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NO. 65468-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

SHAYNE WEDEMEYER,

Appellant.

2011 JAN 25 10:14 13

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

The Honorable Anita Farris, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE REPORTING DEADLINE IS AN ESSENTIAL ELEMENT OF THE CRIME OF FAILURE TO REGISTER.

As argued in the opening brief, violation of RCW 9A.44.130 (2006) depends on the failure to register within the statutorily specified time period. Brief of Appellant (BOA) at 3-9. Accordingly, as suggested by State v. Peterson, 168 Wn.2d 763, 177 n.7, 230 P.3d 588 (2010), the reporting deadline is an essential element of the crime that must be included in the information. The State acknowledges the reporting deadline was not included in the information, instead arguing that it need not be. Brief of Respondent (BOR) at 2-6. The State's argument, however, is based on a misreading of Peterson that confuses "residential status" with "reporting deadline." It argues that because Wedemeyer's residential status under RCW 9A.44.130 (2006) is not an element of the crime charged, it follows that the reporting deadline is not an element of the crime charged. BOR at 5. The State is wrong.

In Peterson, the Supreme Court drew a distinction between residential status and the reporting deadline. The Court noted "[c]ommon sense suggests the statutory deadline is part of the State's burden of proof." 168 Wn.2d at 177 n.7. In contrast, a registrant's residential status

under the statute only determines the deadline by which he must register. The Court said the two are not the same because it is possible to prove that a deadline was not obeyed without proving residential status. Id. at 772.

The State further confuses the Court's holding when it argues an absurd result would follow if the reporting deadline was part of its burden of proof because, the State argues, Peterson held a defendant could be convicted without proof of his residential status. BOR at 6-7. Again, the State confuses residential status with the reporting deadline. Wedemeyer agrees that his residential status need not be in the information, but the reporting deadline does.

Here, the information did not allege Wedemeyer failed to register within 72 hours of moving from his mother's home. CP 51. When Wedemeyer was required to report is an essential element of the crime charged under the statute. His residential status is not. The information is deficient because it lacks the reporting deadline, which is an element of the crime.

2. THE EVIDENCE WAS INSUFFICIENT TO CONVICT WEDEMEYER OF FAILING TO REGISTER, AS CHARGED AND TRIED.

A violation of RCW 9A.44.130 (2006) requires the State to prove that Wedemeyer ceased to reside at his last registered address and that he failed to report within 72 hours of that date (the date the offense is

completed). Here, the State failed to prove Wedemeyer moved out of his mother's home more than 72 hours before August 15, 2006, which was the point in time when Wedemeyer completed the violation of the registration statute, as set forth in the to-convict instruction. CP 45 (Instruction 7).

In response, the State argues that the "on or about" language in the to-convict jury instruction relieved it of its burden to prove the date Wedemeyer ceased to reside as part of its proof that the offense was completed by August 15, 2006. BOR at 8. The State relies on State v. Hayes, 81 Wn. App. 425, 914 P.2d 788 (1996). There, the Court held the "on or about" language was sufficient, but only in cases where "time is not a material element of the crime charged." Id. at 432-433. The State's reliance on Hayes is misplaced because time is a material element of the crime charged here. Unlike in Hayes, where the "on or about" language was sufficient because the charge was for rape and, as such, time was not material, here the reporting deadline, and the date that triggers the deadline, is material and an element of the charged offense.

Because the jury was instructed that to convict Wedemeyer it had to find he completed the offense on August 15, 2006, the State assumed the burden of proving just that. State v. Hickman, 135 Wn.2d 97, 99, 954 P.2d 900 (1998) (elements in the "to-convict" instruction not objected to become the "law of the case" which the State must prove beyond a

reasonable doubt to prevail). Specifically, the State had to prove Wedemeyer ceased to reside at his last registered address (his mother's home) at least 72 hours before the date, i.e., on or before August 12, 2006. CP 45 (Instruction 7, element "2"). The State's evidence in this regard, which consisted only of the testimony of Wedemeyer's mother, was insufficient because at best it proved Wedemeyer ceased to reside at his mother's home as of August 31, 2006. The "on or about" language did not relieve the State of its evidentiary burden, so the State's failure of proof is fatal. In summary, the State failed to prove Wedemeyer ceased to reside at his last registered address, his mother's home, by August 12, 2006, as required by the to-convict instruction.

B. CONCLUSION

For the reasons stated herein and in Wedemeyer's opening brief, this Court should reverse his conviction and dismiss the charge with prejudice. Alternatively, defects in the information require reversal of Wedemeyer's conviction and remand for a new trial.

DATED this 25<sup>th</sup> day of January, 2011.

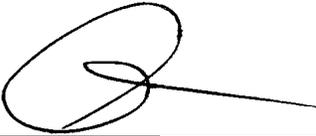
Respectfully submitted,

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SHAYNE WEDEMEYER,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25<sup>TH</sup> DAY OF JANUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
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MONROE CORRECTIONAL COMPLEX  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF JANUARY, 2011.

x *Patrick Mayovsky*

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