he had continually registered and had either not completed or only recently finished moving to a new address when he was arrested on December 19, 2009.

b. The State failed to prove beyond a reasonable doubt that Avilla failed to register at his place of residence. Avilla lived in a trailer that he parked on John Klien's property. He paid Klein rent, had a mail box, and secured his own utilities from the

power company. 2RP 22, 28-29. Avilla decided to move to a new residence for purposes of saving money and living in a better location. 2RP 52. He was registered with the pertinent authorities at the Jim Creek address. 2RP 47.

Avilla was unsure of the date that he moved his belongings from the Jim Creek property. 2RP 55. Klein was away during much of the month of November and worked odd hours as an electrician, and he did not encounter Avilla often when Avilla lived on the property. 2RP 23, 27. On December 10, 2009, a police detective visited Klein's property and Klein said Avilla had recently moved. 2RP 27. The detective did not look to see whether Avilla's trailer was parked on the Jim Creek property. 2RP 44. Klein also did not know the date that Avilla moved. 2RP 27.

On December 19, 2008, a police officer stopped Avilla and he was arrested for failing to register. 2RP 36, 38. Avilla told the officer he was in the process of moving and had not officially left his Jim Creek address yet. 2RP 40-41. He explained as trial that he still received mail at Jim Creek, including his unemployment check, and he returned to the property to gather his belongings and retrieve his mail. He could not recall the exact date he left the Jim Creek property. 2RP 49.

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). When a person moves to a new residence in the same county, they must notify the Sherriff within 72 hours of moving. RCW 9A.44.130(5). If a person moves to a new county, he must inform the Sherriff within 10 days of moving. Id. The purpose of registration is to “provide law enforcement agencies with an address where they can contact a sex offender.” State v. Pray, 96 Wn.App. 25, 28-29, 980 P.2d 240 (1999).

If Avilla’s residence on Jim Creek Road had not officially expired based on his incomplete transition to a new home, he was properly registered and under no duty to change his registration to his future residence. See State v. Petersen, __ Wn.2d __, 2010 WL 1795611, *4 (May 7, 2010) (where the “offender had never moved in the first place, the duty to register was not triggered and no crime had been committed.”)

The prosecution produced evidence showing Avilla was properly registered at his Jim Creek address for approximately six

months and had dutifully registered this and other changes of address. 2RP 10-11, 22. Avilla explained that he was in the process of moving in late 2008 but the transition was not yet complete. 2RP 53-54. He believed he was within the window in which he could lawfully inform the police of his new address. Id.

The court's findings of fact document the paucity of critical evidence necessary for proving the offense. The court found that Avilla "moved from the Jim Creek Road address and either moved to Marysville or 11525 Marino Ave sometime in mid-December." CP 18. But the findings also state that Avilla "vacated that [Jim Creek Road] residence by December 1, 2008." CP 18. The lack of proof establishing when Avilla actually moved away from the residence for which he properly registered demonstrates the State's failure to meet its burden of proof. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

The State failed to carry its burden of proving beyond a reasonable doubt that Avilla knowingly failed to register as a sex offender. The court's inconsistent findings of fact, indicating that Avilla moved to a new address in mid-December, does not establish that the prosecution proved beyond a reasonable doubt that Avilla had not registered within the 72-hour period required

before his December 19, 2009, arrest. The trial court's verdict is not supported by substantial evidence and cannot stand.

c. This Court must reverse and remand with instructions to dismiss the conviction. Since there was insufficient evidence to support Avilla's conviction, this Court must reverse the convictions with instructions to dismiss. To do otherwise would violate double jeopardy. State v. Crediford, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), quoting Burks v. United States, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. THE TRIAL COURT FUNDAMENTALLY MISUNDERSTOOD ITS DISCRETION TO CONSIDER AND IMPOSE AN EXCEPTIONAL SENTENCE

a. A court abuses its discretion when it misunderstands its authority to impose an exceptional sentence. A trial court may not refuse to consider a request for an exceptional sentence below the standard range, as the refusal to exercise discretion is itself an abuse of discretion. State v. Bunker, 144 Wn.App. 407, 421, 183 P.3d 1086, rev. granted on other issue, 165

Wn.2d 1003 (2008). “While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

RCW 9.94A.535(1) includes a list of “illustrative” factors that mitigate in favor of a lesser sentence. State v. Davis, 146 Wn.App. 714, 721, 192 P.3d 29 (2008). The listed factors “are illustrative only and are not intended to be exclusive reasons for exceptional sentences.” RCW 9.94A.535(1). The Legislature “intended” to empower trial courts “to tailor sentences for individual situations that do not fit the predetermined structure.” Davis, 146 Wn.App. at 721-22 (internal citation omitted).

b. The court erroneously concluded it lacked any authority to impose an exceptional sentence. At the sentencing proceeding, the court expressed its desire to depart from the standard range but professed an inability to impose a lesser sentence under the law, believing that it had no discretion. 2RP 81. Because the court misunderstood it had the authority to consider an exceptional sentence, its failure to exercise discretion constitutes an abuse of discretion.

