

65215-0 HEK

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NO. 65215-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES O. WIGGIN,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. ISSUES..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 2

 A. SUFFICIENCY OF THE CHARGING INFORMATION..... 2

 B. COMMUNITY CUSTODY..... 8

IV. CONCLUSION..... 9

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>In re Acron</u> , 122 Wn. App. 886, 95 P.3d 1272 (2004)	8
<u>State v. Brosius</u> , 154 Wn. App. 714, 225 P.2d 1049 (2010).....	3, 7
<u>State v. Elliott</u> , 114 Wn.2d 6, 785 P.2d 440, <u>cert. denied</u> , 498 U.S. 838, 111 S.Ct. 110, 112 L.Ed.2d 80 (1990).....	4, 5
<u>State v. Johnson</u> , 119 Wn.2d 143, 829 P.2d 1078 (1992).....	3
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	2, 3, 4, 6, 7
<u>State v. McCarty</u> , 140 Wn.2d 420, 998 P.2d 296 (2000).....	7
<u>State v. Peterson</u> , 168 Wn.2d 736, 230 P.3d 588 (2010).....	5
<u>State v. Tandeki</u> , 153 Wn.2d 842, 109 P.3d 398 (2005)....	2, 4, 6, 7
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995).....	2

FEDERAL CASES

<u>United States v. Cina</u> , 699 F.2d 853 (7th Cir.), <u>cert. denied</u> , 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983).....	3
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WASHINGTON STATUTES

Laws 2009 ch. 28 § 6 (eff. Aug. 1, 2009)	8
Laws 2009 ch. 389 § 1 (eff. Aug. 1, 2009).....	8
Laws 2010 ch. 224 § 4 (eff. June 10, 2010)	8
RCW 9.94A.505	1, 2, 8
RCW 9.94A.505(2)(b)	8
RCW 9.94A.702	1, 2, 8
RCW 9A.44.130	1, 4, 5
RCW 9A.44.130(6)(b)	5
RCW 9A.44.130(11)(a)	4

I. ISSUES

1. Whether the charging information included the essential elements of the crime so as to inform the defendant of the charges against him and to allow him to prepare his defense?

2. Whether imposition of 36 months community custody under RCW 9.94A.505 and RCW 9.94A.702 for a first Failure to Register conviction was error?

II. STATEMENT OF THE CASE

On July 28, 2009, the State filed an information and affidavit of probable cause charging James O. Wiggin with Failure to Register, pursuant to RCW 9A.44.130. The State filed amended information on March 22, 2010, changing the violation date to the week of April 7, 2009 through May 30, 2009. CP 36-41.

The case proceeded to bench trial and Wiggin was found guilty of Failure to Register. CP 1-3, 19; 5RP 40-42.

This was Wiggin's first conviction for Failure to Register, therefore, the offense is unranked with a standard range of 0-12 months confinement. CP 21; 5RP 42-43.

At sentencing both the prosecutor and defense counsel agreed that while there was pending legislation regarding community custody, the current law required 36 months of

community custody. The trial court sentenced Wiggin to 30 days confinement, with credit for time served, \$500 victim assessment, and 36 months community custody under RCW 9.94A.505 and RCW 9.94A.702. CP 22-24; 5RP 43, 47-48.

Wiggin timely appealed. CP 4-18.

III. ARGUMENT

For the first time on appeal, Wiggin claims that the charging information did not contain the reporting deadline. Wiggin also claims that the court's imposition of 36 months community custody violated the constitutional prohibition against *ex post facto* laws and his right to due process.

A. SUFFICIENCY OF THE CHARGING INFORMATION.

A defendant may challenge the constitutional sufficiency of a charging document for the first time on appeal. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). To be constitutionally sufficient, a charging document must include all essential elements of the crime so as to inform the defendant of the charges against him and to allow him to prepare his defense. State v. Tandecki, 153 Wn.2d 842, 846, 109 P.3d 398 (2005) *citing* Kjorsvik, 117 Wn.2d at 101-02; State v. Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995). An "essential element is one whose

specification is necessary to establish the very illegality of the behavior.” State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) *citing* United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983).

When a defendant challenges the sufficiency of the charging information for the first time on appeal the courts use a two-prong analysis to determine the constitutional sufficiency of the charging document: (1) do the essential elements appear in any form, or can they be found by fair construction in the charging document; and, if so, (2) whether the defendant can show that he was actually prejudiced by the inartful, vague, or ambiguous charging language. Kjorsvik, 117 Wn.2d 93, at 105-06; State v. Brosius, 154 Wn. App. 714, 721, 225 P.2d 1049 (2010). The charging document is read as a whole, construing the words according to common sense and as including facts which are necessarily implied. Kjorsvik, 117 Wn.2d at 109; Brosius, 154 Wn. App. at 721-722.

The first prong looks to the face of the charging document with the court liberally construing the document in favor of its validity. Kjorsvik, 117 Wn.2d at 106; Brosius, 154 Wn. App. at 721. Under the second prong the court may look beyond the face of the charging document to determine if the accused actually received

notice of the charge to be able to prepare his defense. Kjorsvik, 117 Wn.2d at 106. Other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges. Kjorsvik, 117 Wn.2d at 106; Tandecki, 153 Wn.2d at 849.

The amended information in the present case charged Wiggin as follows:

That the defendant, having been convicted on or about the 19th day of March, 1998, of a sex offense or kidnapping offense, to wit: First Degree Rape of a Child, being required to register pursuant to RCW 9A.44.130, and having registered as not having a fixed residence did, on or about the week of April 7, 2009 through May 30, 2009, knowingly fail to report in person to the county sheriff's office; prescribed by RCW 9A.44.130, a felony

CP 36.

“The first prong of the test—the liberal construction of the charging document's language—looks to the face of the charging document itself. Tandecki, 153 Wn.2d at 849. Here, the charging document uses the language of RCW 9A.44.130(11)(a) alleging the essential elements of Wiggin's crime: a previous sex offender conviction, and knowing failure to register with the sheriff's office. “It is sufficient to charge in the language of a statute if it defines the offense with certainty.” State v. Elliott, 114 Wn.2d 6, 13, 785 P.2d

440, cert. denied, 498 U.S. 838, 111 S.Ct. 110, 112 L.Ed.2d 80 (1990).

Wiggin's argument ignores the fact that the information did include a timing element. The amended information expressly states that Wiggin's was transient, having registered as not having a fixed residence. CP 38. The sex offender's residential status informs the registrant of the deadline by which he must register. State v. Peterson, 168 Wn.2d 736, 772, 230 P. 3d 588 (2010). Under RCW 9A.44.130(6)(b) sex offenders who lack a fixed residence are required to report weekly in person to the county sheriff's office.

The amended information also expressly states that Wiggin's knowingly failed to report in person to the county sheriff's office the week of April 7, 2009 through May 30, 2009. This time period included the weekly reporting period set forth in the statute and gave Wiggin ample notice to allow him to prepare his defense. When an offender reports outside any deadline contained in the statute, it is unnecessary to show a particular deadline to prove a violation of the statute. Peterson, 168 Wn.2d at 772.

Construing the words of the charging document according to common sense, including facts necessarily implied, the information

provided sufficient notice of the reporting deadline. Since the essential elements appear in the charging document, the charging information passes the first prong of the Kjorsvik test.

The second prong of the test looks beyond the face of the charging document including other circumstance of the charging process to determine if the charging information actually prejudiced the defendant. Tandecki, 153 Wn.2d at 849; Kjorsvik, 117 Wn.2d at 105-106. The affidavit of probable cause reads in pertinent part:

On March 19, 1998, James O. Wiggin, was convicted of two counts of First Degree Rape of a Child in Snohomish County Superior Court. As a result he is required to register as a sex offender. On February 25, 2009, Wiggin signed the Snohomish County Sex and Kidnapping Offender Registration Notification. On that same day he registered with the Snohomish County Sheriff's Office as homeless in Snohomish County. As a result of his status as homeless, Wiggin was required to report to the Sheriff's Office every Tuesday to account for his whereabouts over the previous week. Wiggin reported as required from February 25 through March 31, 2009. Thereafter he failed to report to the Sheriff's Office as required.