In Davis, the defendant was convicted of failure to register as a sex offender, like Avilla. 146 Wn.App. at 718. The combination of the standard range prison sentence and community custody exceeded the statutory maximum. Id. Mindful of the need to impose a sentence within the statutory maximum, but finding that community custody was important “for this particular crime and this particular defendant,” the trial court imposed an exceptional sentence below the standard range. Id. at 718-19.

This Court affirmed the trial court’s exercise of discretion. It recognized that departing from the standard range to comply with the statutory maximum is a valid legal and factual basis. Id. at 720-31.

Similarly, in In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 329-30, 16 P.3d 677 (2007), the Supreme Court affirmed the sentencing court’s authority to structure a sentence in a way that is not expressly dictated by the SRA, if it finds mitigating circumstances proven by a preponderance of the evidence that sufficiently justify a departure from the standard range.

Just as in Davis, Avilla’s failure to register offense has a 60-month statutory maximum. RCW 9A.44.130; RCW 9A.20.021(1)(c); CP 6. Avilla’s standard range as calculated by the

prosecution was a prison term of 33-43 months and a community custody range of 36-48 months. CP 6, 22. Under a change in the statute enacted in 2009, the statutory term of community custody was 36 months, or three years. RCW 9.94A.701. Presumably because 33 months of prison and 36 months of community custody exceed the statutory maximum of 60 months, the court imposed 27 months of community custody. CP 11.

The decision in Davis plainly permits a court to consider the importance of community custody when imposing a sentence that exceeds the statutory maximum due to the combination of community custody and prison. Yet the sentencing court believed it lacked authority to consider any type of lesser prison sentence, even though it wished it had such authority. 2RP 81. The sentencing court claimed his desire to give Avilla less prison time if it had authority to do so. The court did not consider whether the community and Avilla would benefit from additional community custody.

Additionally, RCW 9.94A.535(1) includes a list of factors that may mitigate in favor of a lesser sentence. The listed factors “are illustrative only and are not intended to be exclusive reasons for exceptional sentences.” RCW 9.94A.535(1). The SRA allows

“variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant's conduct from that normally present in that crime.” State v. Hutsell, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993) (citing with approval, D. Boerner, Sentencing in Washington, § 9-23 (1985)).

One recognized mitigating factor is a failed defense, such as a lack of necessary *mens rea*. See State v. Jeanotte, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997). For example, “where circumstances exist which tend to establish defenses to criminal liability but fail,” the court may consider a mitigated sentence. Jeanotte, 133 Wn.2d at 851 (quoting Hutsell, 120 Wn.2d at 921). Factors favoring the mitigation of the standard range need be established only by a preponderance of evidence. RCW 9.94A.535(1).

Avilla explained his lack of knowledge that he had not properly registered. He said he was in the process of moving, was still receiving mail at this residence, and he believed he was within the time allowed to notify the police of his change of address. 2RP 49, 53-54. Avilla's lack of intent to commit the charged crime could constitute a failed defense that would serve as a mitigating factor.

CP 30 (list of mitigating factors from Sentencing Guidelines Commission). The court's incorrect belief that it lacked any authority to impose a sentence requiring less prison time than the standard range requires a new sentencing hearing.

c. Remand for a new sentencing hearing is required.

When a court misapplies the law or unreasonably disregards the evidence before it, a new sentencing hearing is necessary. See Santobello v. New York, 404 U.S. 257, 263, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); Bunker, 144 Wn.App. at 421.

Here, the court misunderstood the law governing exceptional sentences and erroneously concluded it lacked any discretion to impose such a sentence. The court professed its desire to give Avilla a sentence requiring less prison time if any valid mitigating factor would allow such a term. The court's misunderstanding of its discretion in imposing an exceptional sentence renders its sentence unlawful and untenable, and requires resentencing.

E. CONCLUSION.

For the reasons stated above, Scott Avilla respectfully asks this Court to reverse his conviction for insufficient evidence. Alternatively, he asks for a new sentencing hearing at which the

court may properly consider the factors favoring an exceptional sentence below the standard range.

DATED this 21st day of May 2010.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

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SONYA J. KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.



CL13622669

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

vs.

SCOTT ANTHONY AVILLA,

Defendant.

Case No.: 09-101603-2

FINDINGS OF FACT & CONCLUSIONS OF
LAW

I. FINDINGS OF FACT

The court finds that the Defendant has been convicted of voyeurism and failing to register. As a result he is required to register as a sex offender pursuant to CW 9A.44.130. The defendant registered with the Snohomish County Sheriff's Office the address of 13016 Jim Creek Road, Arlington, Washington on June 2, 2008. He resided at that address until November of 2008. Prior to November he informed the land owner that he would be moving out at the end of November. Sometime in late November or Early December the Defendant moved from his registered address. The court finds that he vacated that residence by December 1, 2008.

The Defendant moved from the Jim Creek Road address and either moved to Marysville or 11525 Marino Ave sometime in mid-December. He was arrested on December 19, 2008, and

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1 was taken into custody. He was released and registered the Marino drive address on December
2 29, 2008.

3 The Defense put forward several defenses to the charge of failing to register. The first
4 defense is that the "State knew where he was" because the defendant was receiving mail at the
5 Jim Creek Road address. The ability to receive mail at a certain address is not a defense to
6 failing to register if the defendant is not residing at that address and simply receiving mail at a
7 particular address does not mean that a person is residing there. The second defense is that "the
8 Sheriff's Office should have done more to check the property." The actions of the Sheriff's
9 Office do not constitute a defense to the crime of failing to register and from the evidence it
10 shows that the Sheriff's Office did check to determine whether he was still residing at the Jim
11 Creek Road address and found that he was not. The third defense is that the defendant was
12 confused about his registration requirements. There are no facts in the record to suggest that the
13 defendant suffered from any confusion that would amount to a defense.

14 The court finds that 19 days is well beyond the seventy-two hour window that the
15 Defendant had to register under the law and that but for the arrest, there may not have been a
16 subsequent registration.

17
18 **II. CONCLUSIONS OF LAW**
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20 Accordingly, the court finds beyond a reasonable doubt:

21 That it has original jurisdiction over this matter;

22 That the Defendant present at trial is Scott Anthony Avilla;

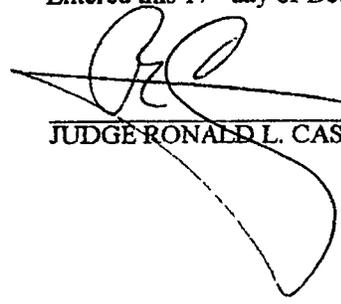
23 That the following acts were committed on November 30, 2008 through December 29,
24 2008 in Snohomish County, State of Washington: Scott Anthony Avilla, having been
25 convicted of a sex offense, Voyeurism, and being required to register as residing at a

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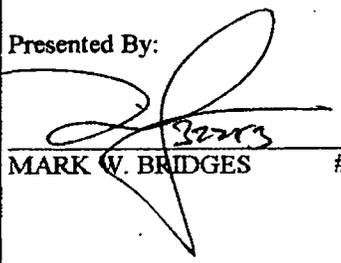
fixed residence did cease to reside at that residence and did knowingly fail to provide timely written notice to the county sheriff's office.

That Scott Anthony Avilla is guilty of the crime of failing to register as a sex offender.

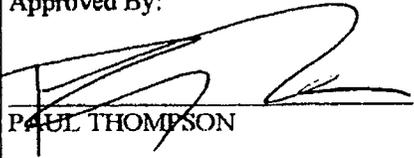
Entered this 17th day of December, 2009.

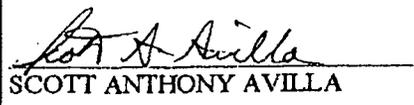

JUDGE RONALD L. CASTLEBERRY

Presented By:


MARK W. BRIDGES #32283

Approved By:


PAUL THOMPSON


SCOTT ANTHONY AVILLA

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 64727-0-I
)	
)	
SCOTT AVILLA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF MAY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
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STEILACOOM, WA 98388 | (X)
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() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON, THIS 21ST DAY OF MAY, 2010.

X _____ 

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