CP 38-39. Wiggin cannot demonstrate lack of notice when the affidavit of probable cause connected to Wiggin's charging information stated the specific facts supporting the charge. CP 38-39.

Wiggin fails to show how the language in the charging information actually prejudiced him. Tandecki, 153 Wn.2d at 849-850; Brosius, 154 Wn. App. at 722. Rather, citing State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000), he asks the court to presume prejudice without further inquiry. Appellant Brief at 9. In McCarty the Court did not reach the question of prejudice under the second Kjorsvik prong, having found that the information liberally construed failed on its face to set forth an essential element of the crime. McCarty, 140 Wn.2d at 426. The court reversed McCarty's conviction without prejudice for prosecution on a new information. McCarty, 140 Wn.2d at 428. McCarty declares that prejudice must be presumed only if the essential elements are missing or cannot be fairly implied. McCarty, 140 Wn.2d at 425. As discussed above, the essential elements appear in the charging document or can be reasonably implied in the charging language. Wiggin makes no argument that the charging language prejudiced his defense.

The charging document is adequate. The essential elements appear in the charging document. The information provided sufficient notice of the reporting deadline to enable Wiggin to prepare his defense. Wiggin's conviction should be affirmed.

B. COMMUNITY CUSTODY.

The State concedes that the court's imposition of 36 months community custody for a first conviction of Failure to Register under RCW 9.94A.505¹ and RCW 9.94A.702² was error. As an unranked offense, a first conviction for Failure to Register has a standard range of 0-12 months. See In re Acron, 122 Wn. App. 886, 95 P.3d 1272 (2004). Wiggin was sentenced to 30 days confinement. CP 22-24; 5RP 47. Under either version of RCW 9.94A.505(2)(b) when an offender is sentenced to "not more than one year of confinement," the court shall impose "a term of community custody not to exceed one year." Accordingly, the State asks this court to reverse the community custody portion of Wiggin's sentence and remand for resentencing in accord with RCW 9.94A.505(2)(b).

¹ RCW 9.94A.505 was amended in 2009 by Laws 2009 ch. 28 § 6 (eff. Aug. 1, 2009) and Laws 2009 ch. 389 § 1 (eff. Aug. 1, 2009). RCW 9.94A.505 was also amended in 2010 by Laws 2010 ch. 224 § 4 (eff. June 10, 2010).

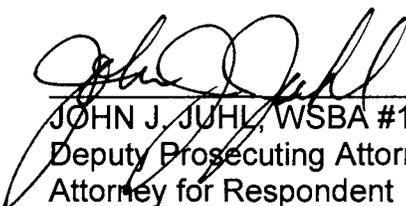
² RCW 9.94A.702 was enacted by Laws 2008 ch. 231 (eff. Aug. 1, 2009).

IV. CONCLUSION

For the reasons stated above, the conviction should be affirmed; the community custody portion of Wiggin's sentence should be reversed and remand for resentencing.

Respectfully submitted on October 15, 2010.

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By: 
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THE STATE OF WASHINGTON,

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v.

AFFIDAVIT OF MAILING

JAMES O. WIGGIN,

Appellant.

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 15th day of October, 2010, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

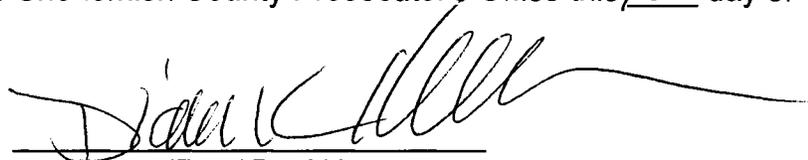
NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 5th day of October, 2010.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line. The signature is fluid and cursive, with a long horizontal flourish extending to the right.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